TAYLOR FRY

Review of legal support

For people injured in the NSW CTP Scheme

3 September 2021

Document classification: Confidential

This report relies on data and information provided to Taylor Fry by the State Insurance Regulatory Authority (SIRA) or otherwise publicly available, and the quality of our analysis and conclusions is subject to the quality of that underlying data. This report has been prepared for SIRA, for its sole use. Third parties should place no reliance on this report, or the data it contains, which would result in the creation of any duty or liability by Taylor Fry to the third party.

ACN 087 047 809
ABN 29 087 047 809
www.taylorfry.com.au

Taylor Fry Pty Ltd

Table of contents

1

Executive Summary

1 Executive Summary

Background to the review

The State Insurance Regulatory Authority (SIRA) has commissioned Taylor Fry to undertake a review of the provision of legal support for injured people in the Compulsory Third Party (CTP) insurance scheme under the Motor Accident Injuries Act 2017 (the 2017 Act).

The 2017 Act, effective from 1 December 2017, made substantial changes to the motor accidents scheme. The intent of those changes was to:

- reduce the time it takes to resolve a claim
- increase the proportion of benefits provided to the most seriously injured road users
- reduce the cost of compulsory third party insurance premiums
- reduce the opportunities for claims fraud and exaggeration.

The reforms increased the number of people with a motor vehicle injury assisted by the scheme by introducing a time limited no fault benefit. A key part of the reforms was to make the claims process easier to access and navigate while maintaining the emphasis on recovery and a return to pre-injury life.

The reforms sought to balance two competing interests:

- To ensure that people who are injured in a motor vehicle accident in NSW have access to medical and financial support appropriate to their needs, retaining a right for those more seriously injured though the fault of another to seek damages. The reforms also recognised that the length of time that a person may spend in intersecting with the scheme may impact on their well-being.
- To ensure that the motorists of NSW who pay for the scheme can purchase affordable premiums in an efficient and effective scheme.

When a new scheme is introduced or an existing scheme significantly amended there will always be debate as how to best strike this balance, including the roles of the many service providers such as the CTP insurers, medical and other health professionals and legal representatives who have traditionally had a significant role in protecting the interest of injured people.

In the previous scheme (under the *Motor Accidents Compensation Act 1999* (MACA)) almost all[1] claimants were represented by lawyers in the scheme. The 2017 Act and the accompanying Legal Fee Regulations significantly and intentionally reduced the role of legal representatives so that the involvement of lawyers, other than in very particular and limited circumstances, only initiated at the point that a claim was in dispute before the Dispute Resolution Service (DRS). Claimants were able to engage legal representation prior to this point, but the Legal Fee Regulations do not recognise or remunerate this involvement.

Significant reductions in scheme legal costs and CTP premiums were expected under the 2017 Act. At the time, costings produced by the scheme actuary, EY (Ernst & Young), anticipated a reduction in average premium of around $101 per policy (15% reduction) under 'mature scheme'[2] assumptions. Legal costs (comprising regulated plaintiff and defendant legal costs and investigations[3]) were anticipated to reduce from around $69 per policy to $50 per policy (a 28% reduction).

---

[1] In excess of 90% of all claimants

[2] Mature scheme: 'where motorists and the general public are fully aware of their rights under the Scheme, relationships between the service providers are well established and the infrastructure of the regulator is fully operative. This means that the estimated cost of the new Scheme in the first few years may be different (i.e. likely lower) than our cost estimates' (EY *Estimated cost per policy of the new NSW CTP Green Slip Scheme under the Motor Accident Injuries Act 2017 (NSW)*, 24 July 2017)

[3] Legal costs after re-allocation of contracted out legal fees to the relevant heads of damage.

Subsequent to costing the new scheme, in 2017 the scheme actuary undertook a projection of ultimate dispute numbers for a mature scheme which, while not used to set the allowance for legal spend in the scheme, was used to test whether the allowance for legal fees in the costing was sufficient.

The experience to date, for both numbers of disputes and legal costs, has been significantly lower than was projected for a mature scheme. To some extent this is understandable, given the potential "honeymoon" impact[4] that was noted by the scheme actuary in the scheme costing report. Furthermore, a consequence of the design of the 2017 Act scheme is that award of damages claims, for many eligible claimants, are not able to be lodged until 20 months has elapsed from date of accident. This has meant that activity on these claims (including legal support) has been deferred, and experience has only recently begun to emerge.

Lower than expected levels of disputes and legal representation in the 2017 Act scheme could indicate that the scheme is working better than expected with injured people able to navigate the scheme without needing a lawyer. Conversely it could also mean that some injured people find it difficult to access the scheme or to proceed through the claiming process. The most likely explanation is that there is an element of truth in both propositions.

Analysis undertaken in this review

In undertaking this review, we have analysed the data for both legally represented claimants and unrepresented claimants. Comparison of these two claimant groups is, however, vexed, and the results can be easily misinterpreted. In considering any such comparison, it is important to remember that any observed relationships between the presence (or otherwise) of legal representation and an observed effect/outcome should be treated as *correlations*, not necessarily *causations*.

For example, our analysis observes that legally represented people are more likely to challenge unfavourable insurer decisions through the process of insurer internal review. However, it is not possible to conclude that this is due to the presence or effect of the legal support – it may simply be that the claimants who are inherently more likely to challenge insurer decisions are those that are also more likely to find lawyers to help them do so. At the same time, it cannot be concluded that legal representation does not influence these outcomes. What is clear, though, is that there is a strong *corelation* between challenging unfavourable decisions and the presence of legal representation.

Noting this important caveat, we have undertaken analysis of insurer internal reviews, disputes and claimant outcomes separately for represented and unrepresented claimants, finding that:

- Legally represented claimants are more likely that unrepresented claimants to seek an internal review to challenge an unfavourable decision
- Legally represented claimants have similar success to unrepresented claimants in achieving the overturn of a decision within both the internal review process and in the dispute resolution process
- However, outcomes within the internal review process are not necessarily a good indicator of the ultimate outcome that claimants are able to achieve, as claimants that challenge internal review decisions have a reasonably high rate of success in eventually achieving an overturn of those internal review decisions
- The extent to which claimants challenge those unfavourable internal review outcomes is much greater for legally represented claimants
- Combined, this means that legally represented claimants have a higher overall rate of success in achieving an overturn of an initially unfavourable decision

[4] "Honeymoon" impact: 'In the first few years following the implementation of personal injury scheme reforms there can tend to be lower claim numbers and claims costs than expected in the costing of the scheme benefits on a mature basis. This effect has been observed in several past personal injury scheme reforms in Australia and other jurisdictions internationally. We refer to this as a "honeymoon" impact and it can result in lower-than-expected costs per policy in the initial years of the scheme following reform' (EY *Estimated cost per policy of the new NSW CTP Green Slip Scheme under the Motor Accident Injuries Act 2017 (NSW)*, 24 July 2017)

- Legally represented claimants are more likely to lodge a claim for an award of damages.

Claimant needs

Legal support was a feature of the MACA 1999 scheme, with almost all claimants engaging legal representation. Legal representation in the 2017 Act scheme is around one third the level that it was under the previous scheme. One of the roles that lawyers played, and continue to play to a lesser extent, is assisting claimants to navigate the scheme – to understand the level of entitlements, challenge unfavourable insurer decisions, and provide overall guidance. The 2017 Act scheme is intended to be easier to navigate, reducing the need for such support.

Throughout our review, including some discussions with claimants, we have observed that there remains an unmet need for claimant support. That is, while the new scheme may be easier to navigate, some claimants still find it difficult. While processes such as insurer internal review have been implemented to assess the appropriateness of initially unfavourable decisions, unrepresented claimants are less inclined to request such a review – and the evidence suggests that if they were to seek a review, a significant proportion would be successful. And certainly, some claimants are unaware of their entitlements (for example, the entitlement for damages), and are more aware of this entitlement and more likely to claim this entitlement if they have engaged a lawyer.

This unmet need (which we believe reflects both a lack of claimant awareness/understanding, and/or a lack of willingness to proceed due to the perceived difficulty of the claims process) should be addressed by SIRA, and our report identifies options for doing so. These options include increasing the support provided by lawyers (say, by initiating the entitlement for paid legal support earlier in the process), or increasing support by entirely different means (say, through improved communications to claimants from the scheme regulator).

The options identified in this paper are not mutually exclusive. In fact, some should be considered as completely independent of whatever other changes are considered or made.

Options

From the point that a person is injured it is critical that they have easy access to information about the option of making a claim, the benefits that may be available and the first steps and assistance that is available in pursuing what for nearly everyone is a stressful and unknown process. This need for information and support does not abate during the claims process.

One means established by SIRA to provide such information is ‘CTP Assist’ which is operated by SIRA and provides information and support for people injured in motor accidents in NSW and to other users of the compulsory third party (CTP) scheme like health providers, hospitals and lawyers. However, CTP Assist is not easy for claimants to find. Many claimants seem unaware that such support is available or have been told and have forgotten. It is a valuable, yet underutilised service.

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.

With an enhanced claimant support program, a reasonable option available to SIRA in response to this review is to postpone final consideration of potential reforms to legal profession engagement. While there is evidence to indicate that the scheme is performing differently to the assumptions that underpin the 2017 reforms, it is still relatively early in the life of the scheme. In our view this alone is not sufficient to defer consideration of any changes – but we further note that a more substantial review of the scheme is now underway and that the recently established Personal Injury Commission (PIC) is beginning to establish a new framework for dispute resolution. Given this related and important activity, it would certainly be reasonable for SIRA to wait until findings from the scheme review and changes related to the PIC have been identified, and to settle the issue of legal engagements as part of a more holistic review process.

Our report also canvasses several other options for increased legal support, should an enhanced CTP Assist program or other such regulatory supports be deemed insufficient to meet claimant needs. Increased legal support could take several forms, which are discussed in the body of the report:

- **Review the triggers for entitlement to legal services** – Our report discusses various points in the claims process at which an entitlement for paid legal support might be considered:
  - at the very beginning, to provide assistance with making a claim (which could be achieved through a fee schedule or through a process similar to the Independent Legal Assistance and Review Service (ILARS) which operates in the NSW workers compensation scheme)
  - at the point where the insurer makes a decision that gives a claimant a right to seek internal review (i.e. a decision by the insurer to reject all or part of the claim, or an element of the evidence upon which the claim is based)
  - after the matter has been through internal review when the insurer has upheld the decision
  - when there is a dispute at DRS, or, going forward, at the PIC

  Key considerations are:

  - what other supports (for example, CTP Assist) could be provided as an alternative to legal services, to mitigate any risk that an injured person will not be able to proceed with all or part of a claim or attain the level of damages to which they are entitled
  - at what point should lawyers be paid to become involved, to mitigate any residual risk.

  CTP insurers and the Insurance Council of Australia (ICA) were strongly of the view that the insurer internal review process should be maintained, as it provides an efficient and effective mechanism through which issues can be addressed without the need to involve lawyers. However, a high proportion of internal review decisions are ultimately overturned – with the greatest rate of successful overturn achieved by legally represented claimants who are more likely to dispute the unfavourable internal review. The 2017 scheme puts considerable obligation upon CTP insurers to help claimants. If the internal review process is to be maintained, we strongly believe that SIRA needs to hold insurers more firmly to account for their decision making (both initially, and at internal review) and to better support claimants in their awareness and understanding of this process.
- **Other options** – Other options considered in the report include:
  - Setting legal fees to more closely map to the work involved (noting that were unable to find work value assessments to support the current regulated fee schedule)
  - Simplifying some common specific issue disputes

Further details are provided in the body of the report.

- **Introducing ILARS for CTP** - ILARS has been operating in the NSW workers compensation scheme since 2012. ILARS provides access to free, independent legal advice for injured workers in circumstances where there is a disagreement with insurers regarding entitlements. Legal fees are set by the Independent Review Office (IRO).

  The terms of reference for this review specifically required that consideration be given to the ILARS option, and it received strong support from the legal profession but strong opposition from the ICA and CTP insurers.

  We have reservations with adopting ILARS in its current form:

  - it would represent a fundamental departure from the policy objective of the reforms introduced in 2017
  - scheduled fees (for workers compensation) are not set by the Minister or reviewable by Parliament or subject to regulation from SIRA

- it may act as is a disincentive to private CTP insurers in providing the assistance that they should be providing to claimants, and it may result in a more adversarial approach to claims management
- it may have a material cost impact on premiums. Experience to date under the 2017 CTP scheme suggests that the allowance for legal costs currently in CTP premiums could accommodate some increases to legal costs without adversely impacting premiums. However, ILARS has the potential to increase costs such that premiums could be adversely impacted. An actuarial costing should be commissioned by SIRA if further consideration is to be given to this option.

2

Context for the review

2 Context for the review

2.1 Context for the review

The State Insurance Regulatory Authority (SIRA) has commissioned Taylor Fry to undertake a review of the provision of legal support for injured people in the Compulsory Third Party (CTP) insurance scheme under the Motor Accident Injuries Act 2017 (the Act).

Background to the review

Legal representation plays an important part in ensuring that injured people have the necessary support to access their entitlements under the CTP scheme. SIRA has had feedback that the current legal costs structure could be improved, to ensure injured people are able to access timely and affordable legal support in the scheme.

Scope of the review

The Review looks at whether the current legislative, regulatory and service provision of legal support is promoting the objects of the Act, including:

- Encouraging the early resolution of motor accident claims
- The quick, cost-effective and just resolution of disputes.

The Review also considers the feasibility of expanding the Independent Legal Assistance and Review Service (ILARS) into the CTP scheme, as well as the role and alignment of SIRA's Legal Advisory Service (LAS) in the suite of supports injured people are able to access in the CTP scheme.

Principles underpinning the review

SIRA proposed a set of principles to underpin the review. These have been developed to align to the objects of the scheme and with all stakeholders in mind.

1. Legal support frameworks should ensure that injured people can access the necessary benefits under the scheme to promote their recovery and return to work or other activities
2. Legal supports should provide incentive for the early resolution of claims and the quick, cost-effective and just resolution of disputes
3. Legal supports should work with other mechanisms in the scheme to ensure its continued affordability for policyholders
4. Legal supports should be proportional to the complexity of the issue in dispute.

2.2 The process

At commencement, Taylor Fry reviewed key documentation including the background to the Act and Regulations made under the Act, and submissions made by stakeholders to both SIRA and to the Standing Committee on Law and Justice in its ongoing review of the NSW CTP scheme. This reduced the demand on stakeholders to make further submissions, as any prior submissions were taken 'as read'.

SIRA opened the review to consultation with an invitation on the SIRA website to make a written submission. In addition, meetings were held with key internal and external stakeholders prior to the submissions closing.

As submissions to this review were received, further meetings were held with key stakeholders to allow each to present their perspective on the operation of the scheme and proposals for reform.

A list of the submissions received is set out at Appendix A (p 73).

A list of the meetings conducted by Taylor Fry is set out at Appendix B (p 74).

To ensure, so far as practically possible, that the claimants' perspective was considered, the consultants also undertook claimant interviews with claimants identified by CTP Assist through the minor injury review and through a request to law firms for claimants who were agreeable to being interviewed. CTP Assist is operated by SIRA and provides information and support for people injured in motor accidents in NSW and to other users of the CTP scheme like health providers, hospitals and lawyers.

Given the nature of the way that these claimants were sourced, their experiences are not considered to be representative of the experience of most people in the scheme. Their accounts reflect their own experiences and perspectives only. Nevertheless, those perspectives do provide some insight into how things are likely to go wrong with the scheme, if they do go wrong (i.e. the scheme's 'failure modes') and of the claimant experience generally.

3

Background to the review

3 Background

3.1 The *Motor Accident Injuries Act 2017*

The *Motor Accident Injuries Act 2017* (the Act) commenced on 1 December 2017. It introduced a new scheme (the Scheme) of compulsory third-party (CTP) insurance for people injured in motor accidents in New South Wales (NSW) to:

- Focus on early and appropriate treatment to enhance recovery and returning to work or other activities (for those who are not working)
- Provide early and ongoing financial support
- Encourage the early resolution of claims as well as quick, cost effective and just resolution of disputes.
- Continue to make CTP insurance compulsory for all motor vehicle owners in NSW and keep premiums for CTP policies affordable by preventing excessive insurer profits and providing treatment and income to support people with injuries while restricting access to damages payments to only those not at-fault claimants with non-minor injuries
- Deter fraud in connection with compulsory third-party insurance.

The new scheme introduced a new statutory benefits regime and a modified common law damages regime, where:

- Most injured people, regardless of fault, are entitled to claim statutory benefits (defined benefits for weekly income payments, medical and treatment costs, and commercial attendant care) for up to 26 weeks[5]
- People with 'minor injuries' as defined in the Act (that is, soft tissue and/or minor psychological or psychiatric injuries) or those who were wholly or mostly at fault in the accident are limited to 26 weeks of statutory benefits, which covers weekly income support and medical and treatment costs.
- The maximum weekly payment period for injured people whose injury is not minor and who were not the person mostly at fault in the accident, is up to 104 weeks unless the injured person has a pending damages claim.
- Treatment benefits and commercial attendant care are paid as statutory benefits and are not payable in any lump sum compensation in personal injury damages claims.
- Claims for damages are limited to damages for economic loss and non-economic loss. No damages may be awarded to an injured person if the person's injuries resulting from the motor accident were minor injuries.
- An injured person who has a pending claim for damages may claim statutory benefits for loss of earnings or earning capacity up to 156 weeks if the degree of permanent impairment as a result of the injury is not greater than 10%, and up to 260 weeks if the person has a pending damages claim and the degree of permanent impairment as a result of the injury is greater than 10%.

[5] Exceptions to this general rule are listed under Division 3.5 of the Act (e.g. where the injured driver has committed a serious driving offence, or where workers compensation is available).

3.2 Key supports in the Scheme

3.2.1 Supports provided by SIRA

The provisions of the Act are supported by administrative arrangements put in place by SIRA which include:

- CTP Assist to provide general advice to non-legally represented claimants (and more recently, including those legally represented)
- The Legal Advisory Service (LAS) which provides legal advice to claimants from solicitors engaged on a LAS Panel for matters outside of the regulated fees.

CTP Assist

CTP Assist provides information and support to people injured in motor vehicle accidents and others involved in the scheme such as hospitals, health professionals and lawyers. CTP Assist can help people identify the correct insurer, provide general information on submitting a claim, provide information on injury recovery and provide information on accessing legal services, including the LAS.

CTP Assist also proactively contacts people at key points to check they have the information they need to support their claim and recovery. Until recently, this proactive contact was only made to claimants that had *not* engaged legal representation.

CTP Assist have a systematic outbound contact program for each claimant who has a post-26 week entitlement. The program includes outbound milestone calls at 75 weeks, 20 months, 2 and 3 years. A specific aim of this program at each point is now to gauge claimant awareness and progress of damages claims. CTP Assist provides information about damages claims to increase claimant awareness where it is lacking.

CTP Assist does not provide legal advice.

CTP Legal Advisory Service (LAS)

The Act required SIRA to establish a service to provide information and assistance to claimants through the claims process and disputes. To give effect to this SIRA established the LAS which provided legal advice on certain legal issues. There are twenty matters listed on SIRA's website and a claimant may obtain advice from a LAS panel solicitor in relation to any one of those matters. SIRA has established a panel of solicitors to provide this advice, which is paid for by SIRA, and so is free to the claimant.

This was established as a pilot program and following an independent review was implemented as a standing function with some changes made to strengthen the process.

Prima facie, this was a good initiative to fill the gap from no longer having paid legal representation available from the commencement of the claim. In practice there has been very limited use of the LAS, and little awareness of the services amongst claimants.

3.2.2 Legal supports

The Act makes provision for specific support by legal practitioners. The Act limits the matters for which an Australian legal practitioner is entitled to be paid or recover for a legal service in relation to CTP claims. It also allows Regulations to be made that limit the legal services for which a legal practitioner is entitled to be paid, and to set maximum costs for those legal services. Maximum legal costs and medico-legal fees are indexed each year in line with inflation.

The Dispute Resolution Service (DRS) may permit the payment of costs in specified circumstances including where the claimant is under a legal disability, for example an infant, or in exceptional circumstances that justify payment of legal costs incurred by the claimant. This is carried forward to the newly created Personal Injury Commission (PIC).

3.3 Legal costs under the Act

Initial consultation process

The process to establish the regulations involving legal costs in the Scheme involved consultation with the legal profession and insurers. On 1 May 2017, SIRA distributed a legal costs principles paper to the legal profession and CTP insurers for comment. Written feedback was received from the Insurance Council of Australia (ICA), NSW Law Society, NSW Bar Association and Australian Lawyers Alliance. Additionally, a series of individual meetings, workshops and written communications occurred between May and November 2017.

As part of this process, SIRA engaged an independent costs specialist to review proposed models and report on different cost models proposed by SIRA. The different proposals put forward by the legal profession, insurers and the independent costs specialist were subject to actuarial analysis by the scheme actuary to determine the cost to premiums and affordability on a mature scheme[6] basis. This actuarial assessment was presented to the legal profession and insurers in a joint workshop on 6 July 2017.

Following this the matter was considered at a series of Ministerial Implementation Group meetings (18, 25 and 27 July 2017), with key stakeholders and the involvement of Ernst & Young, the scheme actuary, and actuaries engaged by insurers (Finity) and the legal profession (Deloitte).

The outcome of the consultation was minor amendments to the draft Regulation. In recognition of the disparity of views and potential cost impact it was agreed at the Ministerial Implementation Group that these provisions would be closely monitored and reviewed two years after commencement of the new Act.

It is clear to us from our assessment of material provided to us in this review, that the Act was developed with close reference to the costings produced by the scheme actuary, and that the provisions specifying the maximum costs for legal and medico-legal services were determined with reference to those scheme costings and with the clear objective of meeting the Government's objective at the time of reducing the cost of CTP premiums for NSW motorists.

[6] Mature scheme: 'where motorists and the general public are fully aware of their rights under the Scheme, relationships between the service providers are well established and the infrastructure of the regulator is fully operative. This means that the estimated cost of the new Scheme in the first few years may be different (i.e. likely lower) than our cost estimates' (EY *Estimated cost per policy of the new NSW CTP Green Slip Scheme under the Motor Accident Injuries Act 2017 (NSW)*, 24 July 2017.

4

Stakeholder perspectives

4 Stakeholder perspectives

4.1 Public consultation

SIRA ran an online consultation process from 2 October 2020 to 2 December 2020, seeking submissions from people and organisations regarding the legal supports available in the CTP scheme. SIRA requested that submissions should identify:

- Specific concerns with the existing structure and provision of legal support in the CTP scheme
- Key principles that should govern the determination of legal costs and the weight to be given to each of these
- Specific changes that are recommended to be made to the system for legal support
- As well as any alternative models of legal support to injured people that would promote the objectives of the Act.

4.2 The insurers

The submissions from the Insurance Council of Australia and individual insurers support the continuation of the current scheme of claim management and involvement of legal representatives. The information in the submissions is the same as provided in submissions to the Standing Committee on Law and Justice.

The industry is particularly keen to maintain the current system of insurer management of claims and disputes being dealt with first by internal review. The industry provides some data on internal review outcomes which they suggest supports the benefit of retaining internal review in its current form with the entitlement to paid legal costs arising on merit review.

The industry is particularly concerned at the proposal to introduce ILARS to the current scheme, noting that it would be a complete reversal of the approach put in place in the 2017 Act and Legal Costs Regulation. The industry suggests that it will lead to a significant increase in the amount of legal costs in the scheme with a resulting flow-on to premiums.

The industry supports better tailoring of legal costs so that allowable costs are targeted to supporting the more complex legal matters.

The industry also supports a review of the decision in relation to exceptional circumstances and suggests that section 8.10 be clarified to make it very clear when legal costs above the regulated fee are allowed on the exceptional circumstances test and when that occurs to be clear how the costs are determined.

To the extent that there are information gaps prior to a claim being lodged the industry supports CTP Assist having a larger role. Where there are threshold legal issues the industry supports extending the Legal Advisory Service on the current basis.

4.3 The legal profession

Submissions were received from the Law Society of NSW, the Australian Lawyers Alliance and some individual legal practices. In addition, we met with a representative of the Bar Association. We also reviewed the submissions from these organisations to the Standing Committee on Law and Justice.

The legal profession suggests that contrary to the stated intention, the scheme is far more complex and difficult to navigate. The profession is most concerned that given the complexity of the scheme there is no entitlement to paid legal costs (with minor exceptions) until a dispute reaches merit review and this compromises the ability of an injured person to bring a claim or to deal with issues raised in that claim so that they receive their fair entitlement.

The profession also notes the considerable disparity between the claimant and their limited entitlement to legal representation and the fairly open-ended nature of the insurers ability to spend on claims handling costs (directly or indirectly). The profession therefore strongly supports a claimant entitlement to legal costs for preliminary advice and to bring a claim, and advocates for the application of the ILARS model to motor vehicle accidents noting that it will afford injured motorists the same access to legal services as injured workers.

The submission from the ALA notes that the assumptions which underpin the scheme have not been met and that there have been far fewer claims, much lower levels of legal representation and many fewer disputes. While some of this may be attributable to scheme changes that were not properly costed, they may also be impacted by injured people not being able to claim or pursue a dispute without legal representation.

The profession also believes that the current level of regulated legal costs is insufficient to properly meet the costs of providing the advice and assistance that is required. It is noted that one of the consequences of this is that it is likely to make legal representation harder to get in future and that lawyers will be more selective about matters that they take on to avoid the burden of carrying too much unpaid work.

The profession also points out that despite the intent of the scheme for the insurers to better assist injured people through the claims process it remains an adversarial system and as a consequence there has been a very high level of matters in which the insurer has rejected part of a claim. The profession refers to data on the level of internal review to support this proposition.

It is also the strong view of the profession that SIRA needs to improve data collection and be more open and transparent on release of data so that the operation of the scheme can be better monitored and understood by all parties.

4.4 Claimant perspective

As part of the review, a selection of twelve claimants were interviewed. SIRA provided Taylor Fry with a list of twelve claimants to be interviewed and the interviews were conducted between 14 January 2021 and 21 January 2021.

The interviews, conducted individually, were of a conversational nature rather than a series of fixed questions. The process sought to provide a forum in which each claimant could feel relatively at ease in describing their experience of the scheme and of legal supports they had received. Claimants were told the interview was independent of the scheme and would have no bearing on their claim outcome or process.

In the following sections, we provide a brief overview of:

- The claimants interviewed
- Claimants' experience with the scheme
- Claimants' engagement with the legal profession
- Claimant's use of other scheme navigation supports.

4.4.1 The claimants interviewed

While the sample size of 12 was too small to be quantitatively representative, the claimants did represent a cross-section of participants in the new scheme:

- **Accident date** – All claimants' accidents happened after the new CTP scheme came into effect.
- **Age** – Claimant ages ranged from 27 to 78. Median age was 51.5.
- **Fault status** – All claimants were assessed as not at-fault (some after disputes).
- **Injury status** – Three claimants were assessed as having minor injuries, nine as non-minor. Of the non-minor, three were assessed with whole person impairment (WPI) > 10%. Note that the majority of

claimants in the scheme have minor injuries, so in this respect the mix of interviewed claimants was clearly unrepresentative.

- **Employment status** – At the time of their accident:
  - Three claimants were retired
  - One was the primary carer for children
  - Eight were in paid work (four of these interviewees had not returned to any form of paid work at the time of the interview).

4.4.2 Claimants' experience with the scheme

Serious accidents are rare: claimants are therefore unfamiliar with the scheme

Claimants reflected how rare a serious motor accident is in a person's life:

- *"... first time ever having an accident like this ..."*
- "*... I've never gone through this really ...*"
- "*the first time – the accident scared me a lot*".

As a result, the claimants interviewed were concerned they didn't know how to navigate the scheme. One claimant, worried about how she had approached everything, spoke for many: "*Did I go about this the right way?*".

Claimants' knowledge regarding access to the Scheme

Claimants, particularly those who were not taken to hospital where good information is generally available (as discussed below), tended to fall back on other networks for information about the Scheme. However, such networks were not necessarily reliable. Claimant interviews highlighted several ways people find out about and access the scheme:

- Some claimants are told about the scheme via friends and family: "*people said you should be entitled to money*".
- Others were told about it by their doctor.
- Some went to a solicitor straight away for information.

Those claimants that were taken to hospital after the accident were generally told about the Scheme in the hospital. However, a plurality of these claimants reported they were so stressed, in pain, and/or medicated that it was hard to take in and remember information. As one claimant reported: "*[The hospital] did give information and they were very good – but I was whacked out of my brain*".

Some claimants approached solicitors in the first instance. In these cases:

- Some were told they didn't have a claim and not helped further.
- Others were told about the scheme and helped on a pro bono basis "*It was one of those first visit free things*".

There is anecdotal evidence solicitors are reducing the amount of help they provide because they are not being paid. This is particularly the case at the start of the claim process. The experience of one claimant with asking for help on lodging a claim is illustrative: "*She [the solicitor] just gave us the [claim] forms [and] we filled them in and sent them in to [the insurer].*"

4.4.3 Claimants' engagement with the legal profession

The interviews discussed the decision to engage, or not to engage, a lawyer. Claimants who decided not to engage a lawyer cited the following reasons:

- They were told they would not have a claim under the new scheme
- They perceived that they would have to pay high fees, or
- They thought the pay-off was too uncertain for the effort involved.

Of those who engaged a lawyer, a portion did so straight away:

- Some thought you needed to have a lawyer to be in the scheme
- Some were advised to do so (usually by a doctor)
- Some thought it prudent to do so early on, even if it wasn't strictly necessary.

Other claimants only engaged a lawyer further into their claims process: this was always out of frustrations with the insurer.

Claimants were happy with the lawyers they were with. They felt listened to, they appreciated the lawyer's competence and service, and the results the lawyer was achieving for them. Some claimants had left lawyers in the past due to dissatisfaction with services.

Most claimants reported their lawyer explained fees at the initial engagement. Nonetheless, some uncertainty and concern about the fees was not uncommon.

4.4.4 Claimants use of other scheme navigation supports

The claimant interviews also discussed other scheme navigation supports:

- CTP Assist
- LAS.

CTP Assist

Claimants in the interviews had mixed awareness of CTP Assist. This was in part due to represented claimants not receiving proactive phone calls from CTP Assist (a practice that, we understand, has now been changed). Of those that interacted with CTP Assist the feedback was positive but mixed: claimants would like more interactions on more matters and more proactive engagement.

LAS

None of the claimants interviewed as part of this report were aware of LAS.

5

Scheme analysis

5 Scheme analysis

Inside this section

We provide analysis and commentary on legal supports in relation to:

- The level of total legal costs
- Internal Review
- Disputes
- Likelihood that claimants will have an unfavourable insurer decision overturned
- Applications for awards of damage
- Differences between law firms
- ILARS experience in NSW workers compensation
- The LAS

5.1 Total legal costs

Total legal costs to date are materially lower than what was allowed for in insurer premiums set at scheme commencement.

The establishment of the new scheme required estimates to be made of the future cost of claims, including an allowance for the expected level of legal expense. After a re-allocation of contracted out legal costs to the relevant heads of damage, the scheme actuary's overall *ultimate* estimate of legal costs for a mature[7] underwriting year in the scheme was $274M, comprised of estimates of $54M in relation to statutory benefits and $220M in relation to award of damages claims. In total, this allowance for legal expense (after re-allocation of contracted out costs) represented around $50 per policy on average. Importantly, this allowance is described by the scheme actuary as a *mature scheme estimate* – meaning that it is intended to reflect the level of costs for a well-established scheme in a steady state.

Since that original mature scheme estimate was made, further guidance has been provided to SIRA by the scheme actuary in relation to scheme premiums (and the publishing of Schedule 1E parameters). That guidance is lower than the earlier mature scheme estimate and reflects the scheme actuary's observation and view of the lower than usual level of claim numbers and costs that are emerging from the scheme in the initial accident years following major scheme reform. This guidance estimated ultimate legal expenses of $238m (around $41 per policy on average).

Table 5.1 shows the level of legal costs observed to date since the commencement of the scheme for the first accident year cohort (AY 2018). It shows that this level is materially lower than has been ultimately allowed for in premium rates. The total legal spend to date across all accident years is $20M ($16M of which arises from AY 2018).

[7] Mature scheme: 'where motorists and the general public are fully aware of their rights under the Scheme, relationships between the service providers are well established and the infrastructure of the regulator is fully operative. This means that the estimated cost of the new Scheme in the first few years may be different (i.e. likely lower) than our cost estimates' (EY *Estimated cost per policy of the new NSW CTP Green Slip Scheme under the Motor Accident Injuries Act 2017 (NSW)*, 24 July 2017).

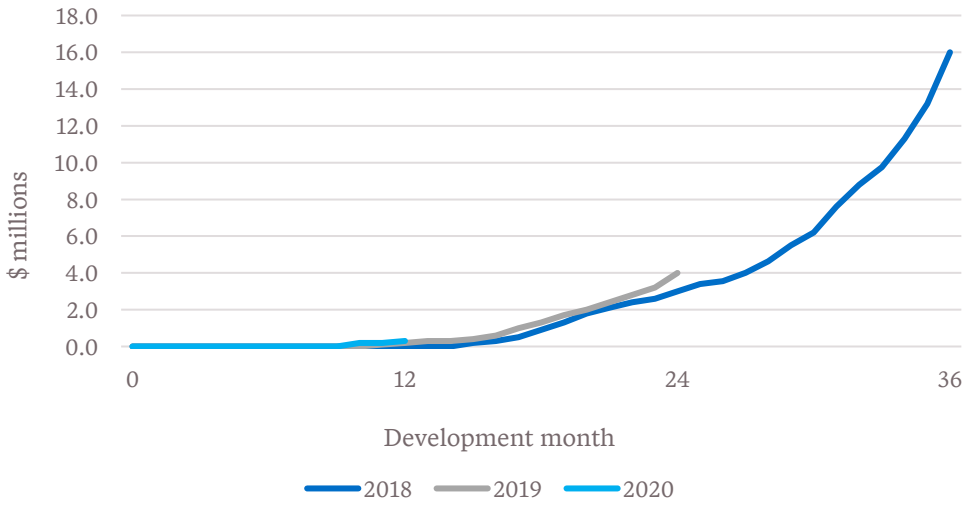
Table 5.1 – Legal costs original estimates versus current allowance versus observed to date

	Original (mature scheme) estimate	Current Schedule 1E Allowance	Observed to date for AY 2018
Statutory Benefits	$54m	$38m	$2m
Award of Damages	$220m	$200m	$10m
Other			$4m
Total (excluding contracted out)	$274m	$238m	$16m

It is important to recognise that the actual legal spend *will continue to increase over time.* Most (around 80%) of the expected legal expense relates to award of damages claims, and claimants with non-minor injuries and less than 10% whole person impairment must wait 20 months from the date of accident before they are able to lodge these claims for damages. All claimants from the 2018 accident year have now passed this milestone and are now able to lodge these claims (the most recent accidents from AY 2018 only reaching this milestone in September 2020). This means that legal expense costs are increasing quite rapidly at the current moment in time (see Figure 5.1), and there is considerable uncertainty about the level that they will ultimately reach. The scheme actuary's position is that there is insufficient evidence at this stage to conclude that actual legal spend for **award of damages** claims will be materially higher or lower than the allowance made in the setting of premiums.

On the other hand, it is apparent that the allowance made for legal costs related to **statutory benefit** claims (originally $54M) will not be reached ($2M to date from the AY 2018 accident year).

Figure 5.1 – Cumulative actual legal costs to date, by accident year



The lower-than-expected level of legal spend in the scheme to date is likely a reflection of the lower-than-expected level of disputation in the scheme to date. Subsequent to costing the new scheme, in 2017 the scheme actuary undertook a projection of ultimate dispute numbers for a mature scheme. The scheme actuary has advised that this estimate of dispute numbers was not used to set the allowance for legal spend in the scheme, but it was used to *test whether the envelope allowed for legal fees was sufficient.*

The projected ultimate number of disputes for a mature scheme was estimated to be approximately 42,000 (including panel reviews). The scheme actuary has subsequently provided an estimate of ultimate dispute numbers for the first accident year of the scheme (AY 2018) and this is significantly lower, at approximately 8,600 (approximately 80% lower than the mature scheme accident year estimate). The *actual* number of disputes to date from this accident year is approximately 3,500 (to 31 December 2020).

The scheme actuary has provided an explanation for the difference between the estimate of dispute numbers in a mature scheme, and that which is estimated for the first accident year. It is reproduced in

Figure 5.2, which shows that the sources of difference between the mature scheme estimate and current AY 2018 estimate are primarily:

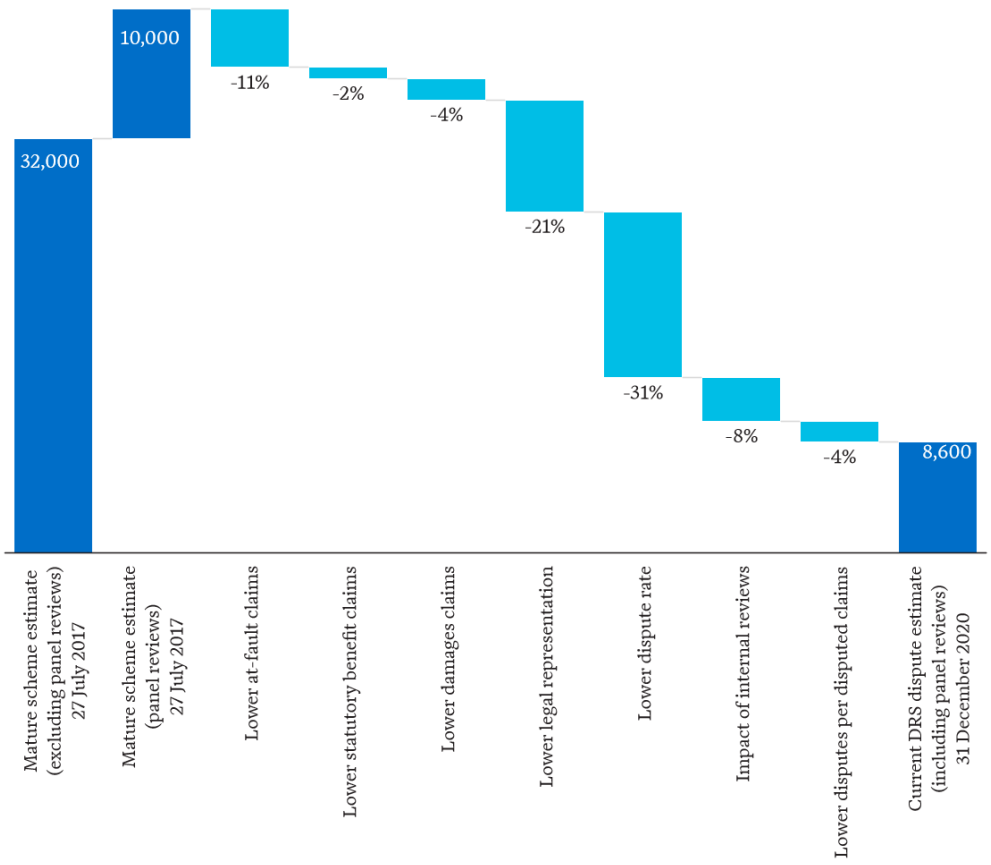
- Fewer claims than expected (particularly, at-fault claims)
- Lower than expected levels of legal representation (legal representation rates of 25% to 35%, compared to the levels of 50% to 60% assumed)
- Fewer than expected disputes, after already allowing for fewer claims and less legal representation.

The scheme actuary observes a correlation between legal representation and the level of disputation, ascribing part of the observed lower level of disputation to the lower observed level of legal representation. It is reasonable to conclude that the lower-than-expected level of observed legal spend is also related to the lower-than-expected levels of disputation and lawyer involvement.

Another driver of the fewer than anticipated number of disputes is that the estimate of disputes made by the scheme actuary under the mature scheme *made no allowance for the impact of insurer internal reviews*, as it was not clear initially how effective that process would be in resolving disputes.

It should also be noted that the expected level of representation in the new scheme (50% to 60%) was lower than the approximately 90% representation levels observed under the previous scheme.

Figure 5.2 – Sources of difference between mature scheme estimate and current estimate



The levels of internal review and of disputation are considered further in Sections 5.3 (p 26) and 5.4 (p 33) respectively.

5.2 Analysing the difference between represented and unrepresented claimants – discussion

Analysis of the difference in outcomes between those claimants that have engaged a lawyer (represented) and those that have not (unrepresented) can be undertaken in different ways, and it important to understand the uses and limitations of these differing approaches.

5.2.1 Comparative analysis based on current legal status

One approach often taken is to separate all claimants into two groups (represented or unrepresented) based on their *current status* (e.g. at the time of the survey, or at the time that the data extract is taken) and to produce comparative statistics for those two groups.

For example, the *SIRA Regulatory Measurement of Customer Experience and Outcomes Study November 2020*, by the Social Research Centre, undertook a survey study of 893 CTP claimants and found, inter alia, that the represented claimants in the surveyed group (i.e. those that had received legal representation during the claims process) were:

- Less likely to trust the scheme compared to the unrepresented claimants
- Less likely to have returned to their main activity or to work compared to the unrepresented claimants
- More likely to have a probable mental illness compared to the unrepresented claimants
- More likely to be dissatisfied with the frequency of their social contact compared to the unrepresented claimants
- More likely to report poor customer service or problems in all areas compared to the unrepresented claimants
- Less likely to agree that they were able to easily access the medical treatment and services they needed or that healthcare providers helped a great deal compared to the unrepresented claimants
- Less likely to expect to make a complete, or nearly complete, recovery compared to the unrepresented claimants.

Such analysis is useful in understanding the nature of these two groups of claimants, and in identifying any key differences in characteristics.

Using this type of approach, we have estimated that claimants who were initially determined to have a minor injury are almost 6 times more likely to have had that determination changed to non-minor if they are *currently* represented (see Section 6).

However, such analysis is limited in determining the effect of representation on a claim outcome because it does not allow for:

- The point at which the lawyer was first engaged, and hence the timing of the provision of legal support
- Any other differences in the underlying characteristics of claims in the represented vs unrepresented groups, some of which arise because there is a self-selection bias of claimants into these groups.

5.2.2 Comparative analysis allowing for the timing of the legal support

The timing of the legal engagement is important if we seek to ascertain the degree to which legal representation could be a factor in the outcome. For example, if we seek to understand outcomes within the process of insurer internal review, then we should limit the analysis of represented claimants to those claimants that had legal representation when those internal review decisions were made (and exclude those claimants that are currently represented, but that engaged a lawyer after the process of internal review).

In making this adjustment, we are relying on the accuracy of the claims data in relation to the timing of the emergence of the legal representation indicator. Insurers have raised the suspicion that lawyers are supporting some claimants, but that these claimants have not indicated that they are legally represented (that is, that lawyers are acting 'behind the scenes' for people who appear to be unrepresented claimants). To the extent that this is true, analysis of legal representation which relies on the timing of that representation as observed in the data will be compromised.

5.2.3 Statistical modelling allowing for underlying differences in claim characteristics and the timing of the legal support

In addition to recognising the timing of the provision of legal support, statistical modelling can be used to adjust for underlying differences in claim characteristics between the represented and unrepresented claimant groups.

For example, the *SIRA Regulatory Measurement of Customer Experience and Outcomes Study November 2020* report found that persons with severe/extreme pain and discomfort were less likely to trust the scheme compared to those with little or no pain. If persons with severe/extreme pain are more likely to seek legal representation, this influences the relatively low level of scheme trust observed for represented claimants.

In producing statistical models that attempt to allow for other claim characteristics (like age of claimant, nature and severity of injury, etc.) we seek to unwind elements of bias between the two groups and provide a more like-with-like comparison (that is, a comparison between represented and unrepresented claimants where *all other things are equal*). Having made this adjustment, a comparison of represented vs unrepresented outcomes is an attempt to isolate the degree to which the legal representation alone is responsible for the observed effect.

5.2.4 Important limitations of the analysis

All models are subject to the limitations of the data which they are modelling. The CTP claims data contains gaps and deficiencies which place unavoidable limitations on the veracity of the analysis.

Statistical models are limited in their ability to put comparisons on a like-with-like basis where there are biases not observable in the claims data. Hence, the results of this analysis should be treated with caution.

Furthermore, any observed relationships between the presence of legal representation and an observed effect/outcome should be treated as correlations, not causations. For example, legally represented people are more likely to challenge unfavourable insurer decisions through internal review. It is not possible to conclude that this is due to the presence or effect of legal support – it may simply be that the claimants who are inherently more likely to challenge insurer decisions are those that are also more likely to find lawyers to help them do so. At the same time, it cannot be concluded that legal representation does not influence these outcomes. What is clear, though, is that there is a strong corelation to the presence of legal representation and that the legal fee regulations do not apply until a claim is disputed, post any unfavourable internal review outcome.

Notwithstanding, we have undertaken analysis of insurer internal reviews, disputes and claimant outcomes separately for represented and unrepresented claimants, with the results explained in the following sections.

5.3 Internal reviews

Table 5.2 outlines the internal review experience for the Scheme. Based on the more developed accident periods, around one in four claims have been subject to at least 1 internal review. Note, these numbers are still developing and will increase over time, particularly for the more recent accident years. As the table demonstrates, claimants that receive an internal review on average receive more than just 1 review (currently there are an average 1.72 internal reviews per claimant that has received an internal review).

Table 5.2 – Internal review (IR) experience

Accident year	Number of claims	Number of IRs	Number per claim	Number of Claims with 1 + IRs	% Claims with IR
2017	867	333	0.38	202	23%
2018	11,508	5,015	0.44	2,729	24%
2019	11,505	4,199	0.36	2,480	22%
2020	8,080	1,567	0.19	1,048	13%
Total	**31,960**	**11,114**	**0.35**	**6,459**	**20%**

Internal reviews are sought on a variety of matters, including determination of fault, classification of the injury as a minor injury and the reasonableness of treatment and care. Figure 5.3, taken from the 31 December 2020 SIRA quarterly publication *CTP Insurer Claims Experience and Customer Feedback Comparison*, shows the relative volume of internal review decisions made by *decision year*, separately by type of review.

Figure 5.3 – Internal review data by decision year, as at 31 December 2020 (SIRA publication)

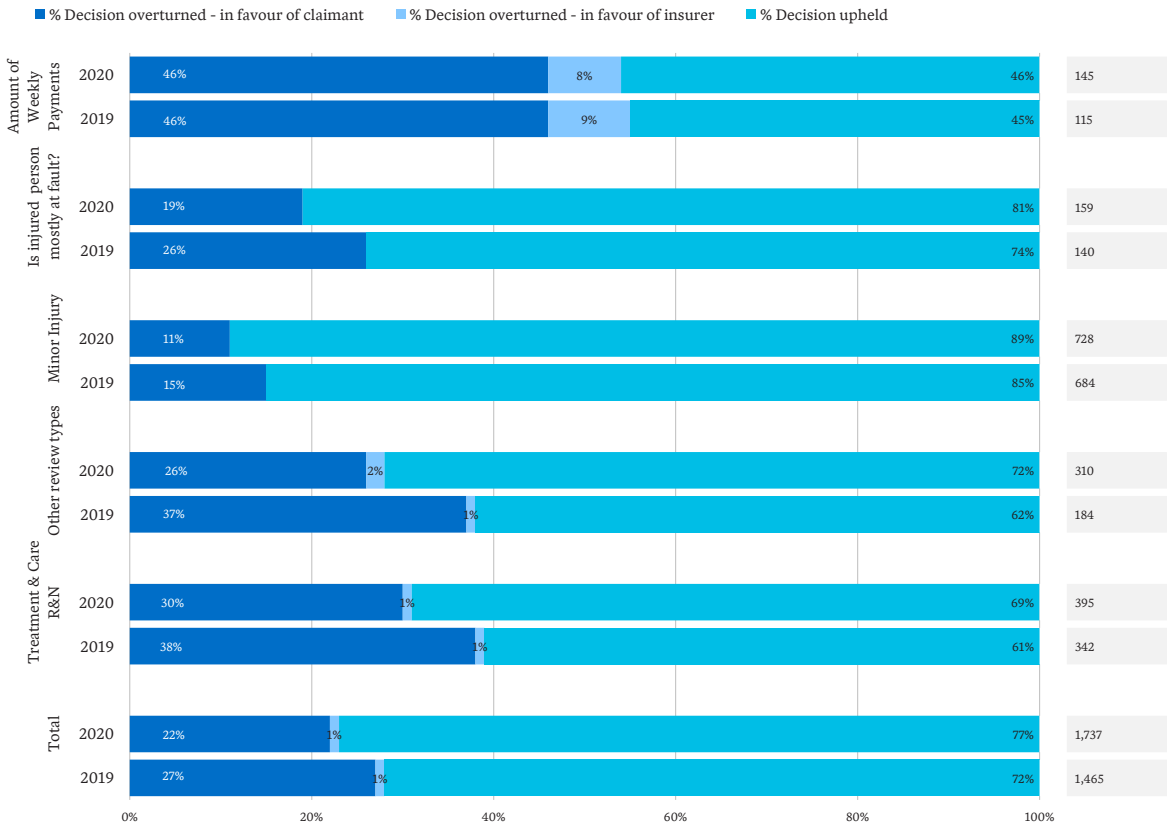
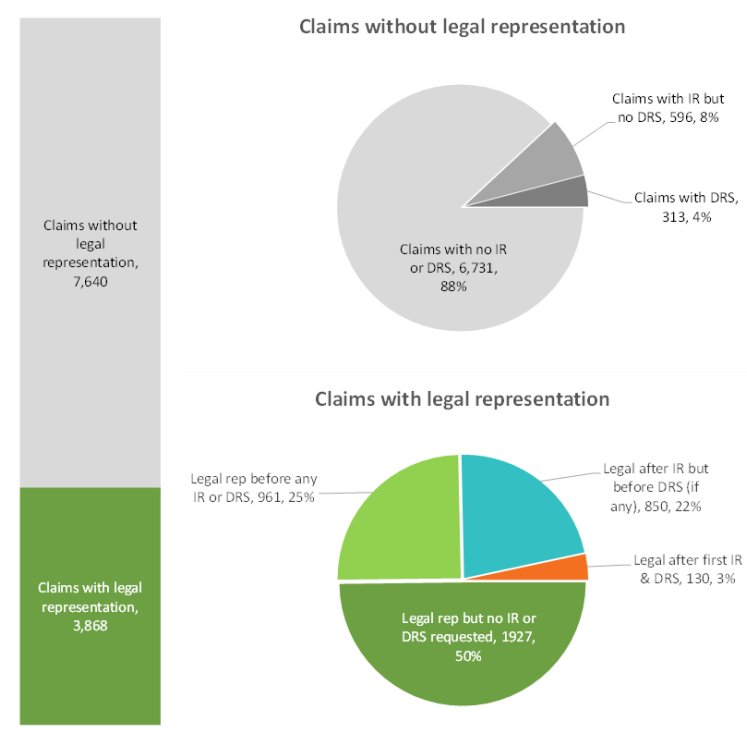


Figure 5.3 shows the relative success that claimants have in seeking to have previously unfavourable decisions overturned by the insurer at internal review. Based on internal review decisions made over the last 2 years, approximately 1 in 4 internal reviews results in a previous decision being overturned in favour of the claimant, although the claimant success rate does vary by the type of decision that is subject to the review. SIRA may wish to further investigate the underlying reasons for the variance in overturn rates. For example, an overturn rate of close to 50% for Amount of Weekly Payments might suggest that there is room for improvement in the administrative process for the initial determination of weekly compensation. High overturn rates (such as around 33% for Treatment and Care) might suggest that either initial decisions are being made against the claimant, perhaps unnecessarily, or that the timing and process of investigating claims and making decisions could be reviewed and improved.

At the internal review stage of the claimant journey, lawyers are not involved. That is, a dispute between the claimant and the insurer has not yet arisen and there are no legal services to which the regulated schedule of legal fees would apply. That said, the data reveals that some claimants have already engaged a lawyer by this time and are already identified in the data as 'represented'.

Approximately 1 in 3 claimants in the scheme is legally represented. Figure 5.4 shows a comparison of legally represented and unrepresented claimants for the 2018 accident year and shows that around half of represented claimants have challenged a decision through internal review, and half of those that sought an internal review engaged their lawyer prior to that review.

Figure 5.4 – Accident year 2018: Legal representation

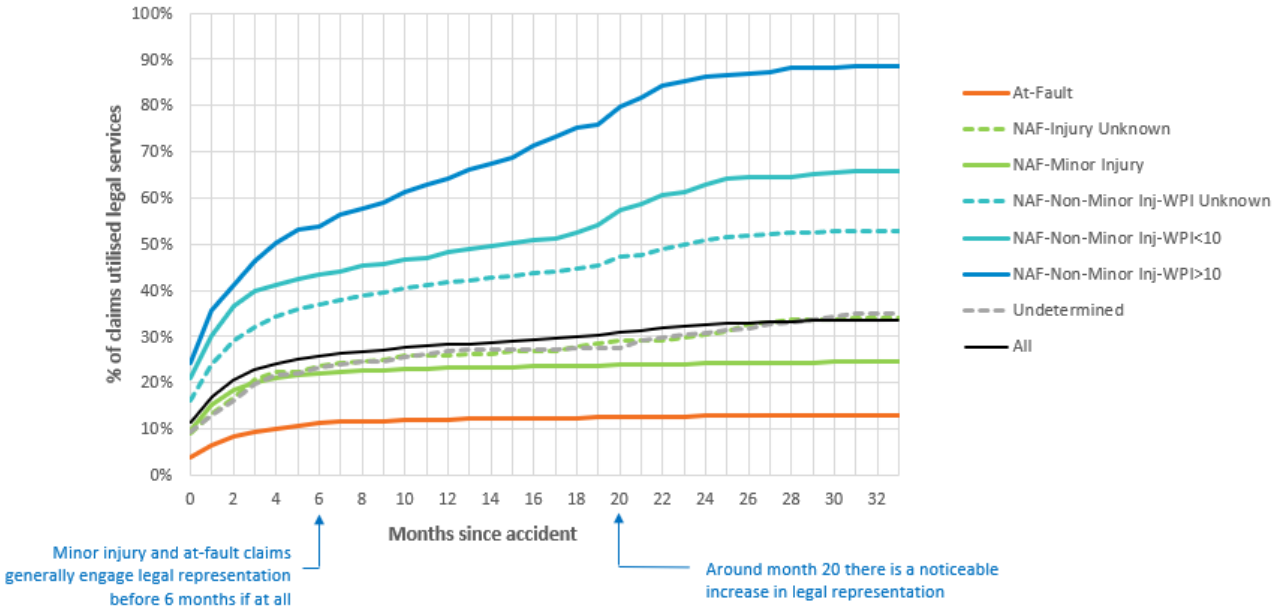


These number are also subject to change over time, as more claimants seek representation, and more claimants seek reviews or pursue disputation.

The likelihood of a claimant to seek representation is partly a function of the circumstances of that claimant and the nature of their injury. In analysing the drivers of lower-than-expected dispute numbers in the scheme, the scheme actuary notes that the current legal representation rate (25%-30%) is lower than the representation rate adopted for the mature scheme estimate (50%-60%) and that this 'creates a difference in the current estimate of disputes compared to the mature scheme estimate'. As Figure 5.5 shows, the representation rate for the first accident year of the scheme (the percentage of claimants that have engaged a lawyer) is around 34% and is still gradually increasing (it has increased by around 1.5% since 1 July 2020, or around 35 additional claimants per month that engage a lawyer). The ultimate level of

representation for this first accident year of the scheme is likely to be around 35%-40%, which is consistent with the view of the scheme actuary that a 50%-60% level of representation will not occur until the scheme has fully matured.

Figure 5.5 – Accident year 2018: Rates of legal representation by claim type



As Figure 5.5 shows:

- Higher rates of representation are seen for more seriously injured claimants
- At fault and minor injury claimants have lower levels of representation, but typically engage lawyers within 6 months from accident
- Lawyers are still being engaged for the more seriously injured claimants, with a noticeable increase in representation levels at 20 months from accident

Feedback from claimant interviews

Anecdotal evidence from claimant interviews indicates that some claimants have decided not to engage a lawyer because of perceived high financial costs, or the perceived high emotional toll of taking an insurer to court. For example:

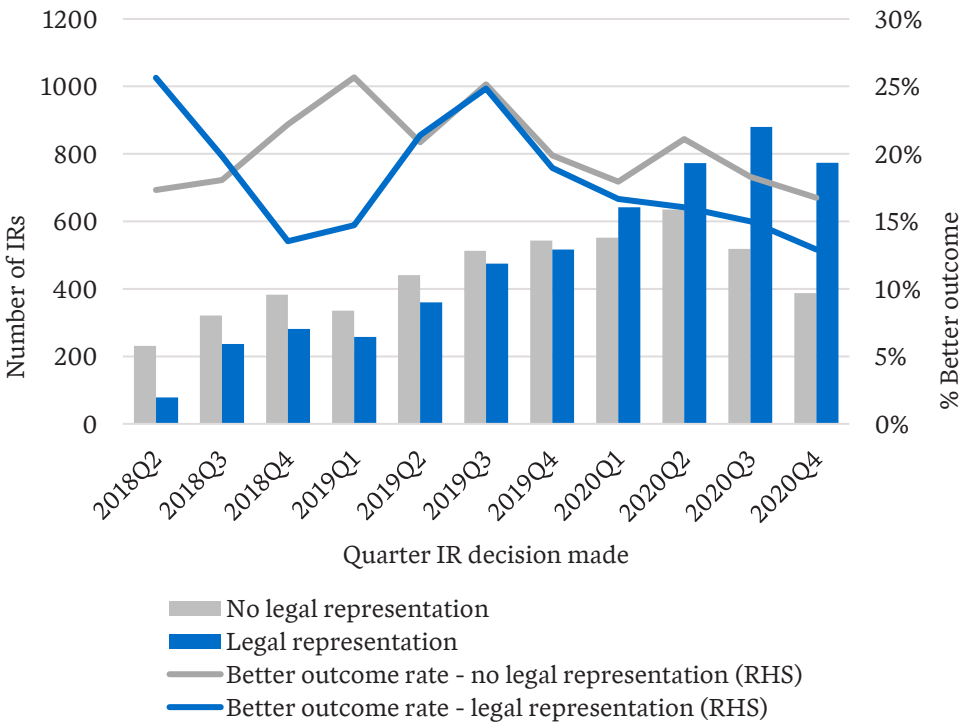
- One claimant decided against engaging a lawyer because "[I] didn't want to pay".
- Another claimant's son reports: "He [the claimant] didn't have money to pay for a lawyer – being a pensioner he didn't have money – and you have to pay up-front ... it wasn't a workers comp... it was just an accident".
- The high emotional toll of disputes was explained as the reason another claimant abandoned legal proceedings: "All it was doing was making me worse".

Additionally, the claimant interviews also indicate that at least some claimants are receiving the message that it's no longer possible to claim any amount that a lawyer could help with. Some claimants are being told by the lawyers that they approach that they are unlikely to have a claim or to "come back in twelve months [if you are still injured]". However, it seems that some claimants have also picked up the message in the broader community that claims via lawyers are no longer available: "At the time people were saying he wouldn't be eligible for anything -because the law had been changed." .

Lawyers are not officially involved in the process of internal review. Nevertheless, we have analysed the success rates of claimants that seek internal review – separately for those that are represented and those

that are not. This analysis indicates that the level of claimant success *within* internal review is very similar between those claimants that have engaged a lawyer and those that have not. This is shown in Figure 5.6, which differentiates between represented and unrepresented claimants and shows the extent to which claimants achieve a better outcome after receiving an internal review.

Figure 5.6 – Legal representation and Internal Review (IR) outcomes, by quarter IR decision made



While the data has been somewhat volatile, the rates of success at internal review appear to be broadly similar (between represented and unrepresented claimants). It is noteworthy, however that the numbers of represented claimants seeking internal review exceeds the number of unrepresented claimants – despite the fact that only 1 in 3 claimants is represented overall. In other words, the *likelihood* of a represented claimant seeking an internal review is much greater than the likelihood of an unrepresented claimant seeking an internal review.

Indeed, after allowing for differences in claim characteristics between these two groups and the timing of legal representation, our analysis suggests that *represented claimants are roughly 2.3 times more likely to challenge* an unfavourable insurer decision by seeking an internal review, compared to unrepresented claimants.

It is important to recognise that this difference in the propensity to challenge an insurer decision at internal review cannot be necessarily ascribed to the presence of a lawyer. We are observing a **correlation** in the data, not necessarily a causal effect. In other words, it may be that those people inherently more likely to challenge an insurer decision are also more likely to seek legal representation. Conversely, it could be that legal representation (albeit behind the scenes at this stage of the claim) is a factor in claimants deciding to challenge an insurer decision. It is not possible for the data and the modelling to distinguish between these possibilities, although the latter explanation would be broadly consistent with the corelation between the level of legal representation and the level of disputes observed by the scheme actuary, and that there are fewer than expected disputes in the scheme because the rates of legal representation are lower than expected.

In comparing outcomes at internal review (represented claimants compared to unrepresented claimants) as is done in Figure 5.6, it is important to consider the following four points:

1. Lawyers are not remunerated at the internal review stage

While we differentiate between represented and unrepresented claimants at the stage of internal review, lawyers actually have no official role in the internal review process and receive no remuneration through the legal fee regulations. Legal fees are payable only when there is a dispute following an unsuccessful internal review.

2. The mix of internal reviews by type of review is different for represented and unrepresented claimants

The mix of represented claimants by internal review type is skewed towards those internal review types that have a lower rate of success at internal review. On the assumption that represented and unrepresented claimants have the same rate of success *within* each review type, represented claimants would have a lower rate of success overall (around 2 percentage points lower) due to having a higher proportion of more challenging review types (e.g. a relatively high proportion of internal reviews for permanent impairment compared to unrepresented claimants).

3. The mix of internal reviews by type of review is changing over time

Trends in the overall rate of better outcome over time are affected by changes in the mix of internal review by type of review over time. Notably, Figure 5.6 shows an increase in internal review decisions for represented claimants in the two most recent quarters, and no such increase for unrepresented claimants – with the rate of favourable outcome marginally lower in both groups. This largely reflects a steady increase in internal reviews from 2019Q3 related to permanent impairment, which to date have a low rate of successful overturn (around 3%) and which are predominantly undertaken for represented claimants (75%) rather than unrepresented claimants (25%).

4. Outcomes at internal review are not a good indicator of the ultimate claimant outcome

Outcomes at internal review can be subsequently challenged and overturned either through formal dispute resolution or prior to that stage. Dispute outcomes are addressed in Section 5.4 (p 33), but it is helpful to consider just the review of minor injury decisions to illustrate this point.

Figure 5.7 – Legal representation and IR outcomes – Minor Injury reviews only

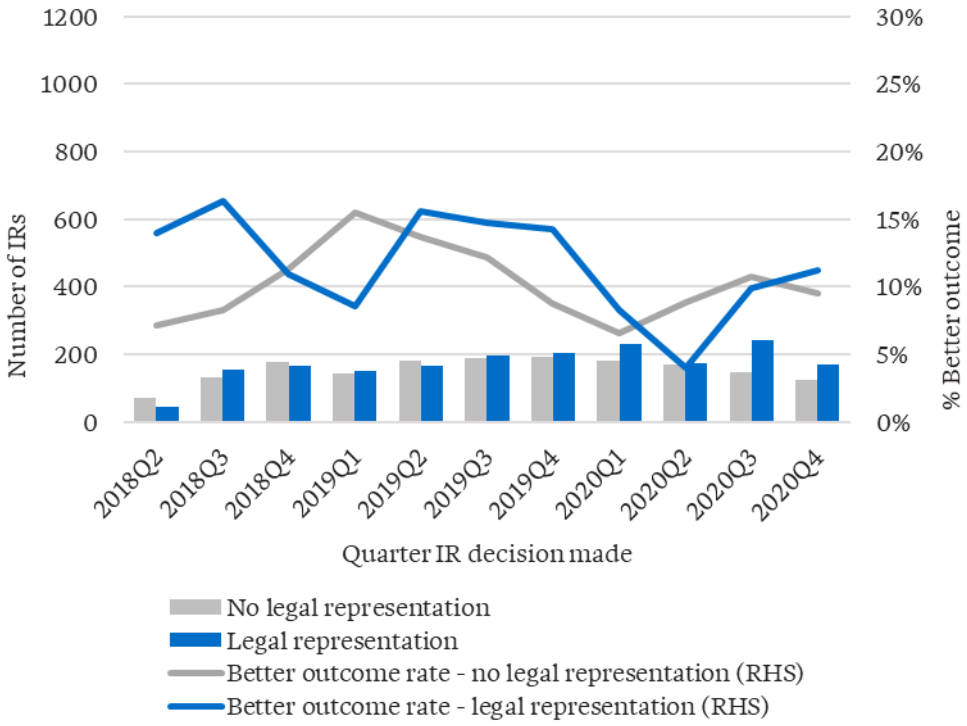


Figure 5.7 shows the rate of achieving a better outcome at internal review, separately for represented and unrepresented claimants, for only reviews of **minor injury status**. Overall, the rate of achieving a better

outcome at internal review is around 10%, similar for represented and unrepresented claimants. However, care should be taken in interpreting these "better outcome" rates, because they do not reflect the current minor injury status for these claimants (i.e. what happens post internal review).

Table 5.3 summarises Figure 5.7 and shows a consistent rate of success for minor injury decisions at internal review, between represented and unrepresented claimants (noting that lawyers do not participate in the internal review process).

Table 5.3 – Minor Injury review outcomes at Internal Review (IR)[1]

Minor Injury review outcome at IR	All Accident Years			AY 2018		
	Unrepresented at IR	Represented at IR[2]	**Total**	Unrepresented at IR	Represented at IR[2]	**Total**
Successful[3]	120	158	**278**	48	72	**120**
Unsuccessful	1,223	1,421	**2,644**	504	691	**1,195**
Total	**1,343**	**1,579**	2,922	**552**	**763**	**1,315**
% Success[3]	**9%**	**10%**	**10%**	**9%**	**9%**	**9%**

Notes: 1. Excludes matters with missing minor injury status
2. Lawyers are not involved during the IR process, but have nevertheless been engaged by the claimant prior to IR
3. Successful for claimant (a successful outcome is the overturn of the minor injury determination to non-minor).

However, Table 5.4 shows that claimants that are unsuccessful at achieving an overturn of the minor injury determination at internal review do have some success in *subsequently* getting an overturn of that determination *after* internal review, and that the rates of success are higher for the cohort that was represented prior to the internal review.

Table 5.4 – Claimants unsuccessful at Internal Review with Minor Injury determination[1]

Minor Injury outcome *after* IR	All Accident Years			AY 2018		
	Unrepresented at IR	Represented at IR[2]	**Total**	Unrepresented at IR	Represented at IR[2]	**Total**
Now non-minor[3]	188	307	**495**	93	200	**293**
Still minor	1,035	1,114	**2,149**	411	491	**902**
Total	**1,223**	**1,421**	2,644	**504**	**691**	**1,195**
% Success[3]	**15%**	**22%**	**19%**	**18%**	**29%**	**25%**

Notes: 1. Excludes matters with missing minor injury status
2. Lawyers are not involved during the IR process, but have nevertheless been engaged by the claimant prior to IR
3. The claimant was unsuccessful at IR but subsequently had the minor injury determination overturned.

Furthermore, some claimants that were unrepresented before the internal review subsequently engaged legal representation. Table 5.5 shows that the success rate for achieving an overturn of the minor injury determination *after* internal review is higher for claimants that subsequently engage legal representation.

Table 5.5 – Claimants not represented prior to Internal Review that were unsuccessful at Internal Review[1]

Minor Injury outcome *after* IR	**All Accident Years**			**AY 2018**		
	Still Unrepresented	Now[2] Represented	**Total**	Still Unrepresented	Now Represented[2]	**Total**
Now non-minor[3]	82	106	**188**	26	67	**93**
Still minor	879	156	**1,035**	350	61	**411**
Total	**961**	**262**	**1,223**	**376**	**128**	**504**
% Success[3]	**9%**	**40%**	**15%**	**7%**	**52%**	**18%**

Notes: 1. Excludes matters with missing minor injury status
2. Claimants that were not represented prior to IR but who subsequently engaged legal representation
3. The claimant was unsuccessful at IR but subsequently had the minor injury determination overturned.

In combination, Table 5.3, Table 5.4, and Table 5.5 indicate that:

- 15% of unsuccessful unrepresented claimants went on to achieve later success in achieving an overturn to a non-minor injury classification (188 out of 1,223). The rate of success of the represented cohort was higher, at 22% (307 out of 1,421).
- Limiting this analysis to only the 2018 accident year (to maximise the maturity of the cohort), 18% of unsuccessful unrepresented claimants went on to achieve an overturn to a non-minor injury classification (93 out of 504), compared to 29% for the represented cohort (200 out of 691).
- The 18% subsequent success rate of initially unsuccessful unrepresented claimants (i.e. unrepresented at the time of internal review) is a combination of:
  - claimants that remained unrepresented after internal review, with a 7% success rate of eventual overturn (26 out of 376), and
  - claimants that subsequently engaged legal representation after the unsuccessful internal review, with a 52% success rate of overturn (67 out of 128).

The analysis suggests that while claimants that have engaged legal representation prior to internal review do not appear to have greater success for the overturn of minor injury decisions at internal review, they do appear to ultimately have greater success in achieving that outcome. Further, those that were unrepresented at internal review have much greater success in achieving that outcome if they subsequently engage legal representation. Hence, internal review decisions are not always a good indicator of the ultimate outcome for claimants.

It is important to recognise that not all claim information might be available in the internal review process, and that some information is only available later in the claims process (for example, at dispute resolution). This subsequent information could be a significant contributing factor in the overturn of some decisions that are made in internal review. If this is the case, SIRA may wish to review and refine some insurer decision milestones to reduce the extent to which adverse decisions are made to the detriment of claimants in the absence of important and relevant information.

5.4 Disputes

We have undertaken similar analysis for claims that are disputed, subsequent to an unfavourable internal review. Table 5.6 outlines the experience of the Dispute Resolution Service (DRS) for the scheme to date[8]. Based on the more developed accident periods, around one in seven claims have been subject to at least one dispute at DRS. Note, these numbers are still developing and will increase over time, particularly for the more recent accident years.

Table 5.6 – Dispute Resolution Service (DRS) experience

Accident year	Number of claims	Number of DRSs	Number per claim	Number of Claims with 1 + DRSs	% Claims with DRS
Not matched to claim		**561***			
2017	867	305	0.35	149	17%
2018	11,508	3,027	0.26	1,560	14%
2019	11,505	1,740	0.15	1,118	10%
2020	8,080	372	0.05	269	3%
Total	**31,960**	**6,005**	**0.19**	**3,096**	**10%**

Note: * It is not possible to categorically match all disputes to claims due to missing data.

As with internal reviews, disputes arise on a variety of matters, including determination of fault, classification of the injury as a minor injury and the reasonableness of treatment and care. The following diagram, taken from the 31 December 2020 SIRA quarterly publication *CTP Insurer Claims Experience and Customer Feedback Comparison*, shows the outcome of the approximately 2,700 disputes that have been resolved at DRS since the commencement of the Scheme.

Figure 5.8 – DRS data by decision type, as at 31 December 2020 (SIRA publication)

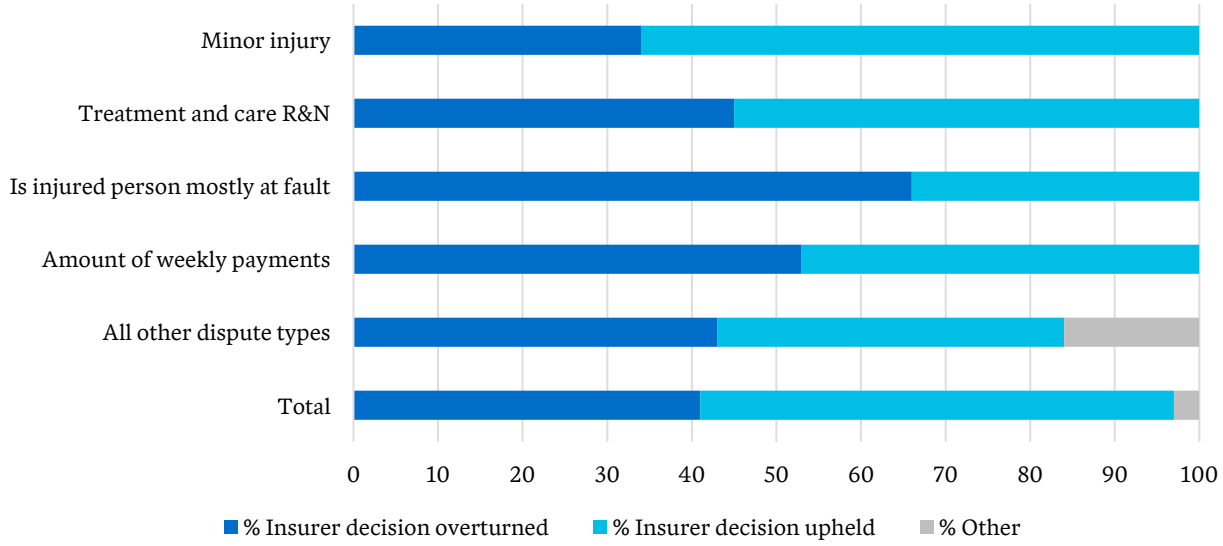


Figure 5.8 shows that approximately 40% of insurer decisions (that is, 2 out of every 5) are overturned in favour of the claimant at dispute, although the claimant success rate does vary by the type of decision that

[8] Noting that the functions of the DRS have now been replaced by the PIC

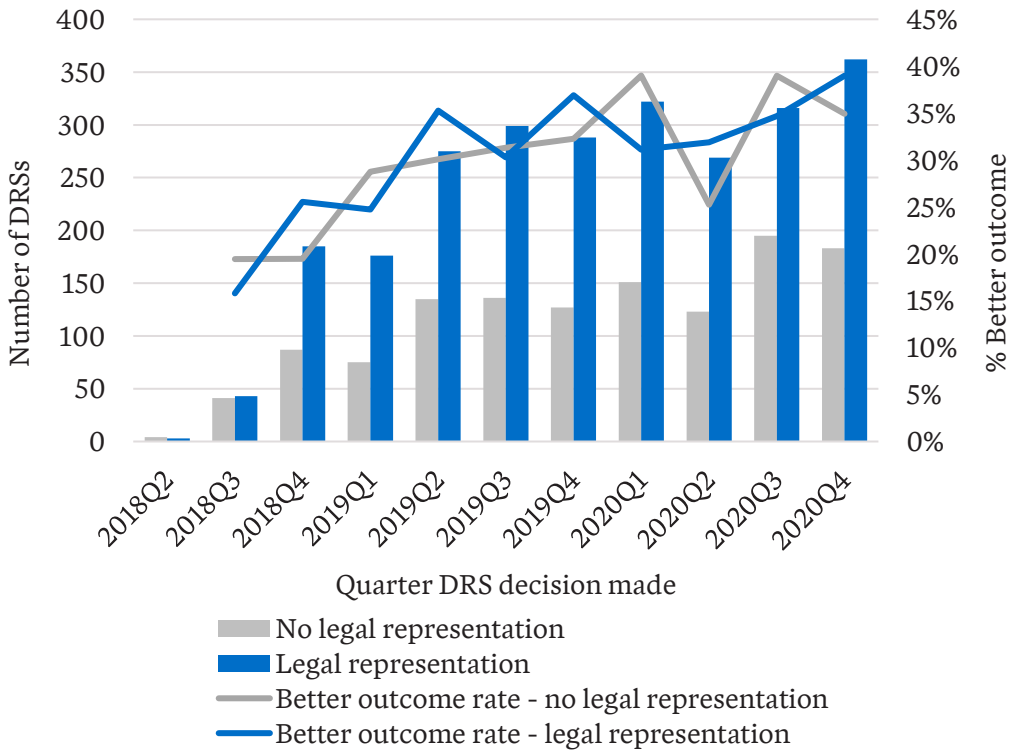
is subject to the dispute (e.g. the overturn rate in favour of the claimant is 2 out of every 3 for disputes on fault compared to 1 out of every 3 for disputes on minor injury).

The overall overturn rate for disputes in favour of the claimant (40%) is greater than the success rate of claimants at internal review (25%). This suggests that insurers are missing the opportunity to make better decisions earlier in the process, to avoid claimants needing to raise disputes. It should be noted, though, that at the dispute stage of the claim there is likely more information available on the nature of the accident and on the claimant injuries, and this new information can be what leads to the reversal of a previous insurer decision.

The variance in overturn rates by type of decision warrants further consideration by SIRA. As discussed with the internal review outcomes in Section 5.3 (p 26), variance in the success of disputes by type of dispute might provide information on the underlying system dynamics. For example, systematically high rates of overturn (e.g. on the issue of fault) might indicate systemic issues with insurer decision-making or the claims process generally and the way in which information unfolds on these matters. Conversely, a low rate of success might be indicative of unmeritorious disputes being raised.

We have analysed the success rate of claimants that dispute their decisions at DRS – separately for those that are represented and those that are not. As was the case for internal reviews, this analysis indicates that the level of claimant success at DRS is very similar between those claimants that have engaged a lawyer and those that have not. This is shown in the following chart, which differentiates between represented and unrepresented claimants and shows the extent to which claimants achieve a better outcome after receiving a decision at DRS.

Figure 5.9 – Legal representation and DRS outcomes, by quarter that DRS decision is made



It is noteworthy, however that the number of represented claimants disputing their insurer decisions at DRS far exceeds the number of unrepresented claimants doing so – despite the fact that only 1 in 3 claimants is represented overall. In other words, the *likelihood* of a represented claimant disputing an insurer decision at DRS is much greater than the likelihood of an unrepresented claimant challenging their outcome at DRS.

Indeed, after allowing for differences in claim characteristics between these two groups, our analysis suggests that *represented claimants are roughly 3.6 times more likely to challenge* an unfavourable insurer decision by disputing the insurer decision at DRS, compared to unrepresented claimants.

As previously explained, this difference in the propensity to dispute an insurer decision at DRS cannot be necessarily ascribed to the presence of a lawyer. We are observing a **correlation** in the data, not necessarily a causal effect. Nevertheless, given that the regulated fee schedule applies to these disputes and the lawyers are remunerated for their participation, it is reasonable to assume that they are in part responsible for encouraging claimants to challenge their outcomes.

It should be noted that a major data limitation that was encountered in assessing the impact of DRS was the difficulty in matching the DRS data with the claims data. It was not possible to align DRS determinations by type of determination with internal review outcomes by type of internal review decision on a 1 to 1 basis.

It is critical to be able to match claims to dispute resolution to enable a complete understanding of the overall claimant journey. We note that SIRA and the PIC have taken this as a key issue in establishing data arrangements post PIC commencement and at the very least this should diminish as an issue going forward. Certainly, being able to track claimant outcomes consistently across the complete claimant journey (including internal review and any subsequent dispute) is crucial for providing feedback to insurers and legal professionals with respect to scheme performance and their roles in the scheme.

5.5 Likelihood that claimants will have an unfavourable insurer decision overturned

Combining both the internal review process and any subsequent disputes that may arise, we have analysed (for the first accident year of the scheme) the relative likelihood that claimants will ultimately have an unfavourable insurer decision overturned in their favour by type of assessment. In so doing, we have attempted to allow for differences in claim characteristics between represented and unrepresented claimants and to some extent allow for self-selection bias – that is, that claimants who actively seek to improve their initial unfavourable assessment would likely use legal representation to do so. Table 5.7 shows the results of this analysis.

Table 5.7 – Rate of improved outcome for claimant

Initial assessment	Subsequent assessment	Relative likelihood of overturn (Represented v Unrepresented)
Minor	Non-minor	1.7 x
At-fault	Not at-fault	3.1 x
WPI < 10%	**WPI > 10%**	3.8 x

Our analysis indicates that, overall, represented claimants are more likely to have an initial unfavourable insurer decision overturned (1.7 times more likely regarding classification of the injury as minor, and 3.8 times more likely regarding an unfavourable decision regarding whole person impairment). However, as our previous analysis has indicated:

- This difference in success rate arises largely because claimants that seek representation are more likely to challenge their outcomes, either at internal review or in disputation, and
- Not because claimants that seek representation have greater success within either of those forums, but
- This cannot be definitely ascribed to being due to the presence or otherwise of legal representation (it is correlation, not necessarily causation), although
- It is reasonable to assume that lawyers are playing some role in encouraging their clients to challenge their unfavourable outcomes and are helping them to do so.

Feedback from our discussions with the DRS indicated that unrepresented claimants require more support from the DRS Assessor than represented claimants. While anecdotal, this feedback does suggest that it is possible that some unrepresented claimants have been assisted in the scheme by other less apparent means, potentially increasing the success rate of unrepresented claimants in the DRS process. In effect to ensure a fair hearing at DRS, the assessors may have been filling a gap. This is unlikely to be carried forward into the PIC and it is likely that the level of representation will necessarily increase at the PIC although the impact of a higher rate of legal representation leading to increased legal costs may well be offset by the PIC adopting practices that collapse all matters in dispute into a single hearing.

We also note that none of the analysis considers the difference in financial outcome (i.e. the award of damages quantum) between represented and unrepresented claimants. It would be premature to attempt such analysis on the scheme data at this time, but we recommend that SIRA considers this in the future.

5.5.1 Minor injury decisions overturned

The determination of an injury as minor or non-minor is a critical decision in the claims process. A minor injury is entitled to statutory benefits for a maximum of 26 weeks. A non-minor injury has statutory entitlements beyond this time, and the ability to lodge a claim for the award of damages.

Table 5.8 shows the total number of claimants from the 2018 accident year which were originally determined to have a minor injury. In total, there were 6,416 claimants initially determined to have a minor-injury. Of these, 1,857 claimants now have legal representation and 4,559 do not.

Table 5.8 – Accident Year 2018 – Claimants originally determined to have a minor injury

	Currently Unrepresented Claimants			Currently Represented Claimants		
	Received IR	Did not receive IR	Total	Received IR	Did not receive IR	Total
Still minor injury	350	3,972	4,322	547	762	1,309
Now non-minor injury	49	188	237	332	216	548
Total	**399**	**4,160**	**4,559**	**879**	**978**	**1,857**
	(9%)	**(91%)**		**(47%)**	**(53%)**	

Table 5.8 shows that from this accident cohort, 9% of unrepresented minor injury claimants sought an internal review regarding their minor injury determination compared to 47% of claimants now represented. In other words, claimants that are currently represented, are 5.4 times more likely to have requested an internal review of their minor injury determination.

Table 5.9 – Accident Year 2018 – Claimants originally determined to have a minor injury

	Currently Unrepresented Claimants			Currently Represented Claimants		
	Received IR	Did not receive IR	Total	Received IR	Did not receive IR	Total
Still minor injury	88%	95%	95%	62%	78%	70%
Now non-minor injury	12%	5%	5%	38%	22%	30%
Total	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**

Table 5.9 expresses the numbers in Table 5.8 as percentages of each respective cohort. Table 5.9 shows that for claimants originally classified as having a minor injury, 12% of the unrepresented claimants that received an internal review are now classified as having a non-minor injury, whereas 38% of represented claimants that received an internal review are now classified as having a non-minor injury. Furthermore, 22% of represented minor injury claimants that *did not* go to internal review still saw that initial decision overturned by the insurer (compared to 5% for unrepresented claimants).

Overall, for claimants originally determined to have a minor injury:

- 30% of represented claimants have succeeded in having that initial decision overturned
- 5% of unrepresented claimants have succeeded in having that initial decision overturned.

Figure 5.3 shows that around 10% of claimants are successful at internal review in having their minor injury decision overturned. Viewed in conjunction with the information in Table 5.5 and Table 5.6, this implies that most overturns of the initial minor injury determination occur:

- **After** the internal review process for represented claimants, where most of the unsuccessful claimants would continue to dispute this decision, and around one in three would succeed (either at DRS or prior to lodging a dispute)
- **Within** the internal review process for unrepresented claimants, with very few of the unsuccessful unrepresented claimants continuing to dispute the internal review decision.

The analysis also shows that a much lower proportion of unrepresented claimants seek that internal review.

This analysis does *not* allow for:

- The timing of the legal support provided
- The difference in characteristic between represented and unrepresented claimants.

In attempting to allow for both of those elements, the differential between represented and unrepresented claimants reduces. This may partly reflect that the legal representation indicator lags behind the actual start of that representation.

A large proportion of minor injury determinations do not lead to the request for an internal review, particularly for unrepresented claimants. A large proportion of unfavourable minor injury outcomes at internal review (i.e. when the insurer upholds their original decision) do not lead to disputes, particularly for unrepresented claimants. There are different explanations as to why a claimant may not pursue an internal review or a dispute, including:

- The insurer's explanation is accepted
- The matter is not of sufficient value for the claimant to pursue
- The claimant is unsure of the internal review/dispute process and/or unwilling to pursue the matter.

The last point raises the possibility that some claimants may be abandoning elements of their claim. There is also the possibility that this may happen, in part, due to a lack of legal support. It seems reasonable to conclude that if some unrepresented claimants had instead been represented, some of them would have achieved greater success in the overturn of the insurer minor injury determination.

In order to improve transparency and ease of analysis, we suggest that SIRA analyse the rates of seeking internal review and dispute relative to the number of claims that are entitled to seek an internal review or dispute (and not relative to total claim numbers, as it currently does). Some claims are fully accepted by insurers and therefore these claimants do not need to challenge the insurer decisions. These matters should be monitored separately, but not included in the analysis of rates of internal review or dispute. By separately analysing those claimants that have had unfavourable decisions against them (and so are entitled to an internal review or dispute) SIRA can ascertain the degree to which these claimants either abandon their claim or pursue the claim further into the process. We also recommend that SIRA further examine this through their claimant surveys and case file reviews.

Table 5.10 – Minor injury overturn – relative level of improved outcome for claimant

Initial assessment	Represented relative to unrepresented
Without allowing for timing of legal support	5.7 times
Allowing for the timing of legal support	3.1 times
Allowing for timing and claim characteristics (to the extent possible)	1.7 times

With reference to the commentary in Section 5.2 (p 24), Table 5.10 shows the relative likelihood that represented claimants will have an overturn of their minor injury determination compared to unrepresented claimants.

Based on their current status (i.e. considering claimants that are now currently represented), these claimants are around 5.7 times more likely to have seen an overturn in their initial minor injury determination. Constraining the analysis such that the legal representation is required prior to the change in minor injury status, this differential reduces to 3.1 times.

Further statistical modelling attempts to unwind implicit claim biases and account for the fact that the characteristics of represented and unrepresented claims are different. After attempting to allow for this, the differential reduces further – to 1.7 times.

As indicated earlier, we are not able to fully allow for all claim characteristics, some of which are not present in the data. For example, the inherently more straightforward matters are less likely to require legal support. This may mean that those claimants that seek legal support may have:

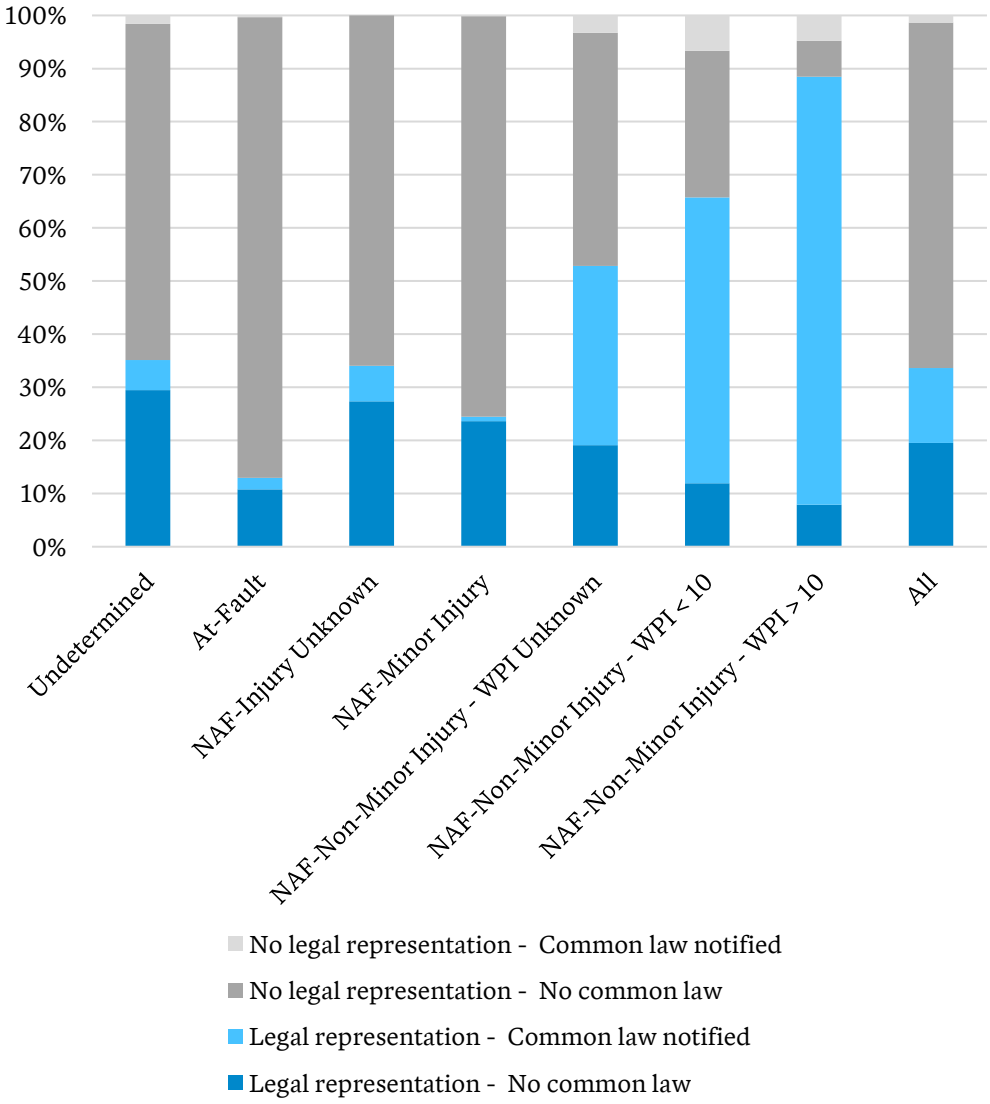
- Technically more challenging matters
- Less obviously meritorious matters (meaning that it isn't immediately clear, without legal support, that an overturn is appropriate)

Nevertheless, based on our analysis, Table 5.10 indicates that the presence of legal support does improve the prospects for claimants to achieve an overturn of the insurer's decision.

5.6 Applications for awards of damage

Figure 5.10 shows the proportion of legal representation and common-law notification by claim type for the 2018 accident year. Claimants from this accident period have all passed the 20-month waiting period for the application of damages claims for not at-fault claimants with non-minor injuries (WPI < 10%). That is, sufficient time has elapsed for common law claims to have been lodged.

Figure 5.10 – Proportion of legal representation and common-law notification by claim type, for claims from accident year 2018



Around two thirds of not at-fault non-minor injuries (WPI <10%) are represented and the majority of these matters have lodged applications for awards of damage. Conversely, only a small proportion of the non-represented claimants in this cohort have made such applications.

Similarly, 90% of the >10% WPI non-minor injury not at-fault claimants are represented, with most having made applications for damages. Only half of the unrepresented claimants in this cohort have made such applications, and these claimants are not subject to the 20-month waiting period.

All other things being equal, a represented claimants is 3 times more likely to lodge an award of damages claim than an unrepresented claimant.

This raises the following questions:

- Why have so few unrepresented claimants made claims for award of damages?
- Have these claimants decided not to pursue damages claims, fully aware of their right to do so?
- Or are these claimants unaware of their rights under the scheme?

Regulatory response

Having been made aware of this material difference in behaviour, SIRA undertook a targeted file review in December 2020 of 101 claims where the injured person was potentially entitled under the Act to make an award of damages claim, but no claim had been made. Amongst other things, this review determined that:

- 62% of these claimants were not advised of their potential entitlement,
- Most communication from the insurer had happened at claim finalisation or at the decision regarding liability beyond 26 weeks, and
- 80% of claimants had returned to work or activities, perhaps indicating that any ongoing impairment was not significant and therefore that any damages claim would be limited.

Notwithstanding, SIRA did request improvement plans from all insurers (other than the very recently licensed Youi) to improve their communications to claimants.

At the same time as this targeted file review, SIRA required insurers to submit information on any potentially eligible claims from the 2018 accident year where a damages claim had not been made. Insurers were required to advise if the injured person had been informed of their entitlement, and if not, why. From the insurer responses it was determined by SIRA that:

- 57% of these injured people had not been advised of their potential entitlements,
- Most of those (around 75%) were unrepresented,
- 37% of claims had been finalised without the person being advised on their entitlement,
- 19% of injured people were working prior to the accident and had not yet returned to work so would likely have some quantum of past economic loss that they would be entitled to claim, and
- 64% of these claimants had a low to moderate injury severity, indicating that those with a 'higher' injury severity had already made their claim for damages (the lower injury severity claims being more likely to recover and return to work, perhaps lessening their desire to seek compensation).

It is noteworthy that CTP Assist now have a systematic outbound contact program for each claimant who has a post-26 week entitlement. This now includes represented claimants. The program includes outbound milestone calls at 75 weeks, 20 months, 2 and 3 years. A specific aim of this program is to gauge claimant awareness at each point, and measure progress of damages claims. CTP Assist provides information about damages claims to increase claimant awareness where it is lacking.

In further follow-up with the insurers, SIRA sent all insurers a sample of 1,750 claims lodged between 1 December 2017 and 1 December 2018 that were considered may be eligible for damages. Insurers were asked to indicate whether they had discussed potential entitlements with these claimants. The sample was chosen based on claims where the claimant was not at fault and their injuries were not minor.

SIRA's insurer supervision team worked with the insurers to remove any non-applicable claims and identified a total of 719 claims where SIRA considered that the claimant should have been advised about a potential entitlement to damages. Some of the reasons the insurers provided for not contacting claimants included:

- The claimant was considered not eligible to claim economic loss and non-economic loss
- The claimant injury had recovered
- The claim was inactive and had been closed.

The insurers advised SIRA in February 2021 that they had all commenced contacting any claimants identified who should have been advised and had also commenced various remediation actions to ensure claimants are contacted in the future.

SIRA has prepared regulatory notices that put each insurer on notice that SIRA considers them to have failed to comply with their duty to act with good faith per section 6.3(3)(a) of the Act. SIRA also considers the insurer conduct to be inconsistent with SIRA's Customer Service Conduct Principles, particularly Principle 3 – resolve customer concerns quickly, respect customers' time and be proactive. The SIRA letters to insurers request a remediation plan, including:

- Confirmation of actions taken to remediate claims both included in the sample and those that were not included in this activity.
- How the insurers tailor their communication style to suit the needs of each claimant.
- How they ensure permanent impairment is proactively assessed so that accurate timeframes surrounding lodgement are communicated to claimants.
- Processes for advising claimants who are eligible to lodge a claim for damages but are not eligible for economic loss and non-economic loss.
- Any further changes to procedures and training regarding communication of entitlement to damages.

SIRA has also referred the matter to the Enforcement & Prosecutions team to investigate regulatory enforcement action in relation to the above breaches.

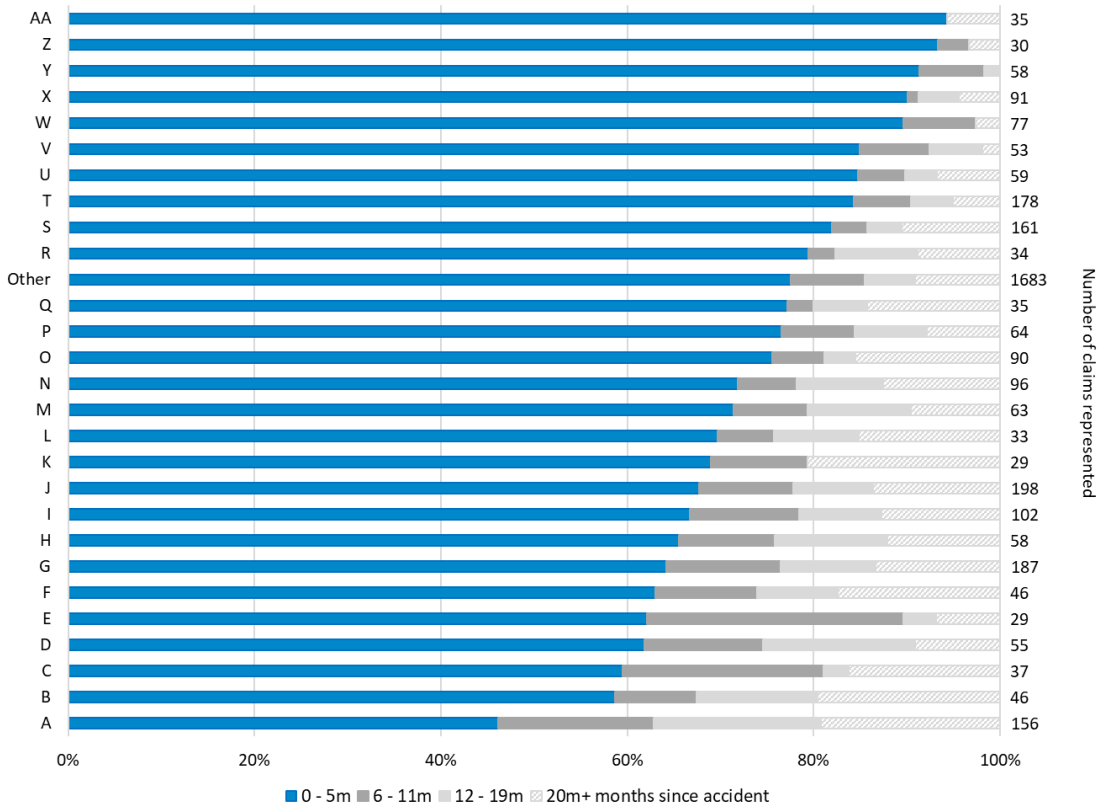
5.7 Difference between law firms

Based on analysis of the 2018 accident year claimants as at mid-December 2020, a total of 3,783 of these claimants were legally represented (or around 30% of all claimants from that accident year cohort).

We have grouped those represented claimants according to the law firm which is providing that legal representation and show the top 27 of those firms (sorted by the number of claimants that they are representing from that accident year). The 'smallest' of these firms was representing 29 claimants. All other law firms (those representing less than 29 claimants) were grouped together (being 1,683 claimants or 45% of the total).

In Figure 5.11 the top 27 law firms (and the remaining 1,683 claimants) are arranged according to the average delay between accident date and commencement of the legal representation.

Figure 5.11 – Delay to legal representation by law firm



As Figure 5.11 indicates, some law firms are being engaged much later in the process than others. For instance, law firm 'A' engaged 54% of their 156 clients after 6 months from accident, compared to law firm 'X' which engaged 10% of their 91 claimants after this point. This is consistent with feedback received in the claimant interviews and anecdotally which indicated that some law firms were turning claimants away and suggesting that they come back only when they have an entitlement to make a claim for damages.

Unsurprisingly, as Figure 5.12 reveals, the law firms that on average engage their claimants at a later time, typically have a higher proportion of non-minor not at-fault claims (those entitled to make claims for awards of damage) and a lower proportion of minor injuries or at-fault claims.

Figure 5.12 – Composition of claimants by law firm

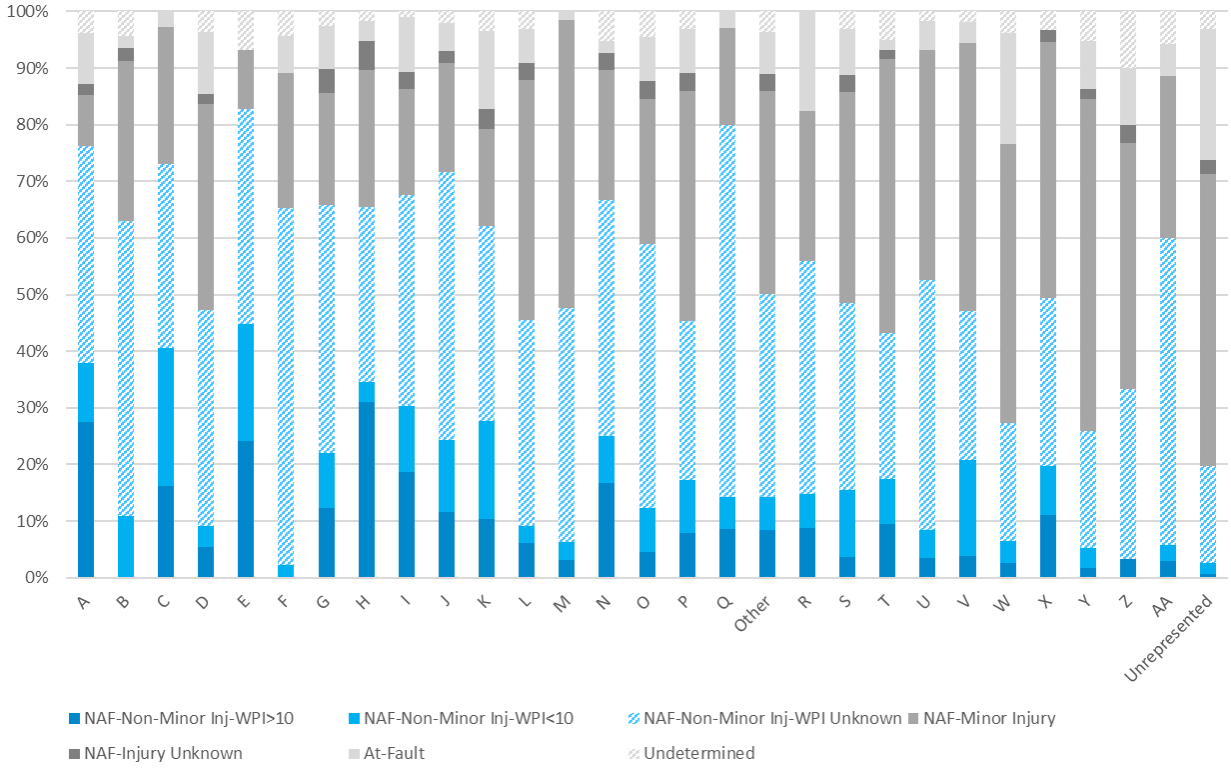


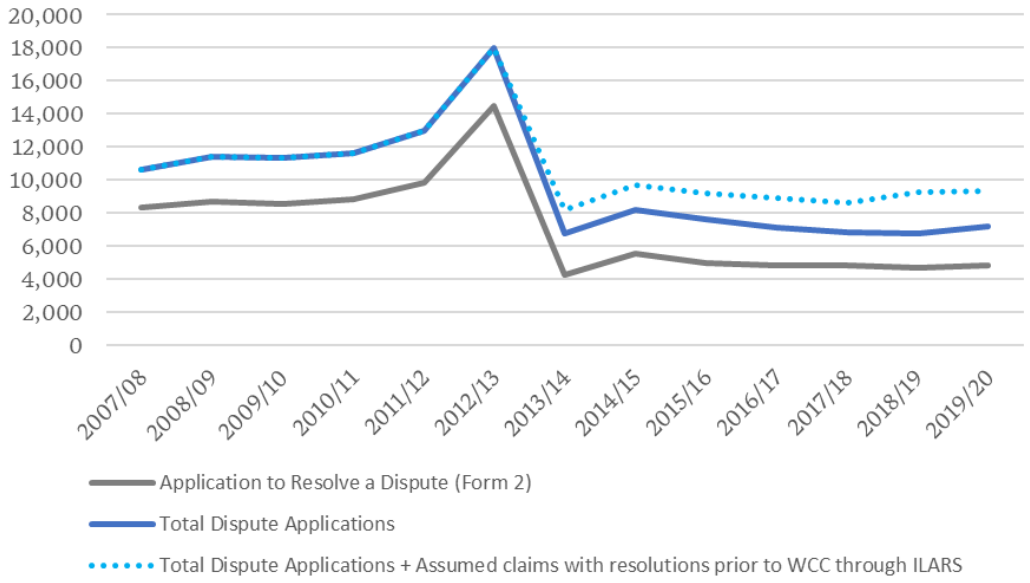
Figure 5.11 and Figure 5.12 show the range of different strategies adopted within the legal profession, likely reflecting the level of fees available for legal support in the scheme at the various parts of the process.

5.8 ILARS experience in Workers Compensation

Reforms to the NSW workers compensation system in 2012 significantly reduced the number of claims and disputes in the system. Following the reforms, the number of claims reduced by around 28%[9]. Data from the scheme actuary indicates that the number of claims for which there are insurer legal costs also reduced by around 28%.

Data from the Workers Compensation Commission (WCC) annual review shows that the level of disputation in the scheme is also considerably lower than it was prior to reform. Figure 5.13 shows dispute application numbers in total, and separately for Form 2 applications (Application to Resolve a Dispute). Applications to resolve a dispute are reduced by around 44% and total dispute applications reduced by around 37%.

Figure 5.13 – Workers Compensation Commission Dispute application numbers



It is also relevant to consider matters that are funded through the Independent Legal Assistance and Review Service (ILARS) but resolved *prior* to the WCC. ILARS provides access to free, independent legal advice for injured workers in circumstances where there is a disagreement with insurers regarding entitlements. ILARS is managed by the Independent Review Office (IRO)[10]. Table 5.11 shows the number of ILARS outcomes over the past three years and Table 5.12 shows the amount of legal fees paid through ILARS for those matters.

Around 40% of ILARS matters never proceed to a claim, representing around 22% of the legal fees paid through ILARS. For those matters where a claim is progressed, resolution prior to WCC proceedings occurs for about half of those matters (32% of all ILARS matters and 26% of all ILARS legal fee payments) typically either through a complying agreement after the claim is made, or because the insurer accepts the claim, and the issue is resolved. In any event, for these claims a dispute application to the WCC is potentially avoided through this process with the help of legal support provided through ILARS.

Resolution after commencement of WCC proceedings occurs for around 28% of ILARS matters and accounts for 52% of overall ILARS costs.

[9] Claims reported, excluding TMF (SIRA NSW workers compensation system inaugural performance report 2014/15)

[10] Previously the Workers Compensation Independent Review Office (WIRO). WIRO transitioned to IRO as a result of legislative changes under the *Personal Injury Commission Act 2020*, effective 1 March 2021.

Table 5.11 – ILARS Outcomes - by number of matters

ILARS outcome	2018/19	2019/20	2020/21[1]	Average
No claim progressed	4,185 (34%)	5,146 (41%)	4,788 (45%)	40%
Claim resolved before proceedings	4,518 (37%)	3,803 (31%)	3,178 (30%)	32%
Claim resolved after proceedings commenced	3,570 (29%)	3,492 (28%)	2,712 (25%)	28%
Total	**12,273 (100%)**	12,441 (100%)	10,678 (100%)	100%

1. From 1 July 2020 to 31 March 2021

Table 5.12 – ILARS Outcomes - by total ILARS legal fee amounts paid

ILARS outcome	2018/19	2019/20	2020/21[1]	Average
No claim progressed	$12.7M (21%)	$14.0M (23%)	$11.4M (23%)	22%
Claim resolved before proceedings	$16.3M (28%)	$16.0M (26%)	$11.7M (24%)	26%
Claim resolved after proceedings commenced	$30.0M (51%)	$32.0M (52%)	$26.3M (53%)	52%
Total	$59.0M (100%)	$62.0M (100%)	$49.4M (100%)	100%

1. From 1 July 2020 to 31 March 2021

Arguably, the claims dealt with through ILARS that have disputes resolved prior to WCC proceedings should be considered as disputes potentially avoided. Hence, Figure 5.13 attempts to also include matters funded through ILARS but resolved *prior* to the WCC. That said, it is impossible to know to what degree matters resolved prior to the WCC, with the support of legal representation through ILARS, would have otherwise proceeded to dispute at the WCC. Comparisons are further confounded because WCC statistics measure the number of claimants whereas ILARS statistics measure the number of disputed matters, and we are advised that there are often several disputed matters per claim. We have attempted to notionally allow for this by adjusting the ILARS resolutions on the basis of an assumed average 1.8 ILARS matters per claim with an ILARS matter (assumes 50% of such claims have 1 ILARS matter, 30% have 2 matters, and the remaining 20% have an average of 3.5 matters per claim). On this (untested[11]) basis, 'disputation' in the post reform scheme is around 21% lower than pre-reform levels (not 37%-44% lower, as indicated only by

[11] We recommend that SIRA considers undertaking a more thorough analysis. Analysis of trends in NSW workers compensation data over time is made more difficult due to the various ways in which activity is measure in different parts of the system (e.g. disputed matters vs claimants with a dispute). Overcoming these data differences was outside the limited scope of this review, but a more complete analysis would be informative and is recommended.

applications to the WCC). The 21% reduction in disputes is less than the observed 28% reduction in claim numbers overall.

Figure 5.14 shows the NSW scheme workers compensation legal costs by payment year (amounts have been adjusted for inflation based on increases in the NSW wage price index). Insurer legal costs exclude common law legal costs to allow like with like comparison to the claimant legal costs (where the common law component is contracted out). Claimant legal costs were replaced by ILARS following the 2012 scheme reforms. The total legal cost is also shown as a percentage of total scheme costs for each payment year.

Adjusted for inflation, total legal spend (excluding common law legal) reduced by around 25% following scheme reform but has been increasing in recent years (to around $130m in 2019/20). Claimant legal spend (including WIRO/ILARS costs) initially reduced by around 35% but is now around 23% lower than pre-reform levels. The initial 35% reduction was broadly in line with the initial expectations of the scheme actuary at that time, for the reduction in legal costs expected as a result of the removal of Section 66 benefits on claims with a Whole Person Impairment level of less than or equal to 10%, and the removal of Section 67 benefits[12].

As a proportion of total payments legal spend (excluding common law legal) has been generally decreasing (from around 4.5% of scheme payments pre-2012 to around 3.5% of scheme payments in 2019/20).

Note, Figure 5.14 includes the operational costs of the Workers Compensation Independent Review Office (WIRO) but does not include other regulatory and administrative costs (i.e. does not include the costs of running the Workers Compensation Commission or Merit Review).

Figure 5.14 – NSW workers compensation legal costs as a percentage of total scheme costs

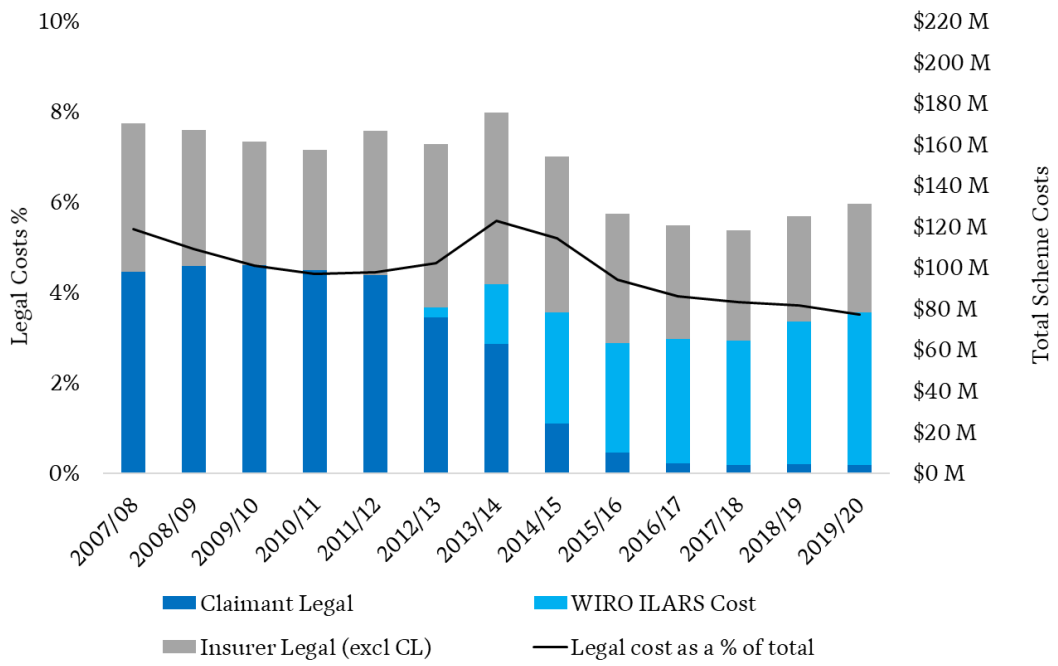
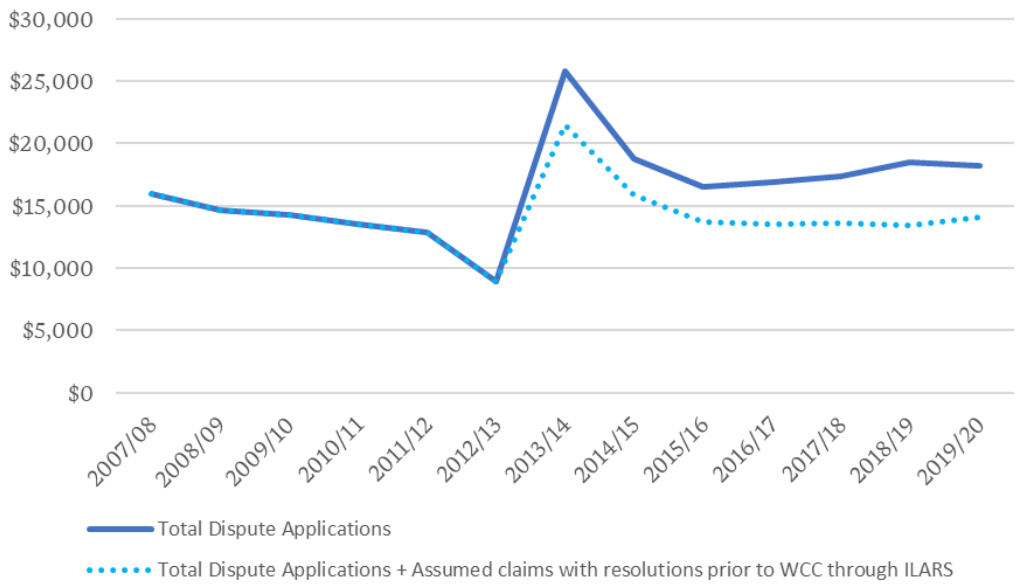


Figure 5.15 shows the average cost per 'dispute' – taking inflation adjusted legal costs from Figure 5.14 and dividing by the total number of dispute applications to the WCC from Figure 5.13 (and by the number of 'disputes' including claims resolved prior to the WCC using ILARS). The timing of dispute applications

[12] Comparison of PricewaterhouseCoopers Nominal Insurer valuations as at 30 June 2012, pre and post allowance for 2012 benefit reforms but including allowance for claimant legal costs (i.e. prior to introduction of WIRO and ILARS).

does not necessarily align with the timing of legal cost payments, so this analysis should be treated as approximate, and indicative only.

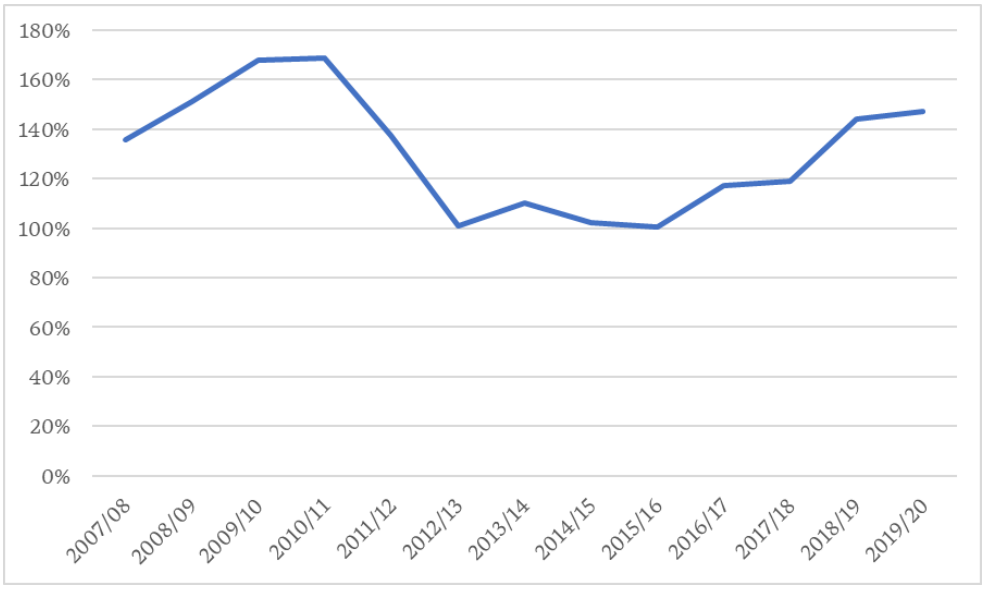
Figure 5.15 – Legal costs (inflation adjusted, excluding insurer common law) – average per 'dispute'



Considering only dispute applications to the WCC, the average cost per dispute (excluding insurer common law legal) has increased by around 27% following scheme reform in 2012. If claims resolved prior to the WCC are also included in the count of 'disputes', the average post-reform cost per 'dispute' is similar to pre-reform levels (assumes 1.8 ILARS matter per disputed claim). As noted previously, this analysis does not include regulatory and administrative costs (i.e. does not include the costs of running the Workers Compensation Commission or Merit Review).

Figure 5.16 shows the legal spend that relates to claimants (that is, the claimants legal spend plus the WIRO and ILARS expense) as a percentage of the legal spend from insurers (excluding common law legal). A relativity of 100% indicates parity between claimant and insurer legal spend. Excluding common law legal, claimant legal spend was approximately 150% of insurer legal spend prior to the scheme reforms in 2012 and reduced to around 105% of insurer legal spend immediately following the reforms. In 2018/19 and 2019/20 claimant legal spend was back to around 150% of insurer legal spend.

Figure 5.16 – Claimant legal spend (including ILARS) as a percentage of insurer legal spend (excl. Common Law legal)



Fees for legal support to claimants (through LARS) are set by IRO and are typically higher than the regulated fees (Schedule 6) that insurers are subject to with respect to legal support services.

This analysis is somewhat rudimentary, and any analysis of percentages or relative payments can mask movements in absolute dollars. Nevertheless, this analysis indicates that:

- Legal costs were expected to reduce by around 35% post the 2012 reforms, as a result of the removal of Section 66 benefits on claims with a Whole Person Impairment level of less than or equal to 10%, and the removal of Section 67 benefits (pre WIRO/ILAR, so other claimant legal costs included)
- Total scheme legal expense (in dollars adjusted for inflation) reduced by around 25%, with claimant legal expense (including WIRO and ILARS costs) initially reducing by around 35%, but now only reduced by around 23%
- Overall claim numbers reduced by around 28% and disputes reduced by around 21% (assuming an average of 1.8 ILARS matters per claim)
- Claimant legal spend (including WIRO and ILARS costs) is now a similar proportion of insurer legal spend as it was prior to the 2012 reforms (claimant legal spend being around 1.5 times insurer legal spend)
- Scheme reforms which significantly reduced overall scheme payments also reduced legal expenses, such that legal expenses expressed as a percentage of total scheme costs is marginally lower.

Noting the limitations of this rudimentary analysis, overall these indicators suggest that the level of legal expense post reform (which includes ILARS) was broadly in line with what it was expected to be (prior to the introduction of ILARS). In other words, the introduction of ILARS did not appear to immediately impact legal costs (and excluding common law, claimant legal costs were broadly reduced to a level similar to insurer legal costs). However, over time the initial reductions in claimant legal costs have been eroded and they have returned to a level that is now around 50% greater than insurer legal costs – similar to the pre-reform relativity. Note, this analysis **does not** consider any possible impact of ILARS on workers compensation claim cost outcomes – it only considers the quantum spent on legal services. It should also be noted that the legislative dispute procedures in the workers compensation system are different to those in the CTP system, so analysis of past trends in the workers compensation data are not necessarily relevant to the CTP scheme.

5.9 Legal Advisory Service (LAS)

Based on data to 30 November 2020 there were:

- A total of 72 LAS referrals to date, averaging about 2 referrals per month since inception (3 per month over previous 18 months).
- 68 referrals which related to the calculation of pre-injury average weekly earnings (PIAWE) – representing 94% of all referrals. Most (although not all) of these matters were related to self-employed/sole trader arrangements where PIAWE calculations are more complicated.
- A total of 54 matters where legal advisory services had been provided, resulting in $45k of costs to date (at an average of approximately $850 per advice).

Note, SIRA lists twenty types of matter that may be referred to LAS.

5.10 Summary of findings and potential implications

In summary, the previous sections of analysis indicate that:

- Legal spend in the new scheme is materially lower than expected, at least for statutory benefit claims
- Related to this, the number of disputes in the scheme is lower than expected, partly due to:
  - Fewer than expected claims
  - A lower-than-expected level of legal representation
  - A lower-than-expected level of disputation (partly as a result of insurer internal reviews)
- Claimants that seek representation are more likely than unrepresented claimants to challenge their unfavourable decision, and as a result are more likely to achieve an overturn of those decisions in their favour
- Claims for awards of damages are significantly less likely from unrepresented claimants than from those that are legally represented
- There is evidence that claimants entitled to make award of damages claims do not do so because they are unaware of, or do not understand, their entitlements
- Solicitors are being more selective about who they take on as clients and when they take them on. There is evidence that at least some law firms are not engaging with new claims but waiting instead until the claims are well progressed in the system and in dispute or able to lodge an award of damages claim.

Not all claimants are utilising the scheme to the full extent of their eligibility to do so and are not pursuing their entitlement to claim. This may be because:

- These claimants are fully aware of their entitlements and make an informed decision to utilise the scheme to a lesser degree, or
- These claimants are not fully aware, or do not completely understand their entitlements, or the friction of exercising their eligibility to claim in the scheme is too high.

It is impossible from an analysis of the data alone to draw a distinction between these quite different possibilities. We recommend that SIRA further enhances its understanding of the scheme through a more comprehensive survey of claimants in conjunction with its existing audit of insurer communications to claimants. It is important to understand both what was communicated to claimants and when, and what claimants actually understood.

Nevertheless, there is some evidence to suggest that there is currently a deficiency in the understanding that some claimants have of the scheme and of their entitlements, and that some claimants find the scheme difficult to navigate.

This has relevance to this report because legal supports within the scheme are a means, but not the only means, by which claimants can gain (or improve) an understanding of their entitlements, and by which the claims process can be made easier for them (i.e. the friction for claimants can be reduced). The lower-than-expected level of legal support operating in the scheme to date is likely to be partly responsible for the observed lower than expected utilisation of scheme entitlements by some claimants.

If claimants are fully aware of their entitlements and are making informed decisions about the degree to which they utilise the scheme, then SIRA might determine that no action is required. A lower-than-expected level of legal spend would ultimately be reflected in lower premiums, to the benefit of all policyholders. Indeed, the 2017 Act makes provision for minimising any excess insurer profits (or losses) if they arise, through a legislative mechanism called TEPL (*Transitional Excess Profits and transitional excess Losses*). The most recent assessment of industry profitability for the first two accident years of the 2017 scheme by the scheme actuary indicates that there has been excess profitability, and SIRA is currently in the process of recovering a portion of this excess profitability which will be returned to policyholders

through reduced levies. A contributing factor to this excess profitability will be the lower-than-expected level of legal representation and legal spend observed in the 2017 scheme.

However, if a lower-than-expected level of legal support has resulted in an unacceptable deficiency in claimants' understanding of the scheme, or a scheme friction that is too high, then SIRA might consider either:

- Increasing funding for lawyers to do the work of education and "friction reduction" – the possibilities for how this could be done range from a modified ILARS to a revised regulated schedule of fees to increase legal utilisation (discussed in the following section of this report), or
- Increasing funding to an alternate service to raise awareness, educate claimants, and assist them in the claims process (commencing at claim lodgement). For example, an expanded and improved version of CTP Assist (see options).

Notwithstanding, we recommend that SIRA continues (and enhances) its audit of insurer processes and claimant communications – to ensure that all claimants are informed of their rights to an internal review, a dispute, or damages claim. Such an audit can ensure that insurers are meeting their legislative obligations satisfactorily. However, this should be supplemented with 'user testing' through claimant surveys, to determine what is actually understood by claimants in the scheme.

6

Options

6 Options

Inside this section

We describe various options that SIRA may wish to consider in relation to legal supports, and the relative merits of these options.

6.1 Options

In this section, we outline various options to address the issues and findings from this review:

- Option 1 – No change to existing arrangements
- Option 2A – Review the triggers for entitlement to legal services
- Option 2B – Set legal fees to more closely map to the work involved
- Option 2C – Simplify some common specific issues disputes
- Option 2D – Increase resourcing for and role of CTP Assist
- Option 2E – Discontinue the LAS.
- Option 3A – Introduce a modified ILARS to CTP
- Option 3B – Defer consideration of ILARS

Regardless of the option, we recommend that SIRA also improve the analysis and reporting of information related to legal supports in the scheme. For both internal reviews and dispute resolution decisions there is an opportunity to improve the feedback to insurers to improve their processes and facilitate training, and to generally provide more targeted performance metrics visible to all stakeholders in the scheme, including legal professionals.

6.2 Criteria for assessing and comparing options

In light of our findings in Section 5.10 and their potential implications, we have assessed these options against the following criteria:

- **Claimant awareness / knowledge increased** – Is the claimant's awareness of the scheme or knowledge of how to dispute a decision within the scheme increased as a result of the option?
- **Claimant friction reduced** – Are frictions associated with claiming, appealing an insurer decision or lodging a dispute decreased?
- **Claimant uncertainty reduced** – Is the level of uncertainty felt by the claimant as they navigate the scheme reduced?

We consider three additional criteria:

- **Consistency with original scheme design** – does the option represent a change from the original intent of 2017 scheme
- **Risk to the sustainability of the scheme** – that is, through the risk of premium increases
- **Risk to claimant wellbeing** – noting that it is generally preferable for claimant wellbeing that they spend less time in the compensation scheme than more.

Our assessment is subjective and high-level, but nevertheless represents our considered view of the relative merits of each option. Any consideration of these changes should be performed taking into account:

- Any relevant recommendations arising from SIRA's statutory review of the Act which is currently underway.

- The impact of the commencement of the PIC. This will likely change the basis of dispute resolution and require a reassessment of the assumptions about the number and timeliness of disputes. In addition, the nature of that forum should be a consideration in setting the legal fees for disputes.

6.3 Option 1 – No change to existing arrangements

6.3.1 Description of this option

This option would involve making no changes to the scheme and incorporating the findings of this review into the Ministerial scheme review currently underway. Any changes to legal support could then be made as part of a broader raft of changes.

6.3.2 Discussion of this option

This review has highlighted that the experience of the scheme on the following factors has been considerably different to the underlying actuarial assumptions:

- Legal utilisation/engagement
- The number of disputes
- The level of legal spend

However, the Scheme has only been in place for just over three years, so it is early in its development:

- The earliest accident year (AY 2018) is now starting to show material increases in activity related to award of damages claims, and as a result an increasing level of legal spend is noticeable.
- The scheme actuary assessment is that it is currently too early to tell if the legal spend on this accident year for award of damages claims will be more or less than allowed for in the scheme costing but concedes that legal spend on statutory benefit claims will be less than expected.

In addition, as mentioned above:

- SIRA has engaged an independent provider to conduct a statutory review of the Act. This review is to consider all aspects of the scheme, which means:
  - It will likely also consider legal services
  - There may other changes recommended as part of that review that could impact on this area (for example, simplifying the dispute structure).
- The PIC commenced in March 2021 and while this review has had regard to the intended practices at the PIC, the experience at the PIC may raise additional issues that need further consideration.

6.3.3 Assessment of this option

Table 6.1 provides a summary of the impact of option 1 on the criteria provided in Section 6.2.

Table 6.1 – Summary of impact of option 1 on criteria

Impact on claimant criteria	Claimant awareness / knowledge increased	No improvement
	Claimant friction reduced	No improvement
	Claimant uncertainty reduced	No improvement
Broader scheme impact	Consistency with original scheme design	No change
	Risks to scheme sustainability	No change
	Risks to claimant wellbeing	No change

6.4 Option 2A – Review the triggers for entitlement to legal services

6.4.1 Description of this option

This option would involve setting triggers for legal costs to become available to claimants at certain key events, for example:

- At lodgement
- Following a decision triggering the right to an internal review
- Following an adverse internal review decision
- Due to delay in the internal review process (e.g. if insurers do not meet legislative timeframes)
- As currently, when a dispute is lodged (formerly with the DRS and now at the PIC)

6.4.2 Rationale for this option

The current system established by the 2017 Act and Legal Costs regulation 'back-ends' entitlement to paid legal costs to the point where a dispute has reached dispute at DRS.

Prior to the 2017 legislation, solicitors acted as gatekeepers to the scheme providing people injured in motor vehicle accidents with information on their claim and their prospects of success. As noted in the discussion on ILARS, without any entitlement to fees at this point in time many solicitors are now simply unable or unwilling to undertake this role.

CTP Assist partially fills this role by providing advice on claims process and by putting potential claimants into contact with the relevant insurer. However, CTP Assist cannot provide legal advice.

Our interviews with claimants demonstrate how stressful it is for some people in pursuing a claim even with the assistance of a solicitor, acting without a fee. We have a concern that some injured people in the absence of being able to obtain legal advice simply do not pursue a claim.

We suggest that SIRA commission an analysis of the propensity to claim. That is, compare the available information on the number of people injured in motor vehicle accidents with the number of claims received.

There will be many reasons why a person may not pursue a claim and the difference cannot simply be attributed to the lack of availability of legal advice. Some further research could be undertaken on this point.

In addition, there are other mature schemes that can provide a comparator of what the rate of claim is like when there is good information available and access to legal advice prior to making a claim. For this purpose, a direct comparison to the Victorian Transport Accident Commission (TAC) scheme would be useful.

The arguments for and against introducing a legal fee to assist with preliminary advice and lodgement of a claim are set out in the discussion on ILARS. As noted, if a preliminary advice and claim lodgement fee is not introduced then we suggest that a significant increase in the role of CTP Assist should be considered to ensure that all people injured in a motor vehicle accident who have sustained a loss as a result of that accident are aware of their rights to make a claim and able to navigate the process.

When a dispute crystalises

Under the current system the conduct of the claim is largely in the hands of the insurer. The Act, Regulations and Guidelines issued under the Act give direction to the insurers for claims handling.

For example, the guidelines specifically require the insurer to proactively support the claimant to optimise their recovery and return to work, to make decisions justly and expeditiously, to act with honesty and professionalism, to communicate with the claimant and keep them informed of the progress of their claim.

Notwithstanding the analysis in this report and by the scheme actuary which shows that represented claimants are more likely to dispute unfavourable decisions, the actual genesis of disputes in the system (and a key driver of the level of disputation overall) are the decisions made by the insurer against the claimant, the manner in which the insurer manages the claim, and specifically the relationship and communication with the claimant.

There are some key areas of concern. Around 25% of claims receive an internal review and many more than one. The number of claims on which there may be a trigger for an internal review is likely much higher than this. The overall success rate at internal review is around 30% (and closer to 50% for some matters) suggesting that there is room for improvement in the initial determinations made by the insurers. Claimants that are unsuccessful at internal review who continue to dispute have an overall success rate of 40% at DRS (and many succeed after internal review without going to DRS, mostly with the support of legal representation). This suggests that there is room for improvement in the processes of insurer internal review itself.

We understand that often, earlier insurer decisions are later overturned in favour of the claimant due to additional information which is presented. While this is certainly understandable, it does suggest to us that insurers may be making adverse decisions against claimants, perhaps as a default, in the absence of all relevant and necessary information. If the legislative timing requirements for making key decisions is placing pressure on insurers to do this prematurely, then SIRA may wish to consider reviewing these requirements. At a minimum, we recommend that this issue is considered as part of the independent review of the scheme in 2021.

The whole concept of the internal review of decisions comes directly from administrative law in relation to specific decisions and from other regulated areas such as financial services in relation to complaints. Its application in compensation claims is relatively new, and prior to the 2017 Act had been limited to matters involving statutory monopoly insurers. There are therefore limited comparators.

However, given the responsibility on CTP insurers to assist claimants through the process, the resultant level of challenge and disputation (and the ultimate success rate of those challenges) in our view seems to be too high.

Furthermore, clear communication with claimants is vital to ensure that they are aware of their correct entitlements and have access to them if they wish to exercise them. Recent investigations into insurer practices with respect to the very low level of application for award of damages claims from claimants with that entitlement indicate that there is significant room for improvement in insurer practices in this area.

If there is no entitlement to legal fees at a preliminary stage, then this is the first point at which the basis of a dispute crystalises.

In our view the two options to address this are:

- To introduce an entitlement to legal costs at the point where the insurer makes a decision that triggers a right to internal review, or
- To allow internal review to continue to run but significantly increase SIRA compliance on insurers' claims handling to reduce the far too high level of disputation. In this case we also suggest that SIRA introduce specific claims handling guidelines for internal review that reflect well established best practice in this area.

If the second option is favoured, then the next point at which a dispute crystalises will be when the insurer upholds the decision on internal review or fails to make the decision within the statutory time frame. In our view this is the latest point at which an entitlement to paid legal representation should first arise. At this point there is an entitlement to go to dispute at DRS and it is our view it is beneficial to have a solicitor involved at this time with a view to settling and or finalising the dispute prior to lodging at DRS. Holding off the entitlement to legal costs until the matter is lodged at DRS runs the risk of burdening DRS with matters that will otherwise settle.

It is also our view that with the creation of the PIC, most claimants will benefit from having a solicitor involved. Given the PIC's expressed interest in having all matters in dispute on a claim dealt with together,

legal representation at this point in time will also assist the process move more quickly, as solicitors will be aware of the PIC processes and able to best help a claimant navigate those systems.

Introducing one of these triggers to a claimant would raise awareness

Reintroducing an upfront fee such as by ILARS would in effect reintroduce solicitors as a significant gatekeeper to the scheme and would raise the awareness of people injured in motor vehicle accidents as to their entitlement to claim and likelihood of the outcome of the claim.

It would specifically overcome the problem that an injured person may not pursue a claim because of the perceived difficulty, either administrative or emotional, of dealing with an insurance company.

If an upfront fee is not introduced, then our recommendations in relation to increasing the role of CTP Assist and/or developing other claimant supports (such as an app, or other digital innovation through which claimants could be kept informed) are even more crucial in ensuring injured people are aware of their rights.

If there is no upfront fee and a claim is lodged the further involvement of a lawyer will depend upon actions taken by the insurer. The analysis in section 4 indicates that on average, 1 out of every 4 matters receiving an internal review is overturned in favour of the claimant (and on some issues, such as the amount of weekly payments, the overturn rate is closer to 1 in 2). For those matters that proceed to dispute at DRS, the overturn rate in favour of the claimant is around 2 out of every 5 (and on some issues, such as fault, is closer to 2 out of every 3). This indicates that insurers are, to a large degree, making early decisions against the claimant that are subsequently overturned, and that represented claimants are more likely to get initial unfavourable decisions overturned. Furthermore, there is evidence to suggest that claimants have not been adequately informed of all of their rights (e.g. to awards of damage) by insurers.

If the insurer denies an element of a claim, then having an entitlement to legal fees at that point will ensure that any decision by a claimant to not proceed has at least been made with the opportunity to get independent advice on the matter. The awareness of the entitlement of a claimant is a critical aspect to ensuring a fairer claims system.

There are arguments for and against whether an entitlement to paid fees for legal representation should arise at the point a part of a claim is rejected or only after internal review. The later the point at which this is initiated then the greater the responsibility that SIRA must take to ensure that insurers are providing the correct level of assistance to allow claimants to understand their entitlement.

The ability to engage a lawyer to help should reduce friction

As we have discussed, the current system is predicated upon an injured person being helped through the system. However, our evidence suggests that, notwithstanding the strong requirements for insurers to assist claimants, there remain large gaps in claimant awareness, and early insurer decisions appear to be made to the detriment of the claimant, only to be overturned if the claimant is willing to dispute. In the absence of paid legal fees, the cost of that is disproportionately met by claimants by way of abandoning an element of their claim because the claimant "friction" is too high. Paid legal representation ensures greater equality in determining the correct entitlement for an injured person as well as reducing friction for the claim.

6.4.3 Assessment of this option

Table 6.2 provides a summary of the impact of option 2A on the criteria provided in Section 6.2 (p 54).

Table 6.2 – Summary of impact of option 2A on criteria

Impact on claimant criteria	Claimant awareness / knowledge increased	✓✓
	Claimant friction reduced	✓✓✓
	Claimant uncertainty reduced	✓✓
Broader scheme impact	Consistency with original scheme design	Consistent
	Risks to scheme sustainability	Dependent on flow-on effect of representation and level of fees
	Risks to claimant wellbeing	Unknown

6.5 Option 2B – Set legal fees to more closely reflect the work involved

6.5.1 Description of this option

Background

Current regulated legal fees set:

- A maximum recoverable amount for a dispute, plus
- An aggregate limit per dispute type.

We understand that initially, the DRS applied the aggregated limit on a *per claim* basis but subsequently moved to a *per dispute* type limit. In our view, this change better aligns with the wording of the fee regulation and we understand that this is also the view of the PIC.

In our review, we were unable to find a description of how the level of recoverable fees were set. However, we understand from discussions that a primary consideration in determination of the fees was the impact that they would have on premiums.

In addition, there are:

- **ILARS fees**
  - These are set at $800 for preliminary legal advice, including completing a claim form.
  - Higher amounts are set for specific dispute types.
- **LAS funding**
  - LAS funding guidelines using the same rate (i.e. the fee schedules to the LAS agreements, set the rate at two hours at $400 per hour).
- **Contracting out arrangements** where claimants with claims larger than the current threshold of $75,000 can enter into fee arrangements with legal practitioners which are payable by the claimant and not through the scheme.

Setting legal fees to more closely map to the work involved

This option would involve setting legal fees to more closely map to the work involved.

We recommend that his be done by way of a work value assessment which would primarily assess the time required, on average, for different stages in making and proceeding with a claim and disputes that arise under the claim. The final determination of the per hour rate should have regard to current industry levels for legal practitioners but also assess potential variations depending upon the demands of individual clients and have regard to work performed by paralegals as well as associate and partner solicitors.

Another matter that may impact this assessment is the new dispute procedures at the PIC.

We note that the current exceptions to regulated fees including exceptional circumstances will be retained by the PIC and that where regulated fees do not apply, the determination of the amount will be with regard to what is considered to be a reasonable and necessary fee.

We also suggest that SIRA look to including in a revised fee scale incentives for both insurers and lawyers to settlement matters early.

6.5.2 Rationale for this option

In our view, setting legal fees to more closely map to the work involved would provide more flexibility in setting fees to reflect the work undertaken, thereby attracting lawyers to scheme.

We note this needn't increase the amount of legal costs for preliminary work including lodging a claim. For example, the assumed current hourly rate of $400 in use in ILARS can be compared to the Legal Aid Commission rate for civil claims work which is $180 per hour.

Post any fee for preliminary advice, legal fees should follow the event. Depending upon the point of initiation the fee schedule should allow for cumulative fee regime that recognises work done.

Rationale for the Minister setting fees

As per the current arrangements in CTP and as per our discussion of ILARS, legal costs should be set by regulation approved by the Minister, subject to exceptional circumstances and contracting out.

Rationale for using exceptional circumstances precedent as required

The exceptional circumstances test is a well understood concept across courts and tribunals. In our view, the recent decision in Moon (*AAI Ltd t/a GIO v Moon (2019/00332392)*) is a correct application of the test. The plaintiff suffered injury in a motorbike accident. His claim for statutory benefits was denied by the insurer on the grounds that the accident was caused wholly by the claimant's fault, and the DRS Assessor upheld that decision. However, the Assessor found that Mr Moon was entitled to costs *outside the regulated amount prescribed by the Motor Accident Injuries Regulation* due to there being exceptional circumstances within the meaning of s8.10(4)(b) of the Act. The Supreme Court upheld that decision and found that on the proper construction of the Act and Regulations there was power for the Assessor to make that costs determination. On the correct construction of the Act when costs are allowed on exceptional circumstances the Assessor also had power to award costs incurred on a reasonable and necessary basis.

The exceptional circumstances test is built into CTP legislation (see s 8.10(4) of the Act) and does not require any additional specification, other than guidance that may be provided by PIC Rules.

Rationale for review of the contracting out threshold

There was strong support for the logic and benefit of having this type of threshold. However, it has been suggested by legal practitioners (for both claimants and insurers) that there would be benefit in reducing the threshold to a lower amount and the pre-2017 Act threshold of $50,000 was specifically mentioned. Legal practitioners (for both plaintiff and defendants) argued that:

- the current regulated fees are insufficient and do not reflect the true cost of work done
- this is in part due to the threshold having been increased from $50,000 to $75,000 at the same time that the 2017 scheme removed treatment and care from awards for damage (reducing the size of those claims against which the threshold is applied) making it more difficult to reach the threshold.

It is true that the threshold increased at broadly the same time that the 2017 scheme was introduced, and that the introduction of the 2017 scheme, in itself, has made it harder for the threshold to be reached (even if it had been maintained at $50,000). As such, there appears to be some merit in reviewing the threshold and potentially reducing it. The work value assessment which we have recommended should help provide some clarity on the level of sufficiency of regulated fees in this area. Any review of the threshold should be done alongside the review of the setting of the legal fees themselves. To the extent that regulated fees are not sufficient, this may have a larger impact as the size of the claim increases.

6.5.3 Assessment of this option

Table 6.3 provides a summary of the impact of option 2B on the criteria provided in Section 6.2 (p 54).

Table 6.3 – Summary of impact of option 2B on criteria

Impact on claimant criteria	Claimant awareness / knowledge increased	✓✓
	Claimant friction reduced	✓✓✓
	Claimant uncertainty reduced	✓✓
Broader scheme impact	Consistency with original scheme design	Consistent
	Risks to scheme sustainability	Low
	Risks to claimant wellbeing	Unknown

6.6 Option 2C – Simplify some common specific issues disputes

6.6.1 Description of this option

This option would involve simplifying some common specific issues disputes so that the requirement for legal representation is reduced. For example, increasing the contributory negligence threshold.

6.6.2 Rationale for this option

This would mean there may be less requirement for representation. The cost implication would have to be assessed on a case-by-case basis. For example, extending the contributory negligence might increase not at fault numbers by a few percentage points, and these might be higher cost claims, compared to average.

6.6.3 Assessment of this option

Table 6.4 provides a summary of the impact of option 2C on the criteria provided in Section 6.2 (p 54).

Table 6.4 – Summary of impact of option 2C on criteria

Impact on claimant criteria	Claimant awareness / knowledge increased	No improvement
	Claimant friction reduced	✓
	Claimant uncertainty reduced	No improvement
Broader scheme impact	Consistency with original scheme design	Consistent
	Risks to scheme sustainability	Low
	Risks to claimant wellbeing	Risk reduced

6.7 Option 2D – Increase resourcing for and role of CTP Assist (and other supports)

6.7.1 Description of this option

This option would involve:

- CTP Assist to be open to everyone – including represented claimants
- Increasing the role of CTP Assist to be a constant point of contact for all claimants
- Increasing the funding commensurately
- Seeking to automate its functions as much as possible (e.g. introducing an app), potentially by leveraging Services NSW
- Significantly increasing the visibility of CTP Assist through increased marketing and communication to policyholders and claimants.

6.7.2 Rationale for this option

CTP Assist is trusted by claimants, but is not well known and is under-resourced

In our interviews, claimants were generally positive about CTP Assist. Any criticism was centred around the service not being more available. Claimants described opportunities for improvement including more regular phone calls and even an app that explains what to expect at each step of the claimant journey.

CTP Assist would benefit from being the first point of contact for a claimant for advice and information on process. While this information is available on the web- to achieve a more prominent role will take a long-term strategy, including marketing. Services NSW, which has a strong brand could be involved in this project.

As part of this enhanced role, we also suggest that CTP Assist not be restricted from contacting represented claimants. This could be for purposes of both checking, for which it is suggested that contact protocols be agreed with legal profession and for research purposes.

Could assist with scheme navigation – reducing claimant friction, and providing information

By its very nature, CTP Assist is able to provide claimants with some of the functions that were previously provided through lawyers in the old scheme, where the overwhelming majority of claimants were represented. In particular, CTP Assist can help by providing claimants with:

- Assistance with claim lodgement
- Information on the overall process and the key insurer decisions
- An understanding of their entitlements (to a lawyer, to challenge, to apply for damages, etc.)

CTP Assist can reduce claimant frictions in the scheme that result in some claimants abandoning their claims. In its current form, however, CTP Assist cannot provide legal advice – although incorporating an in-house legal service might be an option that SIRA wishes to consider if it considers this to be an efficient means of replacing legal advice traditionally provided by the Legal Advisory Service (LAS) which we recommend be discontinued.

In addition to CTP Assist, we recommend that SIRA continue to investigate the deployment of technology and digital innovation that could improve the claimant experience and keep claimants informed throughout their claim experience. An example of this might be an application (app) through which SIRA could update claimants on the status of their claim and inform them of their options and potential entitlements.

6.7.3 Assessment of this option

Table 6.5 provides a summary of the impact of option 2D on the criteria provided in Section 6.2 (p 54).

Table 6.5 – Summary of impact of option 2D on criteria

Impact on claimant criteria	Claimant awareness / knowledge increased	✓✓✓
	Claimant friction reduced	✓✓
	Claimant uncertainty reduced	✓✓✓
Broader scheme impact	Consistency with original scheme design	Consistent
	Risks to scheme sustainability	Low
	Risks to claimant wellbeing	Risk reduced

6.8 Option 2E – Discontinue the LAS

6.8.1 Description of this option

This option would involve:

- Discontinuing the LAS
- Considering alternatives to replace this function, including:
  - from within CTP assist, if it can be delivered more effectively and efficiently than LAS
  - by application of a statutory formula
  - through additional regulated legal fees to cover the services currently provided through LAS

6.8.2 Rationale for this option

Notwithstanding a recent review of LAS which recommended a number of process changes, the use of LAS has been limited. Our analysis in Section 4.8 indicates that only 2-3 matters per month are referred to LAS, and that these mostly relate to determinations of pre-injury earnings. In our claimant interviews, not one claimant was aware of LAS.

A number of the LAS matters are there as catch-all provisions on matters that are rare, such as treatment and care outside of Australia. However, in other cases it is questionable as to whether the lack of use of LAS means that injured people and their families are unaware of their entitlement and/or forgoing a claim.

In our view LAS is not a practical or cost-effective option. Requiring an application via a statutory officer for then subsequent allocation to a panel solicitor could easily be replaced. Options available to SIRA include:

- In-house legal advice (i.e. from within an enhanced CTP Assist). CTP Assist does not currently provide legal advice, but SIRA may wish to consider this as an option if it could be delivered more cost effectively than the current LAS process
- Application of a statutory formula for determining pre-injury earnings
- Listing the matters on which assistance is provided and setting a fee in the legal cost regulations.

6.8.3 Assessment of this option

Table 6.6 provides a summary of the impact of option 2E on the criteria provided in Section 6.2 (p 54).

Table 6.6 – Summary of impact of option 2E on criteria

Impact on claimant criteria	Claimant awareness / knowledge increased	✓
	Claimant friction reduced	✓
	Claimant uncertainty reduced	✓
Broader scheme impact	Consistency with original scheme design	Consistent
	Risks to scheme sustainability	Low
	Risks to claimant wellbeing	Low

6.9 Option 3A – Introduce ILARS to CTP

6.9.1 Description of this option

Background

The Independent Legal Assistance and Review Service (ILARS) has been operating in the NSW workers compensation Scheme since 2012. ILARS provides access to free, independent legal advice for injured workers in circumstances where there is a disagreement with insurers regarding entitlements. Legal fees are set by the Independent Review Office (IRO[13]).

During the Parliamentary debate on the introduction of the new CTP scheme, there was consideration of whether it should also apply to the CTP scheme. However, the decision was deferred to be considered as part of this review.

The consultation process for this review revealed applying ILARS to CTP was polarising among stakeholders. It received:

- Strong support from the Law Society, as well as from individual law firms that made submissions
- Strong opposition from the ICA and CTP insurers.

6.9.2 Discussion of this option

Advantage – Would provide claimant assistance at key points of friction: claiming and disputes

Providing access to ILARS guarantees universal access to legal representation in a process which arises from a highly stressful event and which many people find difficult and complex. Submission from legal practitioners indicated some claimants need assistance on even the most basic claim forms and in putting together the material that is needed to support a claim. This may be due to language, culture, education, or other factors.

Our claimant interviews supported this fact, with legally represented claimants feeling more in control. Common sentiments included comments such as:

- "*[The lawyer] sat down and explained the situation*"
- "*He [the lawyer] made the whole process easier*"

At the same time, claimants who were not represented seemed to be less sure:

- "*Looking back on it now – we should have [engaged a lawyer]*".

Our data analysis indicates that some claimants have legal representation at an early stage prior to any entitlement to legal costs. Our interviews with claimants indicated that those claimants that did engage lawyers early generally felt that this assisted them in being able to make a claim. We note the earlier caveats regarding sample size of the interview process means the experience of the interviewees may not be representative of the scheme as a whole.

The data suggests that unrepresented claimants that receive an unfavourable outcome initially, or at internal review, are much more likely to accept that decision and therefore much less likely to pursue the matter further (by disputing the insurer decision). Unrepresented claimants also appear less likely to pursue damages claims.

[13] Formerly the Workers Compensation Independent Review Office (WIRO)

Advantage – Simplicity across CTP and workers compensation schemes

Having ILARS accessible to both the workers compensation and CTP schemes might allow for simplified administration. This would be consistent with recent policy changes in the NSW injury scheme landscape looking to streamline the NSW accident compensation schemes, such as the introduction of a single accident compensation scheme regulator, and the introduction of the Personal Injury Commission.

Disadvantages – Could disincentivise insurers

However, unlike workers compensation, the NSW CTP scheme is privately underwritten by multiple insurers. As a result, there are potential implications on insurer behaviour that would need to be considered:

- The existing arrangements provide an incentive for insurers to minimise legal costs. An ILARS type approach might reduce this pressure as the costs would either be funded by a system-wide levy payable by motorists or shared by insurers on a pro-rata basis.
- There may be more contested claims by insurers, which would be antagonistic to the original policy intent of the scheme.

Disadvantage – Potentially costly

The data analysis on the impact of ILARS in workers compensation suggests that since scheme reforms in 2012, claimant legal costs have increased more than insurer legal costs and are now back to around 1.5 times the level of insurer legal costs (the same relativity observed prior to the 2012 reforms). We have not considered any potential impact of ILARS on claims costs generally.

The level of regulated fees is critical to the overall cost of an ILARS model, and to the overall sustainability of that model over time. To properly inform its thinking, if considering ILARS as an option for CTP **we recommend that SIRA commission a central estimate actuarial assessment of the estimated premium impact**. Such an assessment should consider the direct cost of increased legal fees, potential changes to legal utilisation, and any potential flow-on effects to the cost of claims. If the impact on premiums is desired to be neutral, the costing will need to balance any assumed increase in the level of legal utilisation against the level of regulated fees.

Furthermore, we would recommend that any application of ILARS into CTP be modified from the model which is in place for Workers Compensation, such that **the power to set legal fees be with the Minister, in a regulation made under the Act and in accordance with the requirements of the Subordinate Legislation Act.** This has the benefit of allowing for both consultation on the fees and appropriate scrutiny by Parliament, which is consistent with good administrative law practice and would be an appropriate control mechanism for fee levels. The current arrangements for workers compensation[14]are not determined in this manner but are set independently by IRO.

Finally, if an ILARS approach were to be considered for the CTP scheme, then consideration might also be given as to whether it would be a separate function outside of SIRA (as it currently is in the workers compensation scheme) or sit within the operations and oversight of SIRA.

6.9.3 Assessment of this option

Table 6.7 provides a summary of the impact of option 3A on the criteria provided in Section 6.2 (p 54).

[14] Note, we are not aware of any other administrative officer that has power to set recoverable legal costs. The closest comparator is the Legal Aid Commission (LAC) but, in that circumstance, it is not set by an administrative officer, but by the Board of the Commission noting that the Minister appoints the Board which is responsible to the Minister and that the LAC fee schedules are discussed with the Minister prior to being made.

Table 6.7 – Summary of impact of option 3A on criteria

Impact on claimant criteria	Claimant awareness / knowledge increased	✓✓✓
	Claimant friction reduced	✓✓✓
	Claimant uncertainty reduced	✓✓✓
Broader scheme impact	Consistency with original scheme design	A significant departure from the current approach of providing back-end loaded legal fees. Early involvement of lawyers for the majority of claims is more consistent with the previous scheme than it is with the current scheme.
	Risks to scheme sustainability	Potentially high. ILARS fees are not set by the Minister or reviewed by Parliament. Early engagement of lawyers also impacts on all matters.
	Risks to claimant wellbeing	Unknown

A modified ILARS

In its current form, we would not recommend the introduction of ILARS. If it were to be considered by SIRA, we suggest that the legal fees be set by Ministerial regulation and subject to review by Parliament. Applying a *modified ILARS* to the CTP scheme (with an upfront fee for preliminary advice and assistance with completing and lodging a claim form) would still represent a significant departure from the current approach of providing back-end loaded legal fees.

6.10 Option 3B – Defer consideration of ILARS

6.10.1 Description of this option

This option would involve deferring consideration of ILARS for CTP until the scheme review.

6.10.2 Rationale for this option

As per option 1, it may be prudent to consider the potential for ILARS as part of the broader scheme review currently underway. That review will be informed by this report, the experience at PIC, and by the further ILARS costing work which we recommend be undertaken.

6.10.3 Assessment of this option

Table 6.8 provides a summary of the impact of option 3B on the criteria provided in Section 6.2 (p 54).

Table 6.8 – Summary of impact of option 3B on criteria

Impact on claimant criteria	Claimant awareness / knowledge increased	No improvement
	Claimant friction reduced	No improvement
	Claimant uncertainty reduced	No improvement
Broader scheme impact	Consistency with original scheme design	No change
	Risks to scheme sustainability	No change
	Risks to claimant wellbeing	Unknown

7

Appendices

Appendix A List of submissions

Formal submissions to this review were gratefully received from:

- Anonymous
- Australian Centre for Justice Innovation (Faculty of Law, Monash University)
- Australian Lawyers Alliance
- Insurance Council of Australia
- Moray & Agnew Lawyers (Newcastle)
- New South Wales Bar Association
- Schreuders Compensation Lawyers
- Stewart Cuddy & Mockler
- Suncorp Group
- The Law Society of New South Wales

Appendix B List of meetings

As part of this review, meetings were held with the following:

- Australian Lawyers Alliance
- CTP Assist
- Elizabeth Welsh
- EY (Ernst & Young) – scheme actuary
- Ian Jones
- Insurer representatives (information session for insurers)
- Legal Advisory Service
- Legal representatives (information session for legal representatives)
- Personal Injury Commission
- Principal Claims Assessor
- State Regulatory Authority
- Suncorp Group
- The Law Society of New South Wales
- Workers Compensation Commission
- Workers Compensation Independent Review Office

Meetings were also held with a small number of claimants (names withheld).

TAYLOR FRY

www.taylorfry.com.au