



Independent
Review Office

26 September 2022

Adam Dent
Chief Executive
State Insurance Regulatory Authority
[REDACTED]

Dear Mr Dent

Statutory Review of the *Personal Injury Commission Act 2020*

Thank you for your letter of 10 August 2022 informing me that the State Insurance Regulatory Authority (SIRA) is commencing a Statutory Review (Review) of the *Personal Injury Commission Act* (PIC Act). I am writing to provide a submission to the Review.

Background to submission

By way of brief background, and most relevant to my office, Schedule 5 to the PIC Act re-established the Workers Compensation Independent Review Officer (WIRO) as the Independent Review Officer. Schedule 5 to the PIC Act also established the Office of the Independent Review Officer (known as the Independent Review Office or IRO) as a separate public sector agency¹, and expanded the Officer's legislative functions, in particular to:

- include a role to deal with complaints from persons injured in motor accidents (CTP complaints)
- provide a legislative basis for the Independent Legal Assistance and Review Service (ILARS).

The Review is to consider whether the policy objectives of the PIC Act remain valid, and whether the terms of the Act remain appropriate for securing those objectives.

When the PIC Bill was first introduced to Parliament, it did not include a Schedule to establish the IRO, and no reforms of the role of the then WIRO were envisaged². The Bill was amended by the Legislative Council to include what is now Schedule 5 to the PIC Act. However, no amendments were proposed to the objects of the PIC Act (at section 3), which are focused entirely on the Personal Injury Commission (Commission).

Given this focus, and that there are no specific policy objectives that relate to the IRO, we have focused our submission on opportunities to improve the legislative foundation of the IRO.

Policy objectives of the PIC Act

The Review provides an opportunity to expand the objects of the PIC Act, either in the existing section 3 or elsewhere (for example, in Schedule 5), to address the functions of the Independent Review Officer.

This may include objects such as:

- to establish the statutory office of the Independent Review Officer to deal with complaints by claimants under workers compensation and motor accidents legislation, and to provide funding for the legal costs

¹ See also section 22 and Part 3 of Schedule 1 to the *Government Sector Employment Act 2013*

² [Personal Injury Commission Bill 2020 \(nsw.gov.au\)](https://www.nsw.gov.au/personal-injury-commission-bill-2020)

- of workers under workers compensation legislation seeking assistance about claims and insurer decisions
- to enable the IRO to provide assistance in finding fast and fair solutions for claims and disputes
- to ensure the IRO is accessible, responsive and transparent in delivering its services, and accountable in reporting on its operations
- to enable the IRO to inquire into and report on important matters arising in connection with the operation of workers compensation and motor accidents legislation.

Strengthening the framework for the IRO

Since commencing as the Independent Review Officer, I have identified opportunities to improve the framework to establish our functions. Primarily, these relate to improved arrangements to protect people who complain to us, to protect workers who are assisted through ILARS, to protect IRO staff and to support information sharing.

I have appended to my letter a list of the amendments that I strongly recommend are considered in the Review. I have included references to analogous legislative provisions in similar agencies, to demonstrate that directly relevant precedents for these requests are available. Implementing these measures would provide the protections and other arrangements necessary to further enable our work.

Clarifying the IRO's role in CTP Care

There is uncertainty about whether the IRO's functions in dealing with CTP complaints extend to dealing with complaints about the acts and omissions of the Lifetime Case and Support Authority (LCSA) in respect of its role under sections 3.2(3)³ and 3.45⁴ of the *Motor Accident Injuries Act 2017* (MAIA).

To deal with this uncertainty, you have delegated relevant SIRA functions under section 10(1)(d) of the MAIA (to investigate and respond to complaints about the claims handling practices of LCSA) to the IRO.⁵

In addition, persons injured in motor accidents before 1 December 2017 and who are covered by the Lifetime Care and Support Scheme should, but may not presently, have access to IRO complaint-handling services.

The review of the PIC Act provides an ideal opportunity to resolve the current uncertainty, ensure comprehensive assistance is available to persons injured in motor accidents who require long-term care and assistance, and make clear the IRO's functions in respect of these complaints.

IRO Inquiry Function

The Hon Judge Gerard Phillips, the President of the Commission, has written to SIRA to raise a concern about the Independent Review Officer's inquiry function.

Subclause 6(b) of Schedule 5 to the PIC Act provides for the Independent Review Officer *'to inquire into and report to the Minister on any matters arising in connection with the operation of [the PIC Act] or the enabling legislation [i.e., the workers compensation and motor accidents legislation] as the Independent Review Officer considers appropriate or as may be referred to the Independent Review Officer for inquiry and report by the Minister'*.

³ Section 3.2(3) MAIA provides that, in the case of the payment of statutory benefits for treatment and care provided more than 5 years after the motor accident concerned, the relevant insurer is the LCSA

⁴ Section 3.45 MAIA provides for special provisions relating to payment of statutory benefits for treatment and care by LCSA

⁵ Instrument of Delegation dated 14 June 2022

I understand the Commission's concern is that this inquiry function, as it concerns the operation of the PIC Act, may impact on the independence of the Commission.

The previous legislation establishing the WIRO – in Chapter 2, Part 3 of the *Workplace Injury Management and Workers Compensation Act 1998* (WIMA) – provided for a similar function at subsection 27(3):

to inquire into and report to the Minister on such matters arising in connection with the operation of the Workers Compensation Acts as the Independent Review Officer considers appropriate or as may be referred to the Independent Review Officer for inquiry and report by the Minister.

The Workers Compensation Acts include both the WIMA and the *Workers Compensation Act 1987*⁶.

When introducing the *Workers Compensation Legislation Amendment Bill 2012* (the legislation that established the WIRO) into the NSW Legislative Assembly, the Hon Michael Baird MP, then Treasurer, stated:

The WorkCover Independent Review Officer will have also the functions of dealing with complaints about insurers, inquiring into and reporting to the Minister on matters concerning the operation of the workers compensation legislation, and such other functions as may be conferred on the Independent Review Officer. The WorkCover Independent Review Officer will have the dual roles of dealing with individual complaints and overseeing the workers compensation scheme as a whole. It will be an important accountability mechanism for the workers compensation scheme.

At that time, and until the establishment of the Commission under the PIC Act, the Workers Compensation Commission (WCC) was established under WIMA, and most of its powers and functions were provided for under WIMA. The WIRO's inquiry function extended to these provisions, and did not, to my understanding, impact on the independence or functioning of the WCC. It did, however, enable a comprehensive view to be taken of matters arising under the Workers Compensation Acts. This is reflected, for example, in recommendations made during the Parkes Project concerning dispute resolution and the role of the WCC.

The Independent Review Officer's function under subclause 6(b) of Schedule 5 to the PIC Act replicate the WIRO's previous role, and expand it to motor accident injury legislation (including dispute resolution by the Commission). In my view, it is appropriate that this function is broadly framed to enable comprehensive oversight of the statutory personal injury schemes.

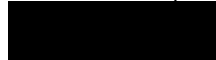
If there is a concern that the function could be construed to extend to inquiring into the correctness or otherwise of particular decisions or operations of the Commission, this could be appropriately addressed, for example, by an amendment that provides that Independent Review Officer is not authorised to inquire into the handling of a particular dispute by the Commission.

I note I have discussed this matter with Judge Phillips, and provided the above information to him.

Further information

If SIRA requires further information about these matters, please do not hesitate to contact me.

Yours sincerely



Simon Cohen

Independent Review Officer

CC: Dr Petrina Casey, Executive Director, Motor Accident Insurance and Regulation, SIRA

⁶ See section 4 WIMA

APPENDIX – Proposed list of amendments to strengthen the framework for the IRO

Issue	Problem	Solution	Example precedents
<p>Protection of complainants from adverse action</p>	<p>Injured people who complain to the IRO are not protected from adverse or detrimental action. Some complainants raise concerns with the IRO, including:</p> <ul style="list-style-type: none"> - they are concerned that making a complaint may result in the insurer denying their claim - their case manager has stated they are angry at the injured person for making a complaint to the IRO. <p>This may result in an injured person not making a complaint. It may also result in actual detriment to the injured person.</p>	<p>Make it unlawful for a person to cause disadvantage to any person on account of them making a complaint to the IRO or assisting the IRO.</p>	<ul style="list-style-type: none"> • Subsection 37 (4) <i>Ombudsman Act 1974</i> (OA) • Subsection 43 (4) <i>Government Information (Information Commissioner) Act 2009</i> (GIICA)

Issue	Problem	Solution	Example precedents
<p>Protecting the confidentiality of information obtained in complaints handling</p>	<p>A person complains to the IRO with the purpose of solving a complaint.</p> <p>The IRO engages in a confidential complaint handling process that includes the use of alternative dispute resolution techniques such as shuttle negotiation, conciliation and mediation to assist the injured person and the insurer solve the complaint.</p> <p>The IRO deals with sensitive personal, health and legal information during these processes.</p> <p>It is important, so that both sides to a complaint can engage fully and with confidence, that the IRO retains the confidentiality of the information provided, subject to any specific exceptions (such as information sharing with SIRA as the regulator).</p>	<p>Prohibit the Independent Review Office and staff of the IRO from being competent or compellable to produce documents or give evidence in respect of information obtained in the course of their duties, subject to any appropriate exceptions.</p>	<ul style="list-style-type: none"> • Section 35 OA • Section 41 GIICA • Section 40 PIC Act

Issue	Problem	Solution	Example precedents
Protecting the confidentiality of information obtained in ILARS Grants administration	<p>A lawyer approved by the IRO to apply for ILARS Grants on behalf of injured workers, establishes a solicitor-client relationship with the injured worker. There are certain privileges that arise from that relationship, and in particular client legal privilege, that both promote the administration of justice and protect the rights of the injured worker.</p> <p>The IRO requires lawyers to provide information, including confidential and legally privileged information, to enable the effective administration of an ILARS Grant. This can include providing copies of legal advice (including Counsel's advice), medical reports and statements of the injured worker.</p> <p>There is a substantial risk, without appropriate protection of this information, that an injured worker may not be able to communicate freely with their lawyer, or the lawyer may be concerned about the disclosure of information relevant to the Grant to the IRO.</p>	<p>Provide for like privileges as those which arise from the relationship between the approved lawyer and the injured worker to arise between the IRO and an injured worker who benefits from an ILARS Grant.</p> <p>This includes ensuring the IRO is not required to disclose to any person or court any information or document (including an application for an ILARS Grant) relating to the administration of ILARS.</p> <p>Appropriate exceptions (for example, to enable the Auditor General to undertake their functions) would be required.</p>	<ul style="list-style-type: none"> • Section 25 <i>Legal Aid Commission Act 1979</i> (LACA)
Protecting IRO staff from claims and actions	Staff of the IRO are not protected from personal liability or proceedings for actions taken (or omitted to be taken) for the purpose of exercising their functions in good faith. This potentially opens up IRO staff to proceedings against them personally, which may impact on the independence or perceived independence of IRO staff in undertaking their duties	<p>Provide, for example:</p> <ul style="list-style-type: none"> • an immunity from proceedings without leave of the Court, or • that an IRO staff member is not to be subject of any action, claim etc. <p>for anything done or omitted to be done when exercising functions and in good faith.</p>	<ul style="list-style-type: none"> • Section 35A OA • Section 45 GIICA • Subsection 64(3) PIC Act • Section 28 <i>State Insurance and Care Governance Act 2015</i> • Section 27 LACA

Issue	Problem	Solution	Example precedents
<p>Promoting access to other complaints handling agencies</p>	<p>The IRO frequently receives complaints that are outside its jurisdiction or more appropriately handled by another complaints-handling agency. This includes some matters where part of the complaint is within our role, and part of the complaint is not. Some examples are complaints about the professional conduct of medical practitioners and lawyers, or complaints that concern breaches of privacy.</p> <p>In these cases, the IRO provides referral information to the person making the complaint. However, on some occasions we are concerned that the person may not be able to act on the referral information.</p> <p>For these cases, being able to refer the complaint directly with the person's consent will provide a more effective complaints service.</p>	<p>Use established arrangements under Part 6 of and Schedule 1A to the OA that enable referral of complaints between complaint handling agencies, to allow IRO to enter into complaint referral arrangements with relevant agencies.</p>	<ul style="list-style-type: none"> • Part 6 and Schedule 1 OA