Department of Finance, Services and Innovation

Improving workers compensation dispute resolution in NSW

A discussion paper on potential reforms to the NSW workers compensation dispute resolution system
## Contents

**Minister's Message** 4

1. **Introduction** 5
   1.1 Purpose of this discussion paper 5
   1.2 Relevant recommendations of the Standing Committee on Law and Justice 6
   1.3 What is in scope of the review and what is not? 6
   1.4 Definition of a dispute 7
   1.5 Broader context 8

2. **Understanding the current system** 10
   2.1 Functions of a dispute resolution system and how they are currently delivered in NSW 10

3. **The case for change** 17
   3.1 The views of claimants 18
   3.2 What the data is telling us 20
   3.3 The views of stakeholders 24
   3.4 Research into other jurisdictions and other dispute resolution systems 24

4. **Approach to developing reform proposals** 26
   4.1 Maintaining independence of existing players in the system 26
   4.2 Principles used to develop our proposals 27

5. **Options for preventing disputes** 29
   5.1 Reform of the independent medical examination system 29
   5.2 Establish a single claim identifier and improve data collection 30
   5.3 Commutation, or lump sum exit from the scheme 30
   5.4 Simplify insurers' notices to claimants 31
   5.5 Provide simpler, clearer public information about dispute resolution options and processes 31

6. **Options to reform the dispute resolution system** 32
   6.1 Option 1 - one stop shop 35
   6.2 Option 2 - one stop shop, with more focused claimant and legal support 37
   6.3 Option 3 - one stop shop, with increased CTP consistency 38
   6.4 Option 4 - consolidated personal injury dispute resolution model 39

7. **Options for broader system improvements to improve dispute resolution processes** 41
   7.1 Using digital solutions to improve the dispute resolution process 41
   7.2 Insurers to conduct internal review of all disputed decisions 42
7.3 Less information required to commence a formal dispute 42
7.4 Options for procedural improvements in dispute resolution 43

8. Next steps 44

Appendix 1: Reference Group members 45
Appendix 2: List of stakeholders consulted by DFSI 46
Appendix 3: Data tables 47
Minister’s Message

The NSW workers compensation scheme has undergone significant change in recent years.

In 2012, wholesale reform of the scheme was undertaken to restore its financial sustainability, improve return to work rates and increase support for the most seriously injured workers. An independent Workers Compensation Ombudsman’s Office (the WIRO) was established to provide oversight of the decisions and practices of insurance companies, employers and lawyers.

In September 2015, WorkCover was split into three entities, icare (insurer), the State Insurance Regulatory Authority (insurance regulator) and SafeWork NSW (workplace safety regulator).

Notwithstanding the significant operational and cultural change over the last five years, we must continually strive for improvement. One aspect of the scheme in need of review is the dispute resolution system.

This was examined recently in a NSW Legislative Council Law and Justice Committee report which recommended the Government establish a ‘one stop shop’ approach to resolving disputes between injured workers and the insurers representing their employers.

Research commissioned by the Department of Finance, Services and Innovation, suggests that the majority of injured workers find the dispute resolution system hard to access and hard to navigate.

While the legal complexity of the scheme is a contributing factor, the presence of multiple dispute resolution bodies, often with overlapping or poorly understood functions, is also a major source of frustration among injured workers, employers and scheme providers.

This discussion paper canvasses options for reform of the dispute resolution system. It explores the various functions performed by the NSW Workers Compensation Commission, SIRA’s Merit Review Service, the WIRO and the courts. It presents four options that would allow for consolidation, simplification and modernisation within the dispute resolution system.

As the Minister charged with leading this consultation on behalf of the Government, I commit to maintaining an open mind throughout the process.

Having recently overseen a major overhaul of the State’s CTP Green Slip Scheme, which gained unanimous support in the Parliament, I am confident that we can build on the productive stakeholder engagement that occurred throughout those reforms.

Thank you for your interest in this discussion paper. We look forward to receiving your submissions and working with you throughout the consultation period.

The Hon Victor Dominello MP

Minister for Finance, Services and Property

www.finance.nsw.gov.au
1. Introduction

1.1 Purpose of this discussion paper

This discussion paper is an important step in building a better dispute resolution system for workers compensation insurance in NSW. It envisages a dispute resolution system that:

- helps the parties reach agreement and resolve issues before they escalate
- supports claimants throughout the process to aid, rather than hinder, their return to work and good health.

The NSW Legislative Council Standing Committee on Law and Justice’s First review of the workers compensation scheme (2017) suggested improvements to the current approach to resolving disputes, including establishing a ‘one stop shop’ for dispute resolution. The Committee concluded that a well-designed dispute resolution body has the potential to make it easier for claimants to navigate the system and exercise their legal rights when required. The one stop shop approach would also increase efficiency and consistency in the way disputes are resolved.

In response to the Committee’s findings, the Department of Finance, Services and Innovation (DFSI) has conducted research into the operation of the current workers compensation dispute resolution system in NSW. This research included investigation into best practice dispute resolution both nationally and internationally, and interviews with claimants and scheme providers. This primary research confirmed that the current dispute resolution system is not working as intended and could be improved. There is broad agreement among stakeholders that the dispute resolution system is unnecessarily complex, and more clarity around the roles of the various government agencies involved is needed.

This discussion paper is intended to canvass stakeholder views on a range of options (representing varying magnitudes of change) to improve the current dispute resolution system, including the establishment of a one stop shop or single dispute resolution forum. It has been drafted by DFSI in consultation with an expert Reference Group representing the various government agencies involved in the current system. However, this paper has been prepared independently of the Reference Group and does not necessarily reflect the views of its members. Other key stakeholders and experts have also been engaged in drafting this paper. (See appendices for details of the Reference Group and other stakeholders and experts consulted.)
1.2 Relevant recommendations of the Standing Committee on Law and Justice

The Law and Justice Committee has made three main recommendations relevant to this paper (recommendations 14, 15 and 16). This discussion paper specifically responds to recommendation 14 and also proposes actions to implement recommendation 15. Consideration has also been given to recommendation 16 in the development of options.

Recommendation 14

That the NSW Government establish a ‘one stop shop’ forum for resolution of all workers compensation disputes, which:

- allows disputes to be triaged by appropriately trained personnel
- allows claimants to access legal advice as currently regulated
- encourages early conciliation or mediation
- uses properly qualified judicial officers where appropriate
- facilitates the prompt exchange of relevant information and documentation
- makes use of technology to support the settlement of small claims
- promotes procedural fairness.

Recommendation 15

That the NSW Government introduce a single notice for both work capacity decisions and liability decisions made by insurers.

Recommendation 16

That the NSW Government consider the benefits of developing a more comprehensive specialised personal injury jurisdiction in New South Wales.

1.3 What is in scope of the review and what is not?

The aim of this review is to identify options for a better dispute resolution system for workers compensation insurance in NSW – one that helps parties reach agreement and resolve issues before they escalate, and supports claimants throughout the process to aid and encourage, rather than hinder, their return to work and good health.

Within the scope of this discussion paper are the procedures, roles, responsibilities, and support services used to resolve disputes. To bring about significant improvements to the current system, some legislative change is likely to be required. Changes to benefits, impairment thresholds and common law rights are beyond the scope of this paper.
This paper discusses different options for moving the workers compensation dispute resolution system toward the aspiration of a fully integrated personal injury dispute resolution system (also put forward by the Law and Justice Committee), to deliver an improved experience for claimants and drive efficiencies across all schemes. The paper also discusses potential improvements that could reduce the overall number of disputes, as well as a number of potential system improvements to make the system run more efficiently. These are complementary initiatives that could be adopted regardless of the dispute resolution model chosen.

Options 1–3 put forward in this paper involve changes that would apply to all workers compensation claims to which the 2012 amendments apply. It does not affect those claimants who are exempt from operation of the 2012 amendments. Option 4 involves the creation of a single personal injury dispute resolution system for workers compensation and compulsory third party (CTP) insurance. Claimants exempt from the 2012 amendments who currently use the WCC to resolve disputes would be transferred to this new system. This paper does not consider whether in the longer term, dispute resolution for other forms of personal injury, for example, Lifetime Care and Support, public liability, dust diseases and sporting injuries could also be integrated into a one stop shop for resolving all personal injury disputes.

1.4 Definition of a dispute

As there is currently no single, agreed definition of what a dispute is in the workers compensation system, this discussion paper adopts the following definitions:

- **Complaint** – a worker expressing dissatisfaction with the actions of an insurer where it affects their entitlements, rights or obligations under the Workers Compensation Acts. Complaints can relate to a decision or a failure to decide.

- **Dispute** – a dispute involves a disagreement with, or a challenge to, an action (including a decision) or inaction of the insurer. This discussion paper refers to formal and informal disputes:
  i. a **formal dispute** is a challenge to a decision through one of the formal, legislated dispute resolution pathways. Currently this includes reviews of work capacity decisions, and matters considered in the WCC.
  ii. an **informal dispute** is a dispute settled outside of the legislated pathways. This typically involves negotiation between the parties to arrive at a mutually agreeable position (including with the assistance of legal representatives, or claimant support services such as WIRO).

The mechanisms and processes for handling both complaints and disputes in the workers compensation system are within the scope of this discussion paper.
1.5 Broader context

This discussion paper needs to be considered in the context of recent, impending, and potential reforms to the workers compensation system.

2012 and 2015 legislative reforms

The current workers compensation dispute resolution system was designed in 2012 as part of the broader reforms to the state’s workers compensation legislation. These reforms introduced work capacity decisions and their review processes, and altered funding arrangements for legal support and pathways in dispute resolution. The 2012 reforms also created the WorkCover Independent Review Officer (WIRO) to deal with complaints about insurers, review work capacity decisions, and to conduct independent reviews on the operation of the system.

In 2012, the WorkCover Authority performed the functions of regulator and nominal insurer within the workers compensation system. In 2015, WorkCover was split into the SIRA (insurance regulator), icare (insurer) and SafeWork NSW (workplace safety regulator). WIRO retained its functions (but changed its name to become known in full as the Workers Compensation Independent Review Officer). While this redistribution of functions did increase independence and allow entities to specialise in particular functions, it also increased the number of organisations operating in an already complex space.

icare’s claims management reforms

In early 2018, icare will introduce a new claims management model. Under this model icare will play a more active role in overseeing and managing disputes in their early stages. icare, rather than the scheme agents it manages, will manage panels for rehabilitation, investigation and medico-legal services. The aim of these changes is to create a simpler, more transparent and more supportive claims experience for workers and employers.

This new claims management model is expected to have a significant impact in terms of reducing complaints and disputes from nominal insurer scheme agents (who cover about 75% of all workers). The reduction of the number of scheme agents (down from five to three, and eventually to one), also commencing from 1 January 2018, will also assist in increasing consistency of decision making (as fewer agents will lead to fewer variations of approach between agents).

Consideration of a single system for resolving personal injury disputes

As noted above, the Law and Justice Committee also recommended that the NSW Government consider the benefits of developing a more comprehensive, specialised personal injury jurisdiction in NSW (recommendation 16).

In 2014, the Government undertook an equivalent process in establishing the NSW Civil and Administrative Tribunal as a one stop shop for specialist tribunal services in NSW. It brought
together 22 previously separate tribunals into four divisions of the Tribunal, streamlining access and administration while retaining the specialist experience and services of the former tribunals.

All of the dispute resolution reform options presented in Section 6 of this paper are consistent with any longer-term objective of creating a single, consolidated personal injury dispute resolution system. Options 1 – 3 involve improving the claimant experience and implementing a one stop shop for workers compensation dispute resolution to varying degrees, but stop short of consolidating the workers compensation and CTP dispute resolution systems. Option 4 proposes consolidating the workers compensation and CTP dispute resolution systems, which would require a longer implementation period, due to the more extensive changes required.

▶ Do you support developing a single system for resolving personal injury disputes?
▶ What do you think might be the benefits and/or costs of a single system?
2. Understanding the current system

2.1 Functions of a dispute resolution system and how they are currently delivered in NSW

Roles of the scheme bodies in the current system

<table>
<thead>
<tr>
<th>Scheme bodies</th>
<th>Claimant support</th>
<th>Legal support</th>
<th>Dispute management/resolution</th>
<th>System oversight</th>
</tr>
</thead>
<tbody>
<tr>
<td>SIRA</td>
<td>Handles complaints and enquiries, info provision</td>
<td>Delegated by SIRA to administer funding for ILARS</td>
<td>Work capacity decision merit review</td>
<td>Scheme regulator</td>
</tr>
<tr>
<td>WIRO</td>
<td>Handles complaints against insurers, provides info about options</td>
<td>Procedural review of work capacity decision</td>
<td>Can inquire into and report to the Minister on matters arising in connection with the Acts</td>
<td></td>
</tr>
<tr>
<td>WCC</td>
<td>Information provision about its processes</td>
<td></td>
<td>Liability, medical disputes and injury management</td>
<td></td>
</tr>
<tr>
<td>icare and other insurers</td>
<td>Information provision about claim and dispute processes</td>
<td></td>
<td>Internal review of work capacity decision and review of liability disputes before they proceed to WCC (optional)</td>
<td></td>
</tr>
<tr>
<td>NSW Legislative Council</td>
<td></td>
<td></td>
<td>Parliamentary oversight focussed at the whole of scheme level</td>
<td></td>
</tr>
<tr>
<td>Standing Committee on Law</td>
<td></td>
<td></td>
<td>Independent oversight of administrative conduct of SIRA, icare and WIRO</td>
<td></td>
</tr>
<tr>
<td>and Justice</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>NSW Ombudsman</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Figure 1

2.1.1 Claimant support

Claimant support is defined as the provision of information and guidance to assist claimants to navigate the complaint and dispute resolution process. It does not include advocacy or legal advice. It plays a role in helping claimants understand the basis for insurer decisions and their options for contesting those decisions. Effective claimant support can encourage early dispute resolution through informal discussions with the insurer and/or employer on behalf of the claimant.

A range of scheme participants currently provide information and support to claimants, employers, insurers and their representatives about how the dispute resolution system operates.

SIRA’s website includes information about disputes and how they are resolved. SIRA deals with complaints from employers and injured workers about insurers and other scheme participants.
(including service providers) through its call centre. The call centre can answer questions, provide information and escalate complaints and queries but does not provide legal advice.

WIRO has a statutory responsibility to deal with complaints (from employers or injured workers) about insurers. WIRO’s Solutions Group investigates and attempts to resolve the issue between the parties. WIRO also provides information on its website and handles general enquiries about entitlements and problems.

The WCC also provides information about its dispute resolution procedures via its website, as do individual insurers and icare.

Despite these services being available, claimant research commissioned by DFSI found that many claimants have difficulties navigating the system and understanding how it operates, as well as difficulties with the complexity of the legislation. Some claimants expressed the view that the Government needed to provide direct support for claimants to assist them navigate the system.

2.1.2 Legal support

Legal support refers to the advice and assistance provided by legal professionals during the dispute resolution process. The NSW workers compensation system is unique as it has its own scheme for funding claimant legal assistance. This scheme – known as the Independent Legal Assistance and Review Service (ILARS) – funds over 90% of applications for assistance. It was established following the 2012 reforms and it is managed by WIRO.

ILARS provides funding for workers to receive advice from independent practising lawyers as to their rights and entitlements under the legislation. This can also include legal representation for injured workers who wish to lodge a dispute in the WCC. ILARS funds matters where there is some prospect of success on the part of the claimant. This funding includes payments for legal costs, medical reports and reasonably necessary incidental expenses. Insurers always pay their own legal costs. WIRO staff liaise with insurers to ensure they are aware of disputes and have responded to them in a timely manner. As part of its review function under ILARS, WIRO encourages early dispute resolution among the parties before proceeding to the WCC, in appropriate cases. Almost all claimants and insurers are legally represented in disputes before the WCC.

Prior to 2012, if an injured worker successfully challenged an insurer’s decision to dispute their claim they would be awarded legal costs, which would be paid by the insurer. If the injured worker lost, the legislation protected them from having to pay the insurer’s costs or their own lawyer’s costs, unless the proceedings were determined to be frivolous or vexatious, fraudulent or made without proper justification. The legislation was amended in 2012 to provide that each party is to bear their own costs in relation to a claim for compensation, and that the WCC has no power to
make orders or determinations about the payment of costs in relation to compensation claims. ILARS was established following this amendment. It is funded by the Workers Compensation Operational Fund, which is funded by levies set by SIRA and paid by insurers, as well as investment earnings.

Funding for legal representation for claimants taking a disputed work capacity decision to the Merit Review Service was introduced in December 2016. The cost of this legal support is covered by insurers – not through ILARS. To date most of the applications lodged in SIRA’s Merit Review Service have involved self-represented claimants without legal support.

Legal representation of workers and insurers in workers compensation disputes is not as widespread in other jurisdictions. In some states, like Victoria, legal representation for injured workers is low (although there are other advocacy and representation options available). Many stakeholders ascribe the high rate of legal representation in NSW to legislative complexity.

2.1.3 Dispute management and resolution

Dispute management describes the processes that support effective dispute resolution. Activities performed under this function include the registration and processing of applications, including identifying relevant documents, and triaging disputes towards an appropriate pathway.

Dispute resolution is the process by which disputes between parties are resolved. It can include the application of appropriate resolution methods (e.g. informal discussions, merit reviews, conciliation, mediation, arbitration, formal determination by impartial decision-makers), referrals to accredited medical specialists where required, and avenues for appeals to higher courts (or tribunals).

Within the current NSW system, there are two separate pathways for resolving workers compensation disputes – one for work capacity decisions and one for other compensation and liability disputes.
Current pathways for resolving a dispute

The work capacity decision pathway

If a worker is injured at work and cannot return to their pre-injury employment, they may receive weekly payments or undertake suitable employment that is different to their pre-injury employment (or a combination of both). These arrangements are subject to regular review to make sure they remain valid. This is called a work capacity assessment.

An insurer completes a work capacity assessment to determine whether a worker has current work capacity or no current work capacity. “Current work capacity” refers to the worker’s capacity to return to work in suitable (but possibly different) employment even though the worker is presently unable to return to their pre-injury employment because of their injury. It is a concept that was introduced to the NSW workers compensation scheme in 2012 as part of major reforms to the scheme. An insurer may make a work capacity decision about a worker’s current work capacity, what is suitable employment for the worker, how much the worker is capable of earning in modified or alternative employment deemed suitable, the worker’s pre-injury average weekly earnings or current weekly earnings, and any other decision that affects a worker’s entitlement to weekly payments.

A worker can ask for a work capacity decision to be reviewed, and can apply to the insurer for an internal review at any time. The internal review is undertaken by a person at the insurer who was not involved in the original decision. Costs are not payable in relation to legal services provided to an insurer or worker in connection with an internal review.
After the insurer has completed the internal review, the worker has the option to seek a merit review of the insurer’s work capacity decision with SIRA’s Merit Review Service (MRS). The MRS contacts the worker and insurer directly and provides the parties with the opportunity to submit all relevant information. The MRS undertakes a review of all relevant documentation and makes an independent assessment of the issues in dispute, issuing a recommendation which is binding on the insurer. Effective from 16 December 2016, workers can obtain paid legal advice in connection with an application for a merit review of a work capacity decision.

After the worker is informed of the findings from MRS, the worker can seek a procedural review of the work capacity decision by applying to the Workers Compensation Independent Review Officer (WIRO). WIRO reviews the procedures taken by the insurer in making the work capacity decision and makes binding recommendations. The procedural review is a review of the insurer’s work capacity decision. It does not assess the merits of the work capacity decision. A work capacity decision may also be subject to administrative review in the NSW Supreme Court.

The liability and medical disputes pathway

Disputes dealt with by the Worker’s Compensation Commission (WCC) fall into two main categories:

- Liability disputes, which mainly relate to payments for weekly benefits, medical expenses, compensation for dependents of deceased workers, lump sum compensation for permanent impairment, and domestic assistance
- Medical disputes, such as the degree of permanent impairment as a result of a work-related injury, whether any proportion of permanent impairment is due to any previous injury or pre-existing condition or abnormality, or whether impairment is permanent.

The WCC also considers workplace injury management disputes (a dispute about the activities and procedures undertaken to support a safe and timely return to work after a work-related injury), and provides compulsory pre-court mediation services for work injury damages disputes.

The WCC is an independent statutory tribunal which uses a combination of alternative dispute resolution and formal tribunal-style arbitration to resolve disputes.

Liability disputes in the WCC are typically resolved through an initial telephone conference where the parties explore settlement options, with unresolved disputes then proceeding to in-person conciliation conferences and, if necessary, arbitration hearings. A decision will only be issued if the parties fail to reach agreement. Decisions are subject to internal appeal (to a Presidential member) and external appeal against Presidential decisions (to the Court of Appeal).
The process is different for medical disputes. First, the medical issue is assessed by an Approved Medical Specialist (AMS) who provides an opinion. If the parties do not agree with that opinion, and provided there are grounds for appeal (as assessed by the Registrar or his delegate), the AMS’s decision can be appealed internally to a Medical Appeal Panel. Judicial review of Medical Appeal Panel decisions and decisions of the Registrar and delegates are available in the Supreme Court of NSW.

2.1.4 System oversight

System oversight refers to the function of ensuring a system is working as intended by identifying areas for improvement and ensuring accountability of scheme participants. This function typically involves responsibility for legislation and policy related to the system, overseeing compliance, enforcement actions and prosecutions, responding to complaints about how the system operates or the conduct of the government participants, the collection and publication of scheme data, and ongoing system improvements.

There are currently four entities with responsibility for overseeing aspects of the operation of the NSW workers compensation system: SIRA, WIRO, the NSW Legislative Council’s Standing Committee on Law and Justice and the NSW Ombudsman. (See Figure 2 – Current system diagram in section 2)

As the scheme regulator SIRA has primary legislative responsibility for regulating the workers compensation scheme in NSW and for carrying out the bulk of these activities, with specific regulatory oversight functions outlined in Part 2 of Chapter 2 of the Workplace Injury Management and Workers Compensation Act 1998. These responsibilities include general functions such as ensuring the efficient operation of insurance arrangements, the timely and effective resolution of disputes and ensuring compliance with the legislation (see section 22), and more specific functions related to monitoring and evaluation of the scheme (see section 23).

WIRO also performs a system oversight function. Section 27 (c) of the Workplace Injury Management and Workers Compensation Act 1998 gives WIRO the power to inquire into and report to the Minister on matters relating to the operation of the Workers Compensation Acts, or matters referred to it by the Minister.

The NSW Ombudsman is an independent oversight body that deals with complaints about the administrative conduct of most public sector agencies and some private bodies. Within the workers compensation scheme the NSW Ombudsman can deal with complaints about the administrative conduct of SIRA, icare and the WIRO. Courts and tribunals such as the WCC are outside the Ombudsman’s jurisdiction.
Under section 27 of the *State Insurance and Care Governance Act 2015*, the Standing Committee on Law and Justice provides dedicated parliamentary oversight by supervising the operation of the workers compensation scheme and reporting to the Legislative Council at least every two years. The oversight by the Law and Justice Committee is focussed at the whole of scheme level – which means the Committee does not have the power to investigate individual claim matters.
3. The case for change

The Law and Justice Committee found that the current workers compensation dispute resolution system was complex and recommended the establishment of a one stop shop. The research conducted by DFSI for this project has confirmed that the current dispute resolution system could be improved.

We agree with the Committee that a one stop shop for dispute resolution will help reduce complexity and increase ease of navigation for all parties.

However, simply establishing a one stop shop will not address all the shortcomings identified within the current scheme. Changes to dispute resolution functions should also consider the outcomes of the claimant experience study outlined below. The study identified that being involved in a workers compensation claim or dispute can be stressful, isolating and psychologically damaging. These findings suggest that adoption of a more proactive support service may be helpful for injured workers with more complex or disputed claims, and help increase the early resolution of disputes.

Our analysis of scheme data found there is a significant amount of dispute resolution (facilitated by existing claimant support and legal support services) occurring before matters are lodged as formal disputes. This demonstrates the important role of claimant support services, and that there is scope for further encouraging the resolution of more disputes in this way, before they escalate to formal disputes.

It has also become clear that overlapping responsibilities of scheme participants is a problem throughout the dispute resolution system. For example, a claimant with a complaint against an insurer can go to SIRA or WIRO or icare, all of whom will handle their complaint slightly differently. This can be confusing and frustrating for claimants.

To meet the aspiration for a clear, supportive system that resolves issues early and puts the claimants’ needs at the centre, at a minimum the following changes are recommended:

- Claimant support – claimants with complex claims are directly contacted by the claimant support provider and provided information and support (note this is separate from the insurer’s role to provide information). For example, a trigger could be a claim duration of six or 12 weeks, which indicates that for some reason the claim has not been able to be dealt with as quickly as most claims are. The information provided should explain to the claimant what to expect with the process of their claim, and what to do if they have concerns or disagree with an insurer’s decision. The service could also expand its role in supporting employers with information and advice and assist
claimants to resolve disagreements with insurers or employers before they escalate into a formal dispute.

- Dispute management and resolution – parties know there is one place to lodge a dispute and there is a flexible process for resolving it. This objective should also ensure that disputes are resolved as early as possible (preferably by agreement) and decisions are timely, clear and consistent.

- Legal support – legal advice is targeted towards those who need it most, for example because of a claimant’s personal circumstances or because of the complexity of their dispute. Legal services are targeted appropriately and are not filling gaps in claimant support. There should be incentives for early resolution and disincentives for pursuing matters that have a low likelihood of success.

- System oversight – there is independent oversight of the system and the roles of the various bodies are clearly defined. Scheme regulation includes a strong focus on dispute prevention.

In undertaking this review our research has consisted of the following key components:

1. a qualitative claimant research study to better understand what it is like for a claimant to access the dispute resolution system
2. an analysis of scheme data to identify trends relating to issues such as the number of disputes lodged, how long they take to resolve, the major issues being disputed, and how much the system costs
3. targeted consultations with a range of stakeholders who provided submissions to the Committee on Law and Justice’s review to better understand their views
4. research into other dispute resolution systems, including desktop research and interviews with system administrators.

The findings of these are expanded upon below.

3.1 The views of claimants

DFSI commissioned AMR Research to undertake a qualitative Claimant Experience Study of people who have recently been through the workers compensation dispute resolution system.
Thirty-two claimants from both metropolitan and regional areas who have recently accessed different parts of the dispute resolution system were interviewed.

“I wasn't really concentrating on the claim. I was just thinking about the future, and what it's gonna be, and how I was stuck without a job, and being able to work, and the sickness, and everything else. That's what I was mainly concerned about.”

Male, WCC, Central Coast & Newcastle

The key findings of this research include:

- There is a low level of overall satisfaction with current dispute resolution processes. Those interviewed rated the system particularly poorly in relation to fairness and ease of navigation.
- Claimants found it difficult to understand how the current system operates and how to access it. The complexity of the current system appeared to be exacerbated by the stresses faced by claimants as a result of physical and psychological injuries.

“I didn't have a clue what to do, where to go, and I was grateful with [law firm] at the time, and still am, because I still got an outcome. I don't know what I would have done. I wouldn't have known where to go, what to start, who to talk to. I just felt very much alone.”

Female, WCC, metro Sydney.

- In practice, the system appears to be highly adversarial, with claimants feeling that they are fighting against insurers with better resources than they can access in proceeding with a dispute.
- By and large, claimants did not find existing scheme support materials to be useful in understanding how the system operates. However, claimants did appear to regard the key government bodies involved in resolving disputes to be impartial and helpful.
- Claimants did not feel well supported in accessing the system. In some cases, claimants were not seeking support to navigate a legal dispute, but rather they were seeking support with the stress and isolation they were experiencing.

“Well, every second day they’re sending out a 16-page letter where you can’t understand, and you’ve got to be a top solicitor to understand what’s going on, and read it out … When you ring up the insurance company and you say ‘what does this word mean?’ even they don’t know. So how’s a broken-down bricklayer supposed to read all that?”

Male, internal insurer review, metro Sydney
3.2 What the data is telling us

As part of this project, DFSI commissioned an actuarial firm to collate and analyse scheme data from the various scheme participants. The charts below summarise the key findings of this analysis. In general, the data shows that the number of disputes has decreased following the commencement of all the 2012 reforms continuing into early 2013. Scheme costs have also reduced and average processing times are steady.

However, there are significant limitations on the data and the ability to use it to understand trends in the system or the claimant experience. The major changes to the scheme in 2012 and 2015 led to changes in the volume and nature of dispute resolution activity which has reduced comparability over the years. Also, it can be difficult to link individual claimants in the different dispute resolution bodies’ datasets, to allow a full assessment of their dispute experience.

Numbers of formal disputes

Figure 3 shows that the number of disputes is declining. This appears to be the result of significant legislative reforms in 2012 and 2015, which have reduced the overall number of workers compensation claims.
Note that Figure 3 only includes formal disputes – where a claimant takes the steps available under the legislation to have their dispute resolved by seeking an internal review of a work capacity decision from the insurer, or by lodging an application with the Workers Compensation Commission for other dispute types.

However, there are also disagreements being resolved elsewhere in the system which could otherwise escalate to these formal dispute resolution processes. These are captured in Figure 4.

Figure 4 shows that the number of ‘informal disputes’ resolved is slightly higher than formal disputes. While it has been developed by an actuary based on data collected by the bodies involved, this chart should be considered “indicative” only because there are significant challenges in tracking disputes in the system to prevent double counting between formal and informal disputes. It is also difficult to compare the data pre- and post-2012 because of the significant change in scheme rules. Nonetheless, the key takeaway from Figure 4 is that there is significant activity in the system that is solving disagreements and complaints early, and preventing the escalation of disputes. Recognising and better understanding this activity, where it occurs, why and how, is an important part of promoting prevention and early resolution of disputes.
The costs of resolving disputes

Figure 5

Total Legal and Administrative Costs

Figure 6

Legal Costs as a % of Total Scheme Costs
Figure 5 and 6 show that total legal costs increased in 2013/14 and since then the trend has been decreasing. Legal costs generally represent around 4-6% of total scheme costs over time, and around 80% of total disputation costs (i.e. legal and dispute-related administrative costs combined). The relative percentage of legal costs also increased in 2013/14, and has reduced over the past three years.

While these charts show that legal or other costs associated have reduced in recent years, there is scope for further research and data analysis, particularly on ILARS matters where a lawyer is funded but the matter does not proceed to the WCC.

**Duration of disputes**

Figure 7 shows average processing time in the WCC. It should be noted that this only shows the length of time taken for a formal dispute considered in the WCC. The average time taken for merit reviews (performed by SIRA) of work capacity decisions is significantly shorter, noting that these are just one type of dispute and often less complex than the matters considered by the WCC.
3.3 The views of stakeholders

DFSI met with a range of stakeholders prior to drafting this discussion paper in order to discuss their views on how the system currently operates and what could be done to improve it. Among these stakeholders there appears to be almost unanimous support for the establishment of a one stop shop, and a recognition that the current system is not working. Other key themes from the consultations include:

- the current system is too confusing and complex for claimants, with different processes depending on the type of dispute and overlapping dispute resolution pathways
- the complexity of the legislation is a key contributor to disputes and some of the problems in the dispute resolution system
- dispute resolution processes need to be transparent and independent
- hearings and conferences play an important role in allowing disputes to be aired and allowing parties to have their say and move on from a dispute
- there are too many medical assessments in the system, which contributes to claimant stress, increases costs and slows down the process
- there are opportunities to increase the use of digital technologies and online platforms in the system.

3.4 Research into other jurisdictions and other dispute resolution systems

Research into other dispute resolution systems and workers compensation schemes in other jurisdictions was conducted through interviews with academics, meetings with officials from other jurisdictions, and desktop research.

Noting that the scope of this review is limited to looking at changes that can be made without comprehensive legislative reform, this research has been used as an indication of what is possible within a well-designed system.

The following findings informed the directions taken in this paper:
• Some other jurisdictions and systems have very high levels of early resolution via conciliation (e.g. Western Australia). This supports an increased focus on early resolution of disputes via agreement.

• The low levels of legal representation of claimants in disputes in some other systems (e.g. Victoria). This suggests that simpler legislation and stronger claimant support can at least partially avoid the need for legal support.

• Other systems are making increasingly greater use of digital dispute management and online dispute resolution (e.g. British Columbia’s Civil Resolution Tribunal), reducing the cost and duration of disputes, improving accessibility overall and making the system easier to navigate.
4. Approach to developing reform proposals

As outlined above, the Government’s aspiration for the NSW workers compensation dispute resolution system is one that:

- helps the parties reach agreement and resolve issues before they escalate into formal disputes
- supports claimants throughout the process to aid, rather than hinder, their return to work and good health.

This paper outlines three categories of reform options for public feedback:

1. Options for preventing disputes (section 5)
2. Options to reform the dispute resolution system (section 6)
3. Options for broader system improvements (section 7).

Success can be measured by reference to the following questions:

- Have the reforms reduced the time and cost for resolving disputes?
- Have the reforms provided a fair process and a level playing field for all parties?
- Have the reforms made the system simpler, more accessible and easier to understand and participate in?

These and other metrics will be used to monitor the impact of any changes made to the dispute resolution system.

4.1 Maintaining independence of existing players in the system

In developing potential reform options, DFSI has also sought to avoid potential conflicts of interests within the various organisations and agencies involved in the dispute resolution system. This objective was firmly established in the Law and Justice Committee’s 2014 Review of the exercise of the functions of the WorkCover Authority, and in the 2015 legislative reforms. The main impetus for splitting WorkCover into SIRA, icare and SafeWork NSW was to remove the conflicts of interest inherent in WorkCover’s various commercial, investigative and regulatory functions in the workers compensation and work, health and safety schemes.

Any realignment of roles and/or consolidation of dispute resolution responsibilities should preserve the separation of functions brought about in the 2015 reforms. For example, claimant support and dispute resolution need to be provided by separate bodies because it could be a conflict of interest.
to both advise a claimant of their dispute resolution options, and later make a decision on the

dispute.

The four options for reform presented below have been designed to minimise these conflicts and
strictly delineate functions. This will ensure that functions operate independently, ensuring that one
function is not unduly influenced by another and that entities can be appropriately held to account.

4.2 Principles used to develop our proposals

DFSI used the following principles to guide decisions about different dispute resolution models.
These have been informed by input from the Reference Group, stakeholder consultations, the
Council of Australasian Tribunals’ Tribunal Excellence Framework, and other research on best
practice dispute resolution.

Procedural fairness
Procedural fairness requires that all parties to a dispute have the opportunity to put their case
forward, know the issues presented, be given an opportunity to respond, and have the case
assessed in an impartial forum.

Minimise conflict
As far as possible, a dispute resolution process should minimise conflict between parties, and
encourage constructive resolution in a transparent and inclusive manner.

Simplicity and efficiency
A dispute resolution process should have a single entry point, i.e. claimants should have a single
place to lodge and track their disputes. The system should enable disputes to be resolved quickly,
efficiently and cost-effectively. The process should also encourage dispute resolution as early as
possible and between the parties directly if practical.

Accessibility
The dispute resolution system should be accessible for all people (workers, employers and
insurers) from a range of educational backgrounds, occupations and geographic locations. The
system should also be accessible for those from culturally and linguistically diverse backgrounds.
Information and advice should be readily available to support interactions with the system.

Transparency and durability
The dispute resolution process should produce predictable, consistent and clear decisions, which
result in low rates of appeal. Decision makers within the system should have ‘integrity and
independence of mind’ to hear and decide matters fairly and free from influence, with appropriate
experience and expertise.
Flexibility and suitability

The method of dispute resolution used to resolve an individual dispute should be both flexible and suited to the circumstances of a particular dispute. The aim is to find the right dispute resolution process for each dispute, or what has been described as ‘fitting the forum to the fuss’.

These principles will be used to evaluate different options for the delivery of dispute resolution services.
5. Options for preventing disputes

As well as providing a case for simplifying the workers compensation dispute resolution system, DFSI’s research also found a strong case for greater emphasis on dispute prevention. The claimant research made it clear that most injured workers already face significant stress following a work-related injury. Reduced stress and disputation may lead to injured workers returning to work sooner, and allow all parties to avoid the financial and time losses associated with disputes.

Further, a reduction in the number of formal disputes will likely increase the efficiency and reduce the cost of dispute resolution bodies.

This discussion paper proposes a range of dispute prevention measures such as better claimant support services, which make it easier for claimants to resolve disagreements with insurers or employers before they escalate into formal disputes. Improved claims management practices and better decision-making by insurers – such as those to be implemented by icare’s new claims management model – can also help prevent disputes.

Various options are identified in this section along with focus questions to help guide feedback.

5.1 Reform of the independent medical examination system

Reforming the Independent Medical Examination (IME) system may reduce the number of disputes and make the process less stressful for injured workers. Stakeholders have raised concerns about the expertise and impartiality of some IMEs, and the impact of requests for multiple re-examinations on claimants.

The Law and Justice Committee identified similar concerns and recommended that icare include sanctions for insurers who fail to comply with SIRA’s medical assessment guidelines.

Receiving conflicting medical opinions can be stressful for injured workers, can increase time and costs, and can also be frustrating for the worker’s treating medical practitioner, whose professional opinion is being queried by an IME.

icare has implemented some reform in this area, including allowing claimants to choose from three nominated IME providers. However, there is also scope for improved quality assurance of IMEs by SIRA, as well as better regulation of their use.

One potential option that could be adopted is that a single pool of IMEs be managed by the regulator (SIRA), and requests for IMEs be independently allocated to an appropriate specialist (i.e. the party requesting the IME does not know which doctor will be allocated and the doctor does not know which party has requested the IME). SIRA is currently reviewing the IME Guidelines.
5.2 Establish a single claim identifier and improve data collection

DFSI’s commissioned data research found that it was difficult to pull together a full picture of the NSW workers compensation dispute resolution system. All scheme participants collect data, but these datasets cannot always be linked. Insurers create their own claim numbers (identifiers), which can make it difficult to track and report on claims as they move into the dispute resolution system. Disputes can also be identified by their WCC file number, but this is not always recorded in ILARS data. Some datasets only use claimants’ names.

A single identifier for each claim for use in all datasets could be implemented to enable data analysis of the whole system, subject to appropriate data protection, privacy and usage guidelines. Taking this one step further, implementing a single claimant (rather than claim) identifier across all forms of personal injury insurance could allow data linking across motor accidents and workers compensation claims, which could provide additional system benefits, such as better enabling an understanding of the full dispute resolution journey (from injury to claim to dispute). It could also help identify system ‘pain points’ and therefore assist in developing measures to prevent disputes or resolve them earlier, and assist in preventing fraud.

5.3 Commutation, or lump sum exit from the scheme

Commutation is currently restricted to workers who meet certain preconditions, including permanent impairment of at least 15%. SIRA must certify that these preconditions have been met. Some other jurisdictions permit more lump sum settlements than NSW. For example, in Western Australia there were around 7,500 in 2014-15, compared to 58 in NSW in 2015.

While it is acknowledged there are differing views on whether commutation is a dispute prevention measure or an issue that relates to benefits more broadly, many stakeholders expressed support for expanding the grounds for workers to commute their rights under the scheme and take a lump sum payment as, in their view, it allows workers to exit the system on acceptable terms, and focus on returning to health and work.

However, payment of a lump sum can affect entitlements from other insurance schemes such as National Disability Insurance Scheme or National Injury Insurance Scheme. This may limit the number of people who could benefit from any expansion of commutation rights.

There are also concerns that workers may have ongoing needs (including some which may not have been previously anticipated) which the lump sum could be insufficient to cover. In the case of medical needs, these may end up being met by the public health system instead of the workers compensation system, or the worker may not have access to the required treatment at all.
5.4 Simplify insurers’ notices to claimants

Under the legislation, insurers are required to use separate types of notices to claimants about decisions related to a single claim depending on whether the decision relates to a work capacity decision or liability decision. The Law and Justice Committee also found that the length and complexity of these notices made them incomprehensible to the average person. This finding was supported by numerous stakeholders who suggested these notices could only be understood with the assistance of a lawyer. According to a number of stakeholders, a single form written in plain English would assist injured workers to understand the outcome of their claim, and how to proceed should they wish to dispute the decision.

5.5 Provide simpler, clearer public information about dispute resolution options and processes

A key finding of the claimant research study was that the system needed to be more user friendly and that more information about the pathways available would have helped in accessing the system and reducing anxiety about what lay ahead.

Face-to-face and telephone enquiry services should be retained, as DFSI’s research found that some claimants do not feel comfortable accessing online services.

Feedback from stakeholders also suggested that information provision to employers could be improved. Many employers have a limited understanding of the dispute resolution process and the impact on their premiums, and that improved responses to claimants and employers could improve their experience. The claimant support service could initiate contact with employers as well as claimants, where appropriate. Contact with employers could, for example, provide them with information about the process and tips on how to support the injured worker during the claim and return to work process.

► Should any of these options for preventing disputes be implemented? Which one/s and why?
► Can you suggest any other ways to prevent disputes?
6. Options to reform the dispute resolution system

The review has found that a one stop shop providing the dispute management and resolution functions would be:

- more efficient – allowing all disputes associated with a claim to be considered together
- clearer and simpler for the parties – there will be only one body for considering disputes
- provide greater consistency in how disputes are handled – all workers compensation disputes will be handled by the same body.

However, simply establishing a one stop shop will not on its own necessarily lead to significant improvements to the current system and can bring its own risks\(^1\). To ensure that a one stop shop will deliver the intended benefits, it would need to be delivered in conjunction with other refinements to provide a better experience for all users.

Better promotion of claimant support services would help more claimants access support and information, and improve their experience during a difficult process (possibly enhancing their health and return to work outcomes), and can encourage the prevention and early resolution of disputes. A proactive model could be targeted at claimants with more complex or disputed claims – with each of these claimants receiving a telephone call from a single claimant support agency, asking if they need any information or assistance, and providing ongoing support as needed. Additional, more tailored claimant support could then be provided if required, including helping a worker to understand the process and inquire about insurer decisions before lodging a complaint or a formal dispute.

Legal support, for matters that have not been resolved through claimant support would continue to be delivered by lawyers with expertise in personal injury law. However, with increased focus on claimant support, it is anticipated that there would be less need for legal support.

Finally, system oversight should be independent and separate from the delivery of dispute resolution services to enable the oversight body to impartially assess the operation of the scheme.

---

\(^1\) See for example Cosmo Howard’s 2017 (ANZSOG) review of government service integration and putting one stop shops in practice highlights the complexities, costs and risks of the one stop shop approach.
Four reform proposals, outlined in the table below have been developed for comment. They are presented in order of least to most change to the current arrangements.

Options 1 – 3 could be relatively quickly implemented (i.e. completed within 12 months of the passage of legislation) and would address immediate needs in the system. Option 4 is in effect an extension of option three, taking more steps towards consolidating all personal injury dispute resolution. As a result, it has a longer implementation timeframe i.e. it would be completed within 24 months of the passage of legislation.
<table>
<thead>
<tr>
<th>Model</th>
<th>Claimant support</th>
<th>Legal support</th>
<th>Dispute management and resolution</th>
<th>System oversight</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td><strong>One stop shop</strong></td>
<td>Status quo: 1. Complaints about insurers handled by WIRO; and 2. Claimants can also use SIRA’s helpline</td>
<td>Status quo: ILARS, delivered by WIRO</td>
<td>One stop shop for formal dispute resolution, with some process and technology improvements (delivered by WCC) supported by a single, centralised online portal bringing together all scheme bodies.</td>
</tr>
<tr>
<td>2</td>
<td><strong>One stop shop, with more focused claimant and legal support</strong></td>
<td>An expanded service delivered by WIRO, including proactive support for complex claims</td>
<td>A more targeted ILARS, delivered by: 1. WIRO; or 2. SIRA</td>
<td>One stop shop for formal dispute resolution with more process improvements (delivered by WCC) supported by a single, centralised online portal bringing together all scheme bodies.</td>
</tr>
<tr>
<td>3</td>
<td><strong>One stop shop, with increased CTP consistency</strong></td>
<td>An expanded model for claimant support, delivered by SIRA, including proactive support for complex claims</td>
<td>More targeted ILARS managed by SIRA moving to consistency with CTP approach over time</td>
<td>One stop shop for formal dispute resolution, with greater process and technology improvements (delivered by WCC) supported by a single, centralised online portal bringing together all scheme bodies.</td>
</tr>
</tbody>
</table>
### 6.1 Option 1 - one stop shop

<table>
<thead>
<tr>
<th>Model</th>
<th>Claimant support</th>
<th>Legal support</th>
<th>Dispute management and resolution</th>
<th>System oversight</th>
</tr>
</thead>
<tbody>
<tr>
<td>One stop shop</td>
<td>Status quo:</td>
<td>Status quo:</td>
<td>One stop shop for formal dispute</td>
<td>Status quo:</td>
</tr>
<tr>
<td></td>
<td>1. Complaints</td>
<td>ILARS,</td>
<td>resolution, with some process and</td>
<td>SIRA, WIRO, L&amp;J</td>
</tr>
<tr>
<td></td>
<td>about insurers</td>
<td>delivered by</td>
<td>technology improvements (delivered</td>
<td>Committee, NSW Ombudsman</td>
</tr>
<tr>
<td></td>
<td>handled by WIRO</td>
<td>WIRO</td>
<td>by WCC) supported by a single,</td>
<td></td>
</tr>
<tr>
<td></td>
<td>and</td>
<td></td>
<td>centralised online portal</td>
<td></td>
</tr>
<tr>
<td></td>
<td>2. Claimants can</td>
<td></td>
<td>bringing together all scheme</td>
<td></td>
</tr>
<tr>
<td></td>
<td>also use SIRA's</td>
<td></td>
<td>bodies.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>helpline</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Option 1 makes the minimum essential reform to the dispute resolution system – creating the one stop shop for workers compensation dispute resolution (in the current WCC) and providing a single online portal for claimants to access all scheme bodies and their dispute resolution-related functions. This model deals with the urgent system changes needed while allowing for the subsequent implementation of further reforms, and potentially broader workers compensation.
legislative changes to reduce complexity. It also allows for consideration of a consolidated personal injury model in the longer term.

In Options 1-3, the single dispute resolution body is an independent tribunal, as claimant research identified that this is important for maintaining confidence in the system. There is also general stakeholder support for a dispute resolution body that is fully independent of Government.

SIRA’s Merit Review Service has recently launched its online dispute management portal where claimants, insurers and their representatives can submit applications, responses, and supporting documents for reviews of work capacity decisions, and track the progress of the dispute online. The WCC currently provides an online lodgement facility that enables digital submission of applications and supporting material for disputes. Bringing these approaches together with a single front end, and expanding them to other scheme bodies, will make it easier for people to engage with the dispute resolution system and streamline the dispute resolution process.

Designed around user needs, it would enable claimants to:

- access factual information
- lodge applications
- obtain supporting documents
- review the other parties’ documents
- obtain advice and updates from a case manager
- schedule meetings
- participate in telephone and video conferences
- track the progress of their dispute
- receive updates on the status of their application.

It would provide a single point of access to all service providers involved and bring together all functions of the dispute resolution system, even if they are provided by different bodies. In that sense, the dispute resolution one stop shop would be complemented by a virtual one stop shop for information and processes.

An online portal will also enable better and more consistent collection of data which will allow opportunities for scheme improvements to be more readily identified and more efficiently addressed.

Overall, Option 1 would significantly simplify the pathway for formal disputes, utilising the expertise of existing players and minimising disruption and risk. However, it would not address many of the issues raised by claimants in the qualitative research, such as the need for more support to help
manage the dispute resolution process. Also, it does not address overlapping roles in the claimant support or system oversight functions.

6.2 Option 2 - one stop shop, with more focused claimant and legal support

<table>
<thead>
<tr>
<th>Model</th>
<th>Claimant support</th>
<th>Legal support</th>
<th>Dispute management and resolution</th>
<th>System oversight</th>
</tr>
</thead>
<tbody>
<tr>
<td>One stop shop, with more focused claimant</td>
<td>An expanded, service delivered by WIRO, including proactive support for complex claims</td>
<td>A more targeted ILARS, delivered by: 1. WIRO; or 2. SIRA</td>
<td>One stop shop for formal dispute resolution with more process improvements (delivered by WCC) supported by a single, centralised online portal bringing together all scheme bodies.</td>
<td>SIRA, L&amp;J Committee, NSW Ombudsman</td>
</tr>
<tr>
<td>and legal support</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Option 2 builds on the one stop shop and a single online portal as proposed in Option 1, with the addition of more claimant support.

Option 2 expands WIRO’s current insurer complaints handling into a claimant support service, including proactive support for claimants with complex claims. Where appropriate, employers would also be contacted proactively, with information about the process and tips for supporting injured workers. This service would continue to resolve complaints and endeavour to bring claimants, insurers and employers together to resolve disputes and disagreements before they escalate. This proposal responds to the clear message of the claimant research that more support and assistance is required, as well as the need for more information for employers.

This option provides for WIRO to keep management of ILARS or for it to be operated by SIRA as a further consolidation of scheme roles. As well, ILARS would be reviewed with a view to identifying ways to reduce costs, which may be possible following the introduction of the broader improvements to the system suggested in this paper (such as expanded claimant support, which may reduce the need for some legal support, and improve data collection and analysis across the system).

To simplify and clarify responsibilities in system oversight, this option removes WIRO’s function under s27(c) of the Workplace Injury Management and Workers Compensation Act 1998 to report to the Minister on the operation of the Workers Compensation Acts, or for the Minister to ask WIRO to report, as this function has not been used to date. This is a legislative clarification to reflect...
current practice and clarify responsibilities. It is also unusual for a body with service delivery functions in a scheme to also hold a quasi-ombudsman oversight role in relation to that scheme. This change seeks to remove that potential conflict of interest. Another option might be to amend the legislation to allow the Minister to ask the Scheme Regulator, the Secretary of DFSI or an independent person to inquire into and report on the operation of the Workers Compensations Acts as required.

In Option 2 (and Option 3 below), the portal proposed in Option 1 could potentially be augmented by further technology developments such as providing parties with access to online dispute resolution tools, and possibly the use of data analytics to enable the triaging of matters into appropriate dispute resolution streams. This would expedite the dispute management process, leading to an improved experience for claimants.

6.3 Option 3 - one stop shop, with increased CTP consistency

<table>
<thead>
<tr>
<th>Model</th>
<th>Claimant support</th>
<th>Legal support</th>
<th>Dispute management and resolution</th>
<th>System oversight</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>One stop shop, with increased CTP consistency</strong></td>
<td>An expanded model for claimant support, delivered by SIRA, including proactive support for complex claims</td>
<td>More targeted ILARS managed by SIRA moving to consistency with CTP approach over time</td>
<td>One stop shop for formal dispute resolution, with greater process and technology improvements (delivered by WCC) supported by a single, centralised online portal bringing together all scheme bodies.</td>
<td>SIRA, L&amp;J Committee, NSW Ombudsman</td>
</tr>
</tbody>
</table>

Option 3 takes a step further from Option 2 by moving all of WIRO’s claimant support and legal support services to SIRA. The main benefit of this model is consistency and resource efficiency, as SIRA is already delivering claimant support for workers compensation, and legal support would be transitioned to the same approach for CTP. Integration of claimant and legal support within SIRA is also likely to improve data collection and information flows within the system, and enable SIRA to more readily perform its regulatory and system oversight functions. The overall scheme would be also simplified with fewer different bodies in the scheme, and SIRA undertaking more roles. However, the workers compensation system would lose the independent contribution of WIRO in this option, with its current functions performed by SIRA (or another independent body in the case of the oversight functions).
The claimant support service would use the same approach outlined in Option 2. As the CTP model for the legal support service is still being developed, and is operating in a different legislative context to workers compensation, Option 3 would involve a transition from ILARS to the CTP legal support model over time.

6.4 Option 4 - consolidated personal injury dispute resolution model

<table>
<thead>
<tr>
<th>Model</th>
<th>Claimant support</th>
<th>Legal support</th>
<th>Dispute management and resolution</th>
<th>System oversight</th>
</tr>
</thead>
<tbody>
<tr>
<td>Consolidated personal injury dispute resolution model</td>
<td>An expanded model for claimant support (delivered by SIRA), including proactive support for complex claims</td>
<td>CTP model (i.e. “costs follow the event”)</td>
<td>Workers compensation and CTP dispute resolution consolidated by delivering them either: 1. In SIRA’s Dispute Resolution Service, potentially with separate divisions for WC and CTP; OR 2. Via a new personal injury tribunal (or an expanded WCC), potentially with separate divisions for WC and CTP.</td>
<td>SIRA, L&amp;J Committee, NSW Ombudsman</td>
</tr>
</tbody>
</table>

Option 4 integrates the workers compensation and CTP dispute resolution systems into a single system.

This model builds on the changes in Option 3 and takes the next steps to full personal injury dispute resolution consolidation by making further changes to the legal support, and dispute management and resolution functions.

In terms of legal support, ILARS would be abolished and instead the dispute resolution body (either a new tribunal or SIRA’s Dispute Resolution Service) would be able to award legal costs. This means that legal costs would be recoverable by claimants at the discretion of the dispute resolution body (as was the case in the pre 2012 workers compensation system).

In terms of dispute management and resolution, two options are provided. Either all workers compensation dispute resolution would transition to SIRA’s Dispute Resolution Service (used for CTP), or a new independent personal injury dispute resolution tribunal would be established, bringing together the WCC and the CTP jurisdiction of SIRA’s DRS (this could potentially be
achieved by expanding the role of the WCC to go beyond workers compensation disputes). Under both alternatives it is likely that there would be separate divisions for workers compensation and CTP, to maintain expertise, but with consistent processes and approaches to resolving disputes across both.

An integrated dispute resolution system could provide a more consistent experience for claimants, improve accessibility for claimants and access to justice through a single gateway for users, increase resource efficiency and improve information sharing.

Implementation for Option 4 would commence six months after the passage of the legislation and be completed within 24 months. This option involves more change so it would take longer to fully implement than Options 1-3, and may need to be implemented in stages depending on the type of dispute resolution body chosen.

This staged approach would also give time for the new CTP dispute resolution system to commence as planned, and for additional reforms involving the CTP system to be communicated to claimants and other stakeholders. It would also enable evaluation of the effectiveness of the new CTP dispute resolution system prior to implementing an integrated system with workers compensation disputes.

► Which option do you prefer and why?
► Are there other options for a one stop shop you would prefer? If yes, what are they and why?
7. Options for broader system improvements to improve dispute resolution processes

In order to support and complement the establishment of a one stop shop, improve dispute resolution processes, and improve claimant experience, DFSI is seeking feedback on a range of other customer-focused improvements that could be made regardless of the one stop shop model chosen. In this section various options are suggested for consideration along with focus questions to help guide your feedback.

7.1 Using digital solutions to improve the dispute resolution process

The four main options above would all be accompanied by digital reforms to provide a single web-based interface to link all scheme bodies and functions (even if they are provided by different bodies). For example, a digital one stop shop could enable claimants to access information and ask questions, lodge complaints, lodge dispute applications, review the other parties’ documents, obtain advice and updates from a case manager, schedule meetings, participate in telephone and video conferences, track the progress of their dispute and receive updates on the status of their application.

This is intended to respond to problems that were identified through claimant research. The study found that the system needed to be more ‘user friendly’ to navigate and that more information about the pathways available would help in accessing the system and reducing anxiety about what lay ahead. The four options above propose to bring together the current approach of SIRA’s Merit Review Service online dispute management portal and the WCC’s online lodgement facility and to expand them to other scheme bodies. The aim of this is to make it easier for people to engage with the dispute resolution system, streamline the dispute resolution process, save people time and effort, and reduce the stress involved in an already difficult time.

These digital reforms would also enable better collection and analysis of system data, which will allow opportunities for scheme improvements to be more readily identified and addressed. This in turn is also likely to present opportunities to improve the dispute resolution process by developing more sophisticated triaging techniques – for example, understanding which disputes are more likely to be settled early could direct them straight to an expedited process; or providing a special pathway with targeted support for high complexity claims.
7.2 Insurers to conduct internal review of all disputed decisions

The experience with the resolution of disputed work capacity decisions suggests that insurer internal review can help resolve disputes early (around 40% of insurer internal reviews of work capacity decisions result in a different decision, according to data provided by SIRA).

It is proposed to retain internal reviews for disputed work capacity decisions, but consideration could also be given to extending this requirement to all disputed decisions by insurers. In an internal review, another officer of the insurer, who was not involved in the original decision reviews the matter afresh, and can seek or receive additional information as part of this review. Further to this, it could be made compulsory for insurers to have an internal review mechanism, as well as a complaints handling function, that complies with the Australian Standards.

7.3 Less information required to commence a formal dispute

The NSW workers compensation dispute resolution system is ‘front-end loaded’, meaning all information to be used in the dispute resolution process needs to be provided and exchanged early in the process.

This ensures that as far as possible all relevant facts are shared at the beginning of the process and the disputed elements are ‘crystallised’ early.

An alternative option would be something like Western Australia’s ‘low doc’ approach to the early stages of a dispute. Matters can go to conciliation without requiring lodgement and sharing of all the documents, as for example, is required in NSW. If the matter is resolved, costs and time are saved. If it is not resolved it proceeds to arbitration and the documents are then required to be filed. There is a view that by enabling matters to be conciliated as soon as possible, in WA many disputes can be resolved before they develop further. Conversely, there could be circumstances
where a matter cannot be resolved in the early stages and obtaining further documentation may delay progression of the matter.

Do you think removing the requirement for full documentation before conciliation would be beneficial? Please explain why or why not.

7.4 Options for procedural improvements in dispute resolution

Regardless of the model chosen for the one stop shop for dispute resolution, there are options for improvements that will make the process quicker, cheaper and less adversarial. Options include:

- separating the conciliation and arbitration stages to encourage settlement at conciliation. This could also enable separation of the roles of conciliator and arbitrator, with benefits for perceptions of procedural fairness
- allowing more mediation or conciliation at more points in the process – for example, Western Australia’s ‘pre-arbitration conference’ which allows parties to participate in mediation one month before the set arbitration date, has been successful in resolving cases
- increasing the use of ‘fast track’ assessments. The expedited assessment pathway in the WCC currently accounts for only around 1.5% of the disputes managed by the WCC, and is tightly controlled in the legislation. More flexibility (complemented by more advanced triaging) could increase their use
- Removing section 65(3) of the 1987 Act (and amend related provisions), which requires the Commission to refer for an assessment by an Approved Medical Specialist first before determining a permanent impairment dispute, could reduce the cost and time to resolve disputes with a permanent impairment component by enabling arbitrators to determine at the one time all issues in dispute; and facilitate settlement negotiations between the parties. The legislation could still allow arbitrators the option of referring a permanent impairment dispute to an AMS for assessment where necessary.

These are just some of the many options available.

Should any of these proposals for process improvements be implemented? Which one/s and why?

Can you suggest any other process improvements?
8. Next steps

Have your say

DFSI is seeking comments, feedback and ideas on how to improve the dispute resolution process in NSW to achieve the Government’s aspiration of a workers compensation system that:

- helps the parties reach agreement and resolve issues before they escalate into formal disputes
- supports claimants throughout the process to aid, rather than hinder, their return to work and good health.

DFSI is particularly interested in hearing your responses to the options canvassed and the questions posed in this discussion paper. You are also invited to raise any additional issues for consideration that have not been covered in this paper.

Your submissions can be made using one of the following options:

- Complete a survey via the Government’s Have Your Say website: https://www.nsw.gov.au/improving-nsw/have-your-say/
- Email: disputeresolution@finance.nsw.gov.au with your comments.
- Phone: 02 9372 9276
- Mail: Dispute Resolution Review
  Central Policy Office
  Department of Finance Services and Innovation
  2-24 Rawson Place, Sydney NSW 2000

Submissions close at 5pm on Friday 16 February 2018.
## Appendix 1: Reference Group members

<table>
<thead>
<tr>
<th>Stakeholders</th>
<th>Contact name</th>
</tr>
</thead>
<tbody>
<tr>
<td>icare</td>
<td>John Nagle, Group Executive, Workers Insurance</td>
</tr>
<tr>
<td></td>
<td>Vivek Bhatia, Chief Executive Officer</td>
</tr>
<tr>
<td>State Insurance Regulatory Authority</td>
<td>Cameron Player, Executive Director, Dispute Resolution Service</td>
</tr>
<tr>
<td></td>
<td>Carmel Donnelly, Acting Chief Executive</td>
</tr>
<tr>
<td>Workers Compensation Commission</td>
<td>His Hon. Judge Greg Keating, President</td>
</tr>
<tr>
<td></td>
<td>Rodney Parsons, Registrar</td>
</tr>
<tr>
<td>Workers Compensation Independent</td>
<td>Kim Garling, Workers Compensation Independent Review Officer</td>
</tr>
<tr>
<td>Review Office</td>
<td>Roshana May, Director, Independent Legal Assessment Review Service</td>
</tr>
</tbody>
</table>
## Appendix 2: List of stakeholders consulted by DFSI

<table>
<thead>
<tr>
<th>Stakeholder</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Employee and employer groups</strong></td>
</tr>
<tr>
<td>Australian Workers Union</td>
</tr>
<tr>
<td>Construction, Forestry, Mining and Energy Union</td>
</tr>
<tr>
<td>Teachers Federation NSW</td>
</tr>
<tr>
<td>Unions NSW</td>
</tr>
<tr>
<td>NSW Business Chamber</td>
</tr>
<tr>
<td><strong>Insurance</strong></td>
</tr>
<tr>
<td>Insurance Council of Australia</td>
</tr>
<tr>
<td>NSW Self-Insurers Association</td>
</tr>
<tr>
<td><strong>Legal</strong></td>
</tr>
<tr>
<td>Australian Lawyers Alliance</td>
</tr>
<tr>
<td>Law and Justice Foundation of NSW</td>
</tr>
<tr>
<td>Law Society of NSW</td>
</tr>
<tr>
<td><strong>Medical</strong></td>
</tr>
<tr>
<td>Australian Medical Association (NSW)</td>
</tr>
<tr>
<td><strong>Other NSW Government</strong></td>
</tr>
<tr>
<td>Department of Justice</td>
</tr>
<tr>
<td>Department of Premier and Cabinet</td>
</tr>
<tr>
<td>Treasury</td>
</tr>
<tr>
<td>SafeWork NSW</td>
</tr>
<tr>
<td>SIRA Board</td>
</tr>
<tr>
<td><strong>Academics</strong></td>
</tr>
<tr>
<td>Dr Genevieve Grant, Senior Lecturer, Faculty of Law, Monash University</td>
</tr>
<tr>
<td>Professor Tania Sourdin, Head and Dean of the Newcastle Law School, University of Newcastle</td>
</tr>
<tr>
<td><strong>Other jurisdictions</strong></td>
</tr>
<tr>
<td>Fair Work Commission</td>
</tr>
<tr>
<td>Accident Compensation Conciliation Service, Victoria</td>
</tr>
<tr>
<td>Department of Justice and Regulation, Victoria</td>
</tr>
<tr>
<td>WorkCover Western Australia</td>
</tr>
<tr>
<td>Workplace Safety and Insurance Board (Ontario, Canada)</td>
</tr>
<tr>
<td>WorkSafe Victoria</td>
</tr>
<tr>
<td><strong>Digital design and technology service providers</strong></td>
</tr>
<tr>
<td>Portable</td>
</tr>
<tr>
<td>Deloitte</td>
</tr>
</tbody>
</table>
### Appendix 3: Data tables

#### Dispute Pathway

<table>
<thead>
<tr>
<th>Dispute Pathway</th>
<th>FY of registration/application</th>
</tr>
</thead>
<tbody>
<tr>
<td>WCC - Liability/Medical Dispute Pathway</td>
<td>8,364</td>
</tr>
<tr>
<td>WCC - WID Dispute Pathway</td>
<td>495</td>
</tr>
<tr>
<td>WCC - Expedited Dispute Pathway</td>
<td>702</td>
</tr>
<tr>
<td>WCC - Arbitrator Appeal</td>
<td>129</td>
</tr>
<tr>
<td>WCC - Medical Appeal</td>
<td>551</td>
</tr>
<tr>
<td>WCC - Other</td>
<td>502</td>
</tr>
<tr>
<td>WCD dispute pathway</td>
<td>0</td>
</tr>
</tbody>
</table>

**Figure 3 data table**

#### Informal 'Dispute' Pathway

<table>
<thead>
<tr>
<th>Informal 'Dispute' Pathway</th>
<th>FY of registration/application</th>
</tr>
</thead>
<tbody>
<tr>
<td>SIRA Customer Experience Centre (CEC) Complaints</td>
<td>0</td>
</tr>
<tr>
<td>WorkCover Claims Assistance Services (CAS) matters</td>
<td>4,394</td>
</tr>
<tr>
<td>WIRO Complaints</td>
<td>0</td>
</tr>
<tr>
<td>ILARS - Resolved prior to WCC</td>
<td>0</td>
</tr>
<tr>
<td>ILARS - withdrawn/not proceeding/other</td>
<td>0</td>
</tr>
</tbody>
</table>

**Figure 4 data table**
### Figure 5 data table

<table>
<thead>
<tr>
<th>Payment Type</th>
<th>FY of payments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal - Claimant</td>
<td>$81.6 M</td>
</tr>
<tr>
<td>Legal - WIRO</td>
<td>$0.0 M</td>
</tr>
<tr>
<td>Legal - Insurer</td>
<td>$50.4 M</td>
</tr>
<tr>
<td>Admin - WCC</td>
<td>$29.5 M</td>
</tr>
<tr>
<td>Admin - WIRO</td>
<td>$0.0 M</td>
</tr>
<tr>
<td>Admin - MRS</td>
<td>$0.0 M</td>
</tr>
</tbody>
</table>

### Figure 6 data table

<table>
<thead>
<tr>
<th>Payment Type</th>
<th>FY of payments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Scheme - Weekly</td>
<td>$902.3 M</td>
</tr>
<tr>
<td>Scheme - Medical</td>
<td>$631.9 M</td>
</tr>
<tr>
<td>Scheme - S66/67</td>
<td>$207.7 M</td>
</tr>
<tr>
<td>Scheme - Damages/Common Law</td>
<td>$227.4 M</td>
</tr>
<tr>
<td>Scheme - Investigation</td>
<td>$90.2 M</td>
</tr>
<tr>
<td>Scheme - Legal</td>
<td>$126.9 M</td>
</tr>
<tr>
<td>Scheme - Other</td>
<td>$88.5 M</td>
</tr>
<tr>
<td>Legal costs as a % of total scheme costs</td>
<td>5.6%</td>
</tr>
</tbody>
</table>

### Figure 7 data table

<table>
<thead>
<tr>
<th>Dispute Pathway</th>
<th>FY of registration/application</th>
</tr>
</thead>
<tbody>
<tr>
<td>WCC - ARD (Form 2)</td>
<td>119</td>
</tr>
<tr>
<td>WCC - WID (Form 11C)</td>
<td>68</td>
</tr>
<tr>
<td>WCC - Expedited Pathway (Form 1/6)</td>
<td>30</td>
</tr>
<tr>
<td>-----------------------------------</td>
<td>-----</td>
</tr>
<tr>
<td>WCC - Medical Appeal (Form 10)</td>
<td>101</td>
</tr>
<tr>
<td>WCC - Arbitrator Appeal (Form 9)</td>
<td>100</td>
</tr>
</tbody>
</table>

Figure 7 data table