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Office of the President

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Our ref: KS-ACTLC

Committee Secretary
Economics and Governance Committee
Parliament House
George Street
Brisbane Qld 4000

By email: egc@parliament.qld.gov.au

Dear Sir/Madam

Motor Accident Insurance Amendment Bill 2019

Thank you for the opportunity to provide comments on the Motor Accident Insurance Amendment Bill 2019 (the bill). Queensland Law Society (QLS) appreciates being consulted on this important legislation.

This response has been compiled with the assistance of the Accident Compensation and Tort Law Committee who have substantial expertise in this area.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. The QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

QLS welcomes the bill which aims to put a stop to claim farming and "protect the affordability and stability" of Queensland's statutory insurance scheme (scheme). The Society has advocated for legislative reform for the past few years with respect to this issue and has engaged with the Motor Accident Insurance Commission (the Commission) and the government in this regard.

We take the opportunity to thank the government and the Commission for providing QLS with various opportunities for consultation during the early stages of the legislative process.

1. Key issues

Having reviewed the bill, we raise the following key issues:

a) QLS supports:

- a. the requirement for the law practice and the claimant to sign certificates swearing that the claim did not arise in contravention of provisions in section 74(1) or (2) or 75, that is, that it did not originate from claim farming;
- b. the extraterritorial application of the 50/50 rule; and

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- c. strengthening the position on the giving or receiving of consideration for claim referrals;
- b) However, in supporting the intent of the bill, the Society also advocates for the maintenance of the fundamental right to remain silent and that cornerstone principles such as legal professional privilege and protection against self-incrimination be preserved.

The concern the Society holds for the proposed legislation which touches on these issues is amplified in circumstances where "authorised persons" (under Part 5A) and "investigators" (under Part 5B) have widened and significant statutory powers where there is no detail of the proposed training or regulation of these persons.

2. Preliminary comments

We note there may be a divergence of views amongst practitioners about the drafting of the bill and its scope.

In particular, we understand there is some concern about the proposed sections 74 and 75 and the potential to proscribe longstanding and otherwise legitimate relationships between law practices, practitioners and community organisations. These concerns arise from a potential interpretation of the proposed legislation. Although QLS does not consider this potential interpretation likely, particularly in relation to general annual sponsorships of organisations, or organisations' events by law practices, we recognise that proscribing conduct (unintentionally or otherwise), by legal practices that provide essential support to community organisations should be avoided. For example, voluntary work provided by lawyers to a community legal centre or receipt of legal costs by a legal practice from a referral from a community legal centre.

We therefore propose some amendment to the drafting in section 74(4) which we believe will allay concerns about the inadvertent capturing of otherwise legitimate and important arrangements. In particular, we suggest the definition of 'consideration' be amended to the effect that:

Consideration means a fee or other benefit but does not include:

1. a gift, other than money, or hospitality if the gift or hospitality has a value of \$200.00 or less; or
2. the provision of pro bono legal services by a supervising principal or an associate of a law practice to a 'community legal service'; or
3. legal costs a law practice is entitled to charge and recover in relation to the claimant's claim; or
4. a fee or other benefit paid for the public good, but not paid for a specific claim referral, by a law practice to:
 - a. a community legal service;
 - b. an entity registered under the Australian Charities and Non-For-Profits Commission Act 2012 (Cth); or
 - c. an industrial organisation.

(5) In this section –

community legal service see Legal Profession Act 2007, schedule 2.

pro bono see Legal Profession Act 2007, schedule 2.

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industrial organisation as defined under the Industrial Relations Act 2016, schedule 5.

Ultimately there is a need to protect the public from claim farmers and to maintain the ethical standards of practitioners. Our reading of the provision is that it is targeted at ensuring that claims did not originate from a claim farmer and that it is in line with solicitor's obligations under Chapter 3, Part 1 of the *Personal Injuries Proceedings Act 2002*.

We accept that the proposed legislation requires a careful balancing exercise to limit any potential avenue that might foreseeably be exploited by practitioners who participate in claim farming. However, we respectfully submit that the government's policy intent should be clearly directed to preserving legitimate business practices including supporting of community organisations.

Finally, we submit that a reasonable period should also be allowed prior to commencement of the legislation and upon implementation, it be subject to regular reviews to ensure there is an appropriate balance struck between eliminating claim farming practices and any unintended impacts on practitioners and/or the community. QLS would be grateful to be involved in any ongoing consultation or review processes.

3. Specific comments on the bill

Clause 5

- *Proposed amendment to section 10(1)*

With respect to proposed section 10(1), we have some concern about the exercise of a delegated legislative power without the scrutiny of the Legislative Assembly in expanding the Commissioner's functions to '*establish and review standards about the proper management of claims with which licensed insurers must comply*'.

This issue is compounded by the prescribing of compliance with the standards as a condition of licence for an insurer (clause 30 of the bill), an increase in penalty units for non-compliance (clause 13) and a retrospectivity aspect provided by clause 5, subsection (7) (amendment of s 10).

We submit that any standard should be created after adequate stakeholder consultation and apply to claims on or after the date the standards are published.

Clause 6

Division 2A Law practice certificates generally and certificates before notice of claim

- *Proposed section 36B Meaning of law practice certificate*

Proposed subsections 36B(2)(a)(i) and (ii) should be amended to include the giving and/or receiving of consideration in the future, that is, the principal and each associate of the law practice "will not give" and "will not receive" consideration for a claim referral.

We also suggest additional wording to confirm that the claimant has been advised to seek independent legal advice or information from the Commission regarding the proposed section 36B certificate.

- *Proposed section 36C Supervising principal cannot complete law practice certificate or notice*

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For clarity, section 36C(2)(b) should be amended by replacing the word "lawyer" with "associate" as defined in section 4 of the bill.

We also propose an additional subsection 36C(3) as follows:

"(3) Where another principal or associate signs a section 36AA certificate under this section, they are taken to have done so with the knowledge, authority and approval of the supervising principal."

- *Proposed section 36E Law Practice referral through sale of business*

QLS submits that this provision should clearly state that where the "new practice" makes subsequent enquiries which reveal activities of the "current practice" which may amount to offences under proposed sections 74 or 75, the new practice will not be guilty of any offence nor precluded from recovering professional fees or outlays from the claimant. However the new practice ought to be required to report such findings to the Commission.

To encourage compliance with 36E(3), it would seem appropriate that the same penalty be applied for non-compliance as provided by in subsection (2), i.e. a maximum penalty of 300 penalty units.

Clause 12

QLS is strongly of the view that the claimant should also be required to complete a certificate on settlement or judgment of the matter. We believe this will be when the claimant or plaintiff will feel most comfortable in revealing the source of the claim referral.

Clause 15

Part 5AA Referrals of claims and contact to solicit or induce claims

- *Proposed section 74 Giving or receiving consideration for claim referrals*

QLS considers this provision is consistent with the prohibition of any payment or the seeking of any payment for the soliciting or inducing of a potential claimant to make a claim contained in the *Personal Injury Proceeding Act 2002*.

We note the position taken by other jurisdictions who have sought to address the issue of claim farming including; the UK who legislated to prohibit referral fees in claims (for damages following personal injury or death) in the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (Sections 56-60) and Western Australia where practitioners must comply with Regulation 18(5) of the *Legal Profession Conduct Rules (2010)* which states that a practitioner must not

"give or agree to give an allowance in the nature of an introduction fee or spotter's fee to any person for introducing professional business to the practitioner" or "receive or agree to receive a similar allowance from any person for introducing or recommending clients to that person."

We refer also to a recent decision of the Civil and Administrative Tribunal New South Wales in a disciplinary matter regarding a solicitor's payment of "commissions" where the Law Society of NSW "*relied on the common law principle in Allinson v General Council of Medical Education and Registration [1894] 1 QB 750 in that the Solicitor's conduct in paying a*

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commission constituted disgraceful and dishonourable conduct and would have been regarded as such by his peers of competence and repute"[18]¹.

We accept that the proposed legislation requires a careful balancing exercise to limit any potential avenue that might foreseeably be exploited by practitioners who participate in claim farming. However, the Society advocates for the additional drafting proposed at point 2 above to ensure legitimate and longstanding donations and support of community legal services and organisations can continue.

QLS considers that the proposed section 74(3) should also require the "current practice" that is selling all or part of the law practice's business to the "new practice", to advise the claimant of their right to request an itemised bill and to apply to the court for a costs assessment of the current practice's bill. The reasoning for the proposed amendment is to cover circumstances where the legal costs are more than what would be anticipated at the point of sale/purchase (i.e. and potentially including an amount for the "referral").

- *Proposed section 75 Approach or contact for the purpose of making a claim*

QLS submits that proposed section 75(3)(b)(i) should be amended to exclude application of this provision in circumstances where the first person is requested to approach or contact the second person by the spouse, relative or friend of the second person and the first person reasonably believes the second person will not object to the approach or contact.

- *Proposed section 76 Responsibility for acts or omissions of representative*

Section 76 seeks to ascribe "responsibility to a person (for example, a corporation or a partner in a law practice) for the acts or omissions of the person's representative within the scope of the representative's actual or apparent authority".² However, the effect of this provision is also to reverse the prosecution's onus of proof with respect to the fault (s76 (2)) and physical elements (s76(3)) of the claim farming offences in sections 74 and 75.

Our legal system generally requires that the person bringing the claim or charge prove fault. The commitment not to reverse the onus of proof is a fundamental legal principle which should not be breached without appropriate justification. We understand from the Explanatory Notes that the policy intent of this reversal is to hold persons responsible for the serious conduct of their representatives (with respect to an offence under section 71(1) or (2) or 75), if the conduct is within the representative's actual or apparent authority.³ We also note the defence provided in subsection (3) where a person is able to prove "the person could not, by the exercise of reasonable precautions and proper diligence, have prevented the act or omission".

It is important to emphasise the Society's general opposition to any laws which undermine established legal processes which in our view, are the cornerstone principles that support a fair and balanced system. We acknowledge however that in these limited and narrow circumstances, the government may consider that the reversal is necessary to meet the objective of eliminating these practices.

Lastly, with respect to subsection (4) we are concerned that there is no definition of "partner" or indeed, of "partner of a partnership". The intended scope of the offence provisions is

¹ *Council of the Law Society of NSW v Gurusamy* [2019] NSWCATOD 89.

² Motor Accident Insurance and Other Legislation Amendment Bill 2019, Explanatory notes at p 9.

³ Motor Accident Insurance and Other Legislation Amendment Bill 2019, Explanatory notes at p 10.

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therefore unclear. Clarity on this point is particularly important in the context of the proposed reversal of the onus of proof.

- *Proposed section 77 Additional consequences for law practice*

Where there has been a conviction for contravention of proposed section 74 and 75, either knowingly or recklessly, we submit that the conduct should be "*Conduct capable of constituting unsatisfactory professional conduct or professional misconduct,*" pursuant to section 420(1)(a) of the *Legal Professional Act (Qld)*.

- *Proposed sections 79 Maximum amount of legal costs for claims and 80 Extraterritorial application of part*

We note that proposed section 79 applies the "50/50 rule" set out in section 347(1) of the LPA to a speculative motor accident claim if section 347 does not apply to the law practice.

QLS strongly supports the extraterritoriality application of this part which we believe may "level the playing field" with law practices and practitioners outside of Queensland.

Part 5A

Division 1AA Interpretation

Clause 17

- *Proposed section 87E Production or display of identity card*

With regard to subsection (3) we submit that the following amendment would be appropriate:

(3) For subsection (1), an authorised person does not exercise a power in relation to a person only because the authorised person has entered a place as mentioned in section 87G(1)(b) or (d) unless the authorised person enters the place with the intention of exercising a power in relation to a person.

Division 2 Entry of places by authorised persons

Clause 19

- *Proposed section 87G General power to enter places*

The strong preference of QLS is that entry to places should generally only be exercised with a valid warrant, the consent of a landholder or occupier or following an appropriate notice period. QLS notes that section 4(3)(e) of the *Legislative Standards Act 1992* provides that legislation should generally confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer.

This is particularly the case when the general powers provided for in proposed section 87RA apply if an authorised officer has entered a place under proposed section 87G(1)(d). These powers apply to licensed insurer's premises where no warrant was obtained or consent given and extend to searching any part of the place, filming any part of the place or taking things from the place.

With respect to proposed section 87G(1)(d), QLS considers that it is inappropriate to authorise an unrestricted power of entry simply on the basis that a place is "open" for

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business. An authorised officer should be required to obtain consent and follow the process outlined in Subdivision 2 "Entry by consent". If there is an urgent need for the entry or a reasonable excuse for notice not to be provided, a warrant should be obtained.

In our view, there is the potential for this power to be misused. Further, this general power raises privacy concerns as many businesses including insurers, will be in possession of commercially sensitive, private and confidential information.

Subdivision 3 Entry under warrant

- *Proposed section 87Q Entry procedure*

We are concerned by the implication of proposed section 87Q(3) where "reasonable belief" is very broad and there appears to be no limit on which the authorised person might then enter a place under warrant without complying with the procedure outlined in subdivision (2).

This power should only be expressed once a warrant is obtained.

Division 3 Other authorised person's powers and related matters

Subdivision 2 Seizure by authorised persons

- *Proposed section 87RD Seizing evidence at a place that may be entered without consent or warrant*

As noted above, if consent is not given but there is a reasonable belief that an offence is being committed, the appropriate course in our view, should be that the authorised officer obtains a warrant to seize the required evidence.

Subdivision 5 Other information-obtaining powers of authorised persons

- *Proposed section 87RQ Power to require name and address*

QLS is also concerned at the introduction of a power to require a person's name and address to be provided. This is a compulsive power usually vested in officers of the Queensland Police Service or similar organisations who have rigorous training and are subject to legislative obligations and codes of conduct with respect to such powers.

- *Proposed sections 87RS Power to require information and 87RT Offence to contravene information requirement*

With respect to proposed section 87RS, we do not agree with the breadth of information that might be required by an authorised person in the absence of:

- a) legal advice in relation to the consequences of providing this information; and
- b) the obtaining of a warrant from the court.

Having regard to section 87RT(3) and the broad scope of matters on which information may be requested under proposed section 87RS(1), there may also be unintended consequences in the applicability of the offence in proposed section 87RT.

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Division 4 Miscellaneous provisions relating to authorised persons

Subdivision 2 Compensation and costs of investigation

- *Proposed section 87RW Compensation*

We are concerned by 87RW(6) where a regulation may prescribe the matters that may, or must, be taken into account by the court when considering whether it is just to order compensation.

In our view it should be amended to remove the words "or must" so that a court has discretion as to matters to be taken into account when considering whether it is just to order compensation to a person.

Subdivision 3 Appeals

- *Proposed section 87SH Powers of court appeal*

The Society is particularly concerned with the inclusion of proposed section 87SH(1)(b), which provides that when deciding an appeal against an internal review decision, the court is not bound by the rules of evidence. The common law principles of the rules and the statutory framework established by the Evidence Act 1977 ensures, so far as practicable, that courts act only on evidence that is relevant, reliable and probative. It is unclear why the court should not be bound by the rules of evidence in these circumstances.

The rules of evidence provide an appropriate degree of fairness and certainty for parties during the appeal process. Further, these are cornerstone principles and in our view, there is no justification for their abrogation. This is particularly important given the nature of the investigation powers being afforded to authorised persons under this bill.

Division 6 Information from commissioner of police service

Subdivision 1 Risk to authorised person's safety

- *Proposed section 87VA Confidentiality of criminal history under s 87V*

QLS is concerned about the unlawful or inadvertent disclosure of a person's personal information including details of any criminal history. Therefore we suggest an amendment to subsection (2) as follows:

(2) *The person may use the information, or disclose the information to another person, if the use or disclosure:*

(a) is for the purpose of the other person performing a function under the Act provided that purpose is related to the original offence which formed the basis for the request under section 87V; or...

Subdivision 2 Offence against this Act or National Injury Act

- *Proposed section 87VB Commission's power to obtain criminal history report about offence*

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QLS considers this power is unnecessary and beyond the scope of information which ought to be reasonably requested. It does not require any connection to the offences under the Act or the National Injury Act and in our view, is at risk of being misused.

Part 5B Special investigations

Clause 25

- *Proposed section 87ZA Definitions for part*

We submit that 87ZA (c)(iii) should be narrowed and amended to "a corporation associated with the law practice and the corporation's executive officers in relation to a claim the commission reasonably suspects is connected to a contravention of section 74(1) or (2) or 75."

- *Proposed section 87ZC Appointment of investigator*

We are concerned about the potential scope of subsection (2)(b) in circumstances where "an entity" that may be investigated under section 87ZC(2)(b) may be "prescribed by regulation". In effect, the bill delegates the special investigation power under Part 5B to the Executive by enabling regulations to amend the application or effect of the Act.

Although we note the policy reasoning behind this delegation is due to the *"evolving nature of the claim farming business model"*,⁴ the Society is of the view that given the nature of the offences imposed by the bill, the extent of the investigator's powers should be the subject of legislative scrutiny.

- *Proposed section 87ZE Investigation of related body corporate*

The scope of investigation of a body corporate is wide and does not have the same limitation of "relevant affairs" as provided by proposed section 87ZC (2).

In our view the investigation of related body corporates should only be where the commission reasonably suspects that section 74(1) or (2) or 75 may have been contravened.

- *Proposed section 87ZF Powers of investigators*

We have particular concern about subsection (2) where there appears to be a positive obligation of an investigated person to appear before the investigator for examination on oath or affirmation.

QLS submits that the fundamental right to remain silent must be preserved. We refer for example to section 397 of the *Police Powers and Responsibilities Act 2000 (Qld)* in this regard.

- *Proposed section 87ZH Examination of investigation person or associated person*

We again raise concerns about the requirement under 87ZH(1)(c)(ii) and potential penalty (of 300 penalty units or 2 years imprisonment) where an investigated person or associated person when appearing before an investigator for examination under a relevant requirement, fails to be sworn or to make an affirmation. The fundamental right to remain silent is a cornerstone principle that must be preserved.

- *Proposed section 87ZI Self-incrimination and legal professional privilege*

⁴ Motor Accident Insurance and Other Legislation Amendment Bill 2019, Explanatory notes at p 9.

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We have a number of concerns with this provision. The first is that under proposed section 87ZI 2(a), a person is not excused from answering a question or producing a document that might incriminate them. The second aspect is the purported removal of legal professional privilege under section 87ZI 2(b).

The society has universally taken the position that to promote certainty in the law and access to justice for all individuals that cornerstone principles such as legal professional privilege and protection against self-incrimination be maintained and be interfered with in the rarest of circumstances, and only then, for the most serious of matters that courts or government can be concerned with.

Appropriate protection from self-incrimination is a fundamental legislative principle. It is our submission that the evidential 'limited immunity' granted in proposed subsection 87ZQ does not justify the abrogation. We are also concerned about the impact of the proposed provision on maintenance of legal professional privilege. We submit that proposed section 87ZI(2)(b) should be removed as:

- a) It is an abrogation of the fundamental common law right of legal privilege; and
- b) From a practical perspective, this power is not necessary as initial referral and source documents of a claim are unlikely to be privileged. If a claim for privilege is made, the matter could readily be determined by a court application if required.

For an individual to receive unencumbered and frank advice about legal matters (or preliminary to matters) the relationship between a lawyer and client must be treated as unfettered and sacrosanct. The importance and significance of these issues also applies to the protection against self-incrimination. It is ordinarily only in closely monitored and protected coercive hearings that the shield of protection offered by these two principles is interfered with.

- *Proposed section 87ZJ Failure of person to comply with requirement of investigator*

QLS also has concerns with the drafting of proposed section 87ZJ and the provisions' potential implication in practice, namely:

- a) The requirement for the court to "inquire into the case" under subsection 2. In an adversarial system it is not the role of a judicial officer to conduct any such inquiries;
- b) Secondly, the proposed power to 'punish the person in the same way as if the person had been guilty of contempt of the court' does not specify the nature and type of the contempt offence. For example, whether it is contempt in the face of the court or outside the court, what conduct might constitute such contempt and the type of punishment which might be applied. Contempt is a serious offence and laws of contempt must be carefully balanced between the administration of justice and principles of natural justice including certainty of the law.

In our view, section 87ZJ(2)(b) is an overreach. It is sufficient for the court to have the power to make the order under 87ZJ(2)(a). If the court does make such an order and it is still not complied with, then a contempt argument can be made out/pursued.

- *Proposed section 87ZL Report of investigator*

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We are concerned about the potential implications of publication of an investigator's report on the commission's website (under subsection (5)) in circumstances where an investigated person may not have been convicted of an offence. This should be limited to conviction.

With respect to subsection (6), to protect confidentiality and ensure the report doesn't incriminate the investigated person in any other potential proceeding, we recommend drafting to the effect:

"(6) If an investigator has given a record of an examination under this part to the commission with the report to which the record relates, a copy of the record may be given to any person provided it is given with respect to the offences the subject of the investigation, and on the conditions, that the commission considers appropriate.

Part 3 Amendment of Motor Accident Insurance Regulation 2018

Clause 29

- *Proposed section 18(1A)(b)(i) and (ii)*

Reference should be made to the offence provision in section 75 particularly in circumstances where the claimant will be required to provide *"the name of the person and the circumstances in which the claimant was personally approached or contacted"*.

The practitioner will be required to explain the contents of the certificate so that the claimant understands the reference to section 75 and the nature of the offence.

In circumstances where a claimant has concerns, on the basis of this explanation, we submit that the claimant's certificate should also be accompanied by a clear warning or information statement to the claimant that they can contact the Commission or the QLS confidentially about the certificate, if they wish.

4. Other matters

a) Contravention of the bill by legal practitioners

The Society is of the view that the greater penalty for a legal practitioner contravening provisions of the bill is a referral to the Legal Services Commission for prosecution with respect to the false signing and swearing of the law practice certificate. For this reason, we suggest amendments to the Notice of Accident Claim Form (NOAC) which has the practitioner acknowledge and accept the potential consequences of prosecution and/or disciplinary proceedings under the *LPA* for engaging in claim farming activities as well as not complying with a lawful requirement.

b) The claimant as a 'party' to the offence

In our view there is a strong argument that the claimant would inadvertently be a party (under section 7 and 8 of the Criminal Code Act 1989) to an offence of claim farming as outlined in the proposed provisions at sections 74 and 75.

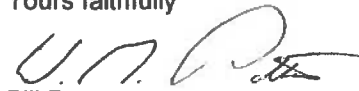
We suggest there are two ways this issue could be addressed. The first is the incorporation of an exclusion of "the claimant" in section 74 and 75. That is, to include wording to the effect that, a person (other than the claimant) must not give or receive consideration for a claim referral or potential claim referral. The second option, is that there be an express policy of the government that it will not prosecute the claimant in these circumstances.

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Whilst the Society prefers the certainty provided with the first approach, we understand that there may be a reluctance on the part of government to adopt it where to do so may inadvertently permit some claimants to engage in activity that would otherwise be an offence under these provisions.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Policy Team by phone on [REDACTED] or by email to [REDACTED]

Yours faithfully



**Bill Potts
President**