Parliamentary Committee briefing note
Personal Injuries Proceedings and Other Legislation Amendment Bill 2022

Overview and policy intent

The purpose of the Personal Injuries Proceedings and Other Legislation Amendment Bill 2022 (the Bill) is to implement amendments to:

- stop claim farming for personal injury and workers' compensation claims;
- prevent undesirable costs agreement practices by law practices for personal injury claims;
- confirm the policy intent for when an entitlement to terminal workers' compensation arises under the *Workers' Compensation and Rehabilitation Act 2003* (WCR Act); and
- make technical and clarifying amendments to the *Electoral Act 1992* (Electoral Act) relating to fundraising contributions and state campaign accounts and disclosure returns.

Oversight of the personal injury and workers' compensation schemes

The Legal Services Commissioner and the Legal Services Commission

The Legal Services Commission (Commission) was established in 2004 and continues its existence under the *Legal Profession Act 2007* (LP Act). The Commission is responsible for receiving and, where appropriate, investigating complaints about the conduct of lawyers, their employees, and unlawful operators in relation to the provision of legal services in Queensland and in appropriate cases initiating disciplinary proceedings and prosecutions. The Commission works with other regulatory authorities, such as the Queensland Law Society and the Bar Association of Queensland, to administer the LP Act.

Additionally, the Commission has a role in overseeing and enforcing the advertising and touting restrictions in the *Personal Injuries Proceedings Act 2002* (PIP Act).

The Commission is overseen by the Legal Services Commissioner, an independent statutory officer appointed under the LP Act by the Governor in Council.

The Workers' Compensation Regulator

The WCR Act establishes a workers' compensation scheme for Queensland, to provide benefits for workers who are injured at work, and to encourage improved health and safety performance by employers.

The WCR Act designates the office of the Workers Compensation Regulator (the Regulator) for the administration of the Act and to oversee the regulation of the workers' compensation scheme. The Regulator is funded through an annual contribution from WorkCover and a levy on self-insured employers.

The Regulator's functions include:

- monitoring insurers' performance and compliance with the Act;
- deciding applications for self-insurance licences;
- undertaking reviews of insurer decisions and responding to appeals of its review decisions;

- supporting and overseeing the administration of medical assessment tribunals;
- undertaking workplace rehabilitation accreditation, and compliance activities;
- providing education on the scheme and rehabilitation advisory services;
- collating and analysing scheme-wide statistics and promoting education about the workers' compensation scheme; and
- conducting and defending proceedings under this Act before a court or tribunal.

Workers' Compensation Regulatory Services (WCRS) has delegated responsibility for the functions of the Regulator and responsibility for implementing government policy for the workers' compensation scheme.

Claim Farming

Background

'Claim farming' is a process by which a third party, the claim farmer, cold-calls or approaches individuals to pressure them into making a compensation claim for personal injuries. Claim farmers may use tactics such as implying they act on behalf of government agencies or insurers; inducing or harassing individuals to make a claim with the promise of quick, easy and significant compensation; and even offering to coordinate medical treatment. Claim farmers then sell the individual's personal information to a legal practitioner or other claims management service provider to handle the claim.

The *Motor Accident Insurance and Other Legislation Amendment Act 2019* (the MAI Amendment Act) introduced the first explicit legislative prohibition on claim farming in Queensland to stop claim farming for compulsory third party (CTP) claims under the statutory insurance scheme established by the *Motor Accident Insurance Act 1994* (MAI Act).

The MAI Act (as amended), subject to limited exceptions, prohibits the act of cold-calling or personally approaching another person without their consent and soliciting or inducing them to make a CTP claim. It is also an offence under the MAI Act for any person to pay claim farmers for the names of potential claimants, or to receive payment for a claim referral or potential claim referral. Obligations were imposed on legal practitioners representing injured claimants to certify during the claims process that neither they nor their associates had paid a claim farmer for the claim.

Since the MAI Amendment Act was enacted, it has become apparent that the claim farming industry has pivoted to new types of personal injury claims. As a result, some stakeholders have advocated for the extension of the claim farming prohibitions to child sexual abuse claims and others have expressed concern about the occurrence of 'survivor claim farming' in Queensland. Similarly, there have been anecdotal reports of Queensland workers' compensation claim files being sold, suspicious activity from interstate law firms, and scam phone calls falsely impersonating WorkCover Queensland. Even if only a small portion of personal injury claims are fraudulent/unmeritorious, there is the prospect of significant unjustified calls on public funds and insurers, a potential vulnerability and risk to the workers' compensation scheme and possible impacts on the viability of private/not-for-profit institutions which deliver vital services for government and the community.

Acknowledging the agile nature of the claim farming industry, the Bill will proactively prevent widespread claim farming across all personal injury schemes and ensure parity across personal injury legislation in Queensland.

The Bill amends the PIP Act, LP Act and the WCR Act, applying and adapting provisions enacted under the MAI Amendment Act, to prohibit claim farming in the personal injury and workers' compensation

areas. It is not the intention that the prohibitions on claim farming affect the ability for potential claimants to initiate and progress legitimate claims for personal injuries arising out of ordinary civil litigation or workers' compensation matters or prevent individuals from being informed of their rights or their access to justice. Rather, it will prevent potential claimants from being incentivised, harassed, or induced by a claim farmer into making a claim.

A short summary of the PIP Act, LP Act and WCR Act is outlined below for the Committee's information.

Personal Injuries Proceedings Act 2002

The PIP Act establishes a mandatory pre-court process for personal injury claims prior to any proceeding being filed in court. The PIP Act does not, however, apply to claims for personal injuries arising from exposure to asbestos or tobacco products; car accidents (to which the MAI Act applies); or work accidents (to which the WCR Act applies).

The mandatory pre-court process requires a claimant to notify the respondent of the intention to make a claim. This is done by way of a Part 1 Notice which sets out matters relevant to the claim including a description of the incident and who the claimant believes to be responsible and why; the circumstances surrounding the incident and how the claimant was involved; medical treatment received and medical certificates; and pre-existing conditions (if relevant). For claims involving medical negligence, the claimant is to provide an initial notice to the respondent, before a Part 1 Notice is given, which sets out matters including a description of the medical services alleged to have given rise to the personal injury; the name of the doctor who provided the medical services (if known); the date/s when and place/s where the medical services were provided; and a description of the personal injury alleged to have been suffered. The Act then provides for how and when the respondent is to respond to a Part 1 Notice and the consequences for failing to respond.

Thereafter, the PIP Act includes provisions for the giving of a Part 2 notice (which sets out more details of the claimant's economic loss and health/injury details), the conduct of a compulsory conference between the parties, and if no settlement is reached, the exchange of mandatory final offers. If the claim fails to settle during this pre-court process, the claimant can commence court proceedings.

The PIP Act also contains provisions which restrict the advertising of personal injury services by legal practitioners and others; and prohibit touting at the scene of an incident, at a hospital or at another time or a person paying or seeking payment for touting.

The new claim farming offences and provisions relating to law practice certificates for personal injury claims generally have been included in the PIP Act, as outlined below.

Legal Profession Act 2007

The LP Act provides for the regulation of legal practice and lawyers in Queensland and deals with a wide array of matters, including admission into the profession; requirements for practising certificates and provisions relating to their amendment, suspension, or cancellation; the conduct of legal practice, including the handling of trust money and trust accounts; cost disclosures requirements and professional indemnity insurance. Additionally, and of particular relevance to the amendments in the Bill are the matters outlined below.

Section 347 of the LP Act provides that a law practice is entitled to charge a client no more than half the amount to which the client is entitled under a judgment or settlement for a speculative personal injury claim, after deducting any refunds the client is required to pay and the total amount of disbursements for which the client is liable. This is commonly referred to as the 50:50 rule.

The Bill also provides for the independent statutory office of the Commissioner. Chapter 4 entrusts the Commissioner with the oversight of complaints and investigations into matters relating to legal practitioners, law practice employees, unlawful operators and any person suspected of contravening the advertising or touting restrictions in the PIP Act. Chapter 6 then provides the Commissioner with various powers which can be utilised in investigations including powers of entry; power to require reasonable help or information; and powers to seize evidence.

Amendments to the LP Act will strengthen the 50:50 rule provisions and extend, and supplement, the Commissioner's existing powers, to faciliate the oversight and enforcement of the new claim farming provisions and law practice certificate requirements (as contained in the PIP Act)

Workers' Compensation and Rehabilitation Act 2003

The WCR Act and the *Workers' Compensation and Rehabilitation Regulation 2014* establish Queensland's workers' compensation scheme. The Act designates WorkCover Queensland (WorkCover) as the provider of accident insurance to Queensland employers. WorkCover is a government-owned statutory body that operates as a commercial enterprise. It is fully funded by the premiums paid by employers. Its charter is to maintain a balance between benefits for injured workers and affordable premiums for employers.

WorkCover insures employers against the cost of their workers' statutory and possible common law claims, ensuring a worker who is injured at work receives financial support. A WorkCover insurance policy covers an employer for all compensation, medical expenses and damages claimed by injured workers for injuries that arise out of—or in the course of—employment, where employment is a significant contributing factor to the injury.

In addition to WorkCover, the Queensland scheme (like all other Australian jurisdictions) allows employers to provide their own workers' compensation insurance, through self-insurance licences, if they meet certain requirements and demonstrate the financial capacity to fully fund future liabilities. There are currently 28 licences for self-insurance in the scheme.

Queensland's workers' compensation scheme is a no-fault, statutory scheme. That is, it does not matter if it is the worker's or the employer's fault that an injury occurred, compensation is still paid as prescribed in the WCR Act. These payments and benefits are referred to as statutory compensation and may include weekly payments as income replacement, lump sums to compensate for permanent impairment, and hospital and medical expenses. Statutory claims are designed to be a straightforward and non-adversarial process. Claimants can self-represent during statutory claims, without the need for legal representation or advice.

Workers who are permanently impaired as a result of their injury may also be entitled to lump sum compensation and, if their injury was due to negligence, may also be entitled to common law damages.

The Queensland workers' compensation scheme has a number of existing safeguards that make it less susceptible to fraudulent claims compared to other personal injury schemes. These safeguards include having an employer as an 'other party' to claims, and legislative tests for eligibility and to establish work relatedness. Further, dispute resolution processes and an experienced fraud and prosecution function also mitigate the risk of unmeritorious claims or fraudulent conduct.

Despite these safeguards, the scheme is still at risk of claim farming, particularly if other personal injury schemes become less profitable. Within the statutory component of the scheme, there are significant lump sum benefits paid to claimants for matters including permanent impairment, latent onset injuries and industrial deafness. In addition, payments for common law damages may be substantial. As such, it is essential the proposed reforms apply broadly within the scheme, to ensure one claim type does not inadvertently become more appealing to claim farmers.

While Queensland will be the first Australian workers' compensation scheme to introduce amendments to protect against claim farming, its coverage will prevent the workers' compensation scheme from becoming an unregulated avenue for claim farmers.

Amendments in the Bill

Claim farming offences (clauses 51 and 60)

The Bill will amend the PIP Act and the WCR Act to create two new offences in each Act prohibiting claim farming practices, modelled on the equivalent offences in the MAI Act and to complement sections 67 and 68 of the PIP Act which prohibit touting.

The first offence removes the financial incentive to engage in claim farming by prohibiting a person from giving or receiving consideration for referring a claimant or potential claimant (proposed new sections 71(1) and (2) of the PIP Act and 325R(1) and (2) of the WCR Act) . Similar to the offence in the MAI Act on which these provisions are based, consideration will mean a fee or other benefit, but does not include a gift other than money or hospitality if the value is $200 or less. Further, consideration, does not include a payment or other benefit, not for a claim referral or potential claim referral, to a community legal service; an industrial organisation; a registered entity within the meaning of the *Australian Charities and Not-for-Profits Commission Act 2012* (Cwlth); a school association; or a sporting association (proposed new section 71A). This aim of this offence is to prevent a person from paying a claim farmer for the details of potential claimants or receiving payment for a claim referral or potential claim referral.

The second offence prohibits a person from personally approaching or contacting another person to solicit or induce them to make a claim (proposed new sections 71B of the PIP Act and 325T of the WCR Act). Personal approach or contact includes contact by mail, telephone, email, or other forms of electronic communication. This offence aims to prohibit the act of cold-calling or personally approaching another person without their consent to solicit or induce them to make a personal injury claim.

Like the MAI Act, the Bill provides certain exceptions for these offences. The first offence will not apply to a law practice that is selling its business to another law practice, where the new practice pays for the referral of a claimant or potential claimant, provided the amount is consistent with the current fees and costs the law practice is entitled to charge for the claim. Additionally, the first offence does not prohibit advertising or promoting a service or person to the public or a group, which results in a claimant using the service or person, for example, an advertisement about a law practice's services on a website.

Similarly, the second offence will not apply if the act of contacting a potential claimant is not expected or intended to result in, and does not result in, that person or another person receiving consideration because of the contact. Additionally, there are circumstances where a law practice or lawyer may contact a person, such as if they had previously provided services to the person, or a community legal service or industrial organisation has asked the law practice or lawyer to contact the person and, in these circumstances, it is believed or advised that the person will not object to that approach or contact.

The claim farming offences carry a maximum penalty of 300 penalty units.

Law practice certificates (clauses 41-48 and 59-60)

General requirements

To ensure compliance by law practices with the claim farming provisions, the Bill will require that a law practice certificate be provided by legal practitioners in relation to personal injury claims and workers' compensation claims at various stages.

Pursuant to proposed new sections 8B of the PIP Act and 325F of the WCR Act, a law practice certificate must state the supervising principal and each associate of the law practice has not paid a claim farmer for the claim, or approached, solicited, or induced the claimant to make a claim in contravention of the claim farming provisions. Additionally, in line with the objective of the Bill in preventing undesirable billing practices, when a claim is a speculative personal injury claim, the law practice certificate must state that the costs agreement complies with the rules regarding costs under section 347 of the LP Act and section 71E of the PIP Act.

Law practice certificates in the personal injuries scheme

For the PIP Act, a copy of the law practice certificate that is given to the complainant must also be provided to the respondent with the initial notice (for medical negligence cases) or a Part 1 Notice (if not otherwise given with the initial notice) – see sections 9 and 9A of the PIP Act. Additionally, if a law practice sells its business to another law practice before a claimant lodges a claim, the current law practice must give the new law practice a law practice certificate, and a copy to the claimant, before the referral occurs (proposed new section 8F).

There are further requirements for the giving of a law practice certificate after notice of the claim has been given (sections 9C and 13A) and a fresh law practice certificate is also required to be generated and provided when the claim is settled or finalised (proposed new section 61).

A table depicting the full requirements in relation to law practice certificates under PIP Act is **Attachment 1** to this briefing note.

Law practice certificates in the workers' compensation scheme

To ensure the entirety of the workers' compensation scheme is protected against claim farming, it has been necessary to make certain departures from the MAI Act, to include the no-fault statutory compensation component that is unique to the workers' compensation scheme.

Stakeholders were in broad agreement that statutory claims component of the scheme must not be left unprotected, and requirements for law practice certificates should be included. There was also recognition that some workers will not continue on to make a common law claim following a statutory claim and that the payment of statutory lump sum compensation can finalise a worker's claim (e.g. a worker may make an irrevocable election to accept a lump sum rather than proceed to common law).

The requirements for supervising principals to provide law practice certificates during a statutory claim have been drafted in consultation with scheme stakeholders. **Attachment 2** to this briefing note outlines the requirements in relation to law practice certificates under WCR Act.

It was not considered appropriate that law practice certificates were provided to insurers at the commencement of all statutory claims where the claimant is legally represented. Legal stakeholders indicated that injured workers should be able to privately seek legal advice without other parties inferring the statutory claim is likely to progress into a damages claim. Legal stakeholders were concerned this could change the claim dynamic, undermine rehabilitation and return to work efforts, impact the employment relationship and be detrimental to the interests of injured workers.

Instead, a law practice certificate for a statutory claim is required to be provided:

- at the time when a law practice is retained by a claimant to act in relation to the claimant's claim (proposed section 325I) - to the claimant only; and
- upon receipt of a direction to pay compensation to an account held by a law practice; or within seven days after payment of certain lump sum compensation - to the insurer and copy to the claimant (proposed section 325J).

This approach ensures the statutory scheme is protected but does not impede access to statutory compensation or mean claimants are pressured to seek or disclose legal representation, preserves the nature of the no-fault and non-adversarial statutory claim process (proposed section 325J) and recognises the potential finality of a workers' compensation claim following the payment of lump sum compensation.

For a common law claim, the law practice certificates for the workers' compensation scheme are modelled on the MAI Act.

For common law claims, the law practice certificate is required to be provided:

- with the notice of claim (proposed section 275(7A)), or within a month of an insurer's waiver of compliance (proposed section 325K), and
- within seven days of a claim being finalised (proposed section 325L).

To minimise administrative burden for law practices, proposed section 275(7A) provides that a law practice certificate given to the claimant or insurer during the course of a statutory claim, may accompany a valid notice of claim for common law damages.

In practice, this means that generally a law practice certificate will need to be provided for a claimant represented in the course of both a statutory and common law claim as follows:

- at the time when a law practice is retained by a claimant to act in relation to the claimant's claim; and
- receipt of a direction to pay compensation to an account held by a law practice or within seven days after payment of certain lump sum compensation; and
- at the finalisation of a claim for damages.

There are other circumstances where a law practice certificate will need to be provided:

- if a claimant retains or changes a law firm mid-claim (proposed section 325I); and
- if a law practice (the current practice) sells all or part of the law practice's business to another law practice (proposed section 325M).

Failure to provide a law practice certificate

A breach of the obligation to provide a law practice certificate, or providing a false or misleading certificate, attracts a maximum penalty of 300 penalty units (see proposed new sections 8C, 8E, 8F, 9C, 13A and 61 and sections 325H, 325I, 325J, 325K, 325L, 325M and 325P in the WCR Act).

Additionally, the Bill will impose an obligation on the supervising principal of those practices representing respondents and insurers in PIP Act claims to notify the Commissioner if the respondent does not receive the law practice certificate as required under the new provisions (proposed new section 71G of the PIP Act). Insurers under the WCR Act have similar requirements to report non-compliances with claim farming offences and law practice certificates (proposed new section 325Y of the WCR Act). Whilst there is no equivalent in the MAI Act, these provisions were considered necessary to ensure the regime meets its policy objectives of establishing measures directed at eliminating or reducing claim farming.

Enforcement and special investigations (clauses 27, 32 and 61)

The Bill extends the role of the Commissioner and the Regulator by providing the Commissioner and Regulator with the power to investigate breaches of the claim farming provisions.

Proposed new section 539B of the LP Act provides that the Commissioner's powers under chapter 6 (Investigations) and the new special investigation powers under chapter 6A (discussed below) extend to the investigation of the conduct of an external entity (i.e an entity that is not a legal practitioner, law practice employee or unlawful operator) if the Commissioner suspects the entity has contravened a claim farming provision or the restrictions on advertising and touting in chapter 3, part 1 of the PIP Act.

Additionally, new chapter 6A of the LP Act (and chapter 12, part 1A of the WCR Act) will empower the Commissioner (and Regulator) to appoint a special investigator (or in the case of the WCR Act, an investigator) who will have extensive powers to investigate suspected contraventions of the claim farming offences. The special investigator (or investigator) will have the power to require a person under investigation, or an associated person, to produce documents or appear for examination on oath or affirmation. The Bill provides significant penalties of up to 300 penalty units or 2 years imprisonment for failing to comply with a request of a special investigator (or investigator), or for misleading a special investigator (or investigator).

To ensure the special investigator (or investigator) can properly investigate breaches, a person under investigation cannot claim the privilege against self-incrimination or legal professional privilege as a reason for failing to comply with a request of the special investigator (or investigator). However, the Bill will counterbalance the abrogation of both privileges by specifying that:

- if in complying with a requirement made under proposed new section 581F of the LP Act or 532S of the WCR Act, the person discloses a privileged client communication—
    - the person is taken for all purposes not to have breached legal professional privilege in complying with the requirement; and
    - the disclosure does not constitute a waiver of legal professional privilege or otherwise affect any claim of legal professional privilege for any purpose other than a proceeding for an offence against the following proposed new sections of the PIP Act: 8C, 8E, 8F, 9C, 13A, 61, 71(1) or (2) or 71B, or the following proposed new sections of the WCR Act: chapter 6B, part 2 or section 325P, 325R(1) or (2) or 325T (see proposed new sections 581G of the LP Act and 532T of the WCR Act); and
- if an individual gives or produces information or a document under proposed new section 581D of the LP Act or 532Q of the WCR Act— evidence of the information or document, and other evidence directly or indirectly derived from the information or document, is not admissible against the individual in any proceeding to the extent it tends to incriminate the individual, or expose the individual to a penalty in the proceeding, other than:
    - a proceeding about the false or misleading nature of the information or anything in the document or in which the false or misleading nature of the information or document is relevant evidence; or
    - a proceeding for an offence against the following proposed new sections of the PIP Act: 8C, 8E, 8F, 9C, 13A, 61, 71(1) or (2) or 71B, or the following proposed new sections of the WCR Act: chapter 6B, part 2 or section 325P, 325R(1) or (2) or 325T (see proposed new sections 581N or the LP Act and 532ZA of the WCR Act).

At the conclusion of an investigation, the special investigator (or investigator) is required to report to the Commissioner or the Regulator about their opinion on the matters under investigation. This report may be published by the Commissioner or the Regulator, in whole or in part, if considered in the public interest and where the investigated entity has been convicted of an offence under a claim farming provision.

The Bill also enables the Regulator to apply for injunctions against persons believed to be engaging in claim farming activity. Certain offences under the WCR Act are already investigated and prosecuted by the Office of Industrial Relations (OIR) on delegation of the Regulator. These include defrauding a workers' compensation insurer; providing false or misleading information to an insurer or medical provider; failure by an employer to insure or under-insuring; and prohibited use of workers' compensation information by employers. Claim farming offences will be managed in a similar way. Further, the Commissioner's existing powers to apply for injunctions under section 703 of the LP Act will, by virtue of an amendment to the definition of relevant law, extend to a person engaging or proposing to engage in claim farming activity.

The new special investigator (or investigator) powers introduced by the Bill are modelled on the MAI Act subject to the following key changes:

- Proposed new section 581C of the LP Act, which is modelled on section 87ZC of the MAI Act and deals with when a special investigator can be appointed, has been reframed to also provide for the investigation of the relevant affairs of an entity, not limited to legal practices and insurers. Unlike the MAI Act and the WCR Act which both concern statutory insurance schemes, the PIP Act has broader application to a diverse range of claimants, respondents and insurers.
- Proposed new section 581C of the LP Act enables the Commissioner to appoint a 'Australian lawyer' (who is admitted) as opposed to an "Australian legal practitioner" (a practising certificate holder) as utilised in the corresponding provision in the MAI Act (section 87ZC). This is because the LSC may be staffed by Australian lawyers (who as government legal officers do not require practising certificates) rather than Australian legal practitioners and the LSC may wish to appoint one of its own investigators as a special investigator.
- The equivalent of section 87ZM of the MAI Act (Admission of special investigators report in evidence) has not been included in the Bill on the basis that the Commissioner and Regulator did not consider such provision to be necessary.
- To address stakeholder feedback, the equivalents of sections 87ZJ(2)(b) (Failure of a person to comply with a requirement of an investigator); 87ZL (Report of investigator) and 87ZO (Costs of investigation) of the MAIA have all been amended to provide that failure to comply with a requirement of the special investigator cannot be punished by the court as contempt (proposed new section 581H(2) of the LP Act and 532U of the WCR Act); an investigator's report cannot be published unless the investigated entity is convicted of an offence (section 581J(5) of the LP Act and section 532W(5)); and the recovery of costs of an investigation from the investigated entity is dependent upon conviction (proposed new section 581L of the LP Act and section 532Y of the WCR Act).

Information sharing framework to support enforcement (clauses 53 and 62)

Importantly, the Bill facilitates an information sharing framework among the relevant enforcement bodies, being the Commissioner, the Regulator, and the Motor Accident Insurance Commission (MAIC). The Bill specifically authorises the Commissioner and the Regulator to disclose information with each other and the MAIC for the purpose of the administration by the relevant entity of a claim farming provision or monitoring and identifying patterns or trends in conduct to which claim farming provisions apply. These provisions will operate in addition to the existing information sharing provisions in the MAI Act and the MAI Regulation.

This information sharing framework will promote inter-agency coordination and manage the risk of duplication in enforcement and investigation activities across schemes, given the foreseeable risk that claim farming entities may target multiple personal injury schemes. Through information sharing,

enforcement bodies will also be able to identify entities that are frequently exhibiting signs of engaging in claim farming across compensation schemes or who may present a risk of such activity.

Additionally, the Bill contains a specific provision in the PIP Act which provides that insurers may provide information about non-compliance with the law practice certificate requirement or claim farming provisions to the Commissioner. It will be in insurers' interests to notify contraventions of the scheme given it is intended to deter fraudulent and unmeritorious claims.

Calculating legal costs and undesirable billing practices

Background

Under the 50:50 rule applying to speculative personal injury claims, a law practice is prevented from charging a client more than half the amount to which the client is entitled under a judgment or settlement, after deducting any refunds the client is required to pay and the total amount of disbursements for which the client is liable.

In order to maximise the amount charged to clients, legal stakeholders advised that some law practices are entering into costs agreements which treat certain matters as outlays that would ordinarily be expenses of the law practice and within the 50:50 rule limit. Legal stakeholders also advised that there are circumstances where a fee paid to a third party for preparing a document detailing the particulars of a claim may potentially disguise a claim farming arrangement.

Amendments in the Bill (clause 16)

To address these concerns and ensure that successful claimants receive a fair and equitable share of settlement funds, clause 16 amends section 347 (Maximum payment for conduct of speculative personal injury claim) of the LP Act to require legal practitioners to treat certain additional amounts as legal costs (now referred to as claim-related costs) for the purpose of determining whether the claim-related costs charged to a client exceed the maximum amount a law practice may charge and recover in a speculative personal injury claim. These additional amounts include an amount paid or payable to a third-party entity for obtaining instructions or preparing statements in relation to the claim (not including amounts paid or payable to counsel engaged by the legal practice after notice of the claim is given under the PIP Act); interest on certain loans or other arrangements for funding disbursements or expenses relating to the claim; and other disbursements or expenses prescribed by regulation.

It is noted that consequential amendments to section 79 (Maximum amount of legal costs for claims) of the MAI Act have been made to reflect the terminology changes proposed to section 347 of the LP Act. Section 79 cross-refers to this section and the concept of legal costs, which is being replaced with the term 'claim-related costs' by the amendments to the 50:50 rule in clause 15 of the Bill.

Terminal workers' compensation

A diagnosis of a terminal injury or illness has a profound and complex impact on a worker's life and navigating a terminal injury caused by work is an incredibly difficult time for workers and their families.

Queensland workers with a latent onset injury are entitled to lump sum compensation of up to approximately $750,000 if their injury is diagnosed as, or over a period of time their injury progresses to, a terminal condition.

Terminal conditions are work-related illnesses or injuries that are likely to result in the death of a worker in the immediate to short term and that is not able to be cured. Queensland's workers' compensation scheme does not provide a set list of terminal conditions eligible for this compensation, however, common claims for terminal latent onset conditions include:

- accelerated silicosis with progressive massive fibrosis;
- mesothelioma; and
- end-stage work-related cancers.

Terminal compensation is a specific payment in the scheme and is intended to provide for palliative care and additional support urgently needed by a worker in the final stages of their injury or illness. Although some workers are eligible to seek common law damages to compensate for their end-of-life care and financial needs, for others the prompt assessment and payment of terminal compensation may provide a more practical and immediate benefit and alleviate the immediate need to seek common law damages. This compensation may also allow workers to spend more time with their family at this crucial time in their illness.

Terminal compensation is not intended for workers whose condition will result in a short decrease in their life expectancy, or whose life is predicted to end a considerable time into the future e.g., 10, 20, 30 or more years in the future.

This is because until a claim is closed, these workers can continue to access entitlements and support from the workers' compensation scheme. Examples include:

- ongoing weekly wages compensation;
- access to ongoing counselling and mental health support;
- medical treatment;
- rehabilitation, including return to work support;
- vocational counselling; and
- re-training into a new role, particularly relevant for workers with silicosis who need to be removed from dusty environments.

Workers are also entitled to access terminal compensation should their injury progress to this phase in the future.

In implementing recommendations arising from the 2017 Coal Workers' Pneumoconiosis Select Committee, workers with pneumoconiosis (e.g., asbestosis, coal workers' pneumoconiosis and silicosis) are now also eligible for additional benefits if their injury has not yet progressed to the terminal phase. These benefits include additional lump sum compensation of up to:

- $130,800 for their injury, depending on the severity of disease and the worker's age, in addition to standard entitlements such as weekly benefits and medical expenses, and other lump sum compensation paid based on the worker's whole person impairment.
- $130,800 if the worker's condition deteriorates over time, which is payable even if the worker has received previous lump sum compensation or their claim was closed after receiving common law damages, provided the damages settlement did not account for further progressive disease.

Queensland is the only jurisdiction to offer broad ranging statutory terminal compensation of this nature. However, other jurisdictions which recognise 'terminal conditions' for compensation purposes generally have eligibility requirements for a person's death to be imminent, with date rates of between one to two years (or 12 to 24 months). For example:

- **Tasmania** has a statutory scheme limited to workers with an imminently fatal asbestos-related disease where their prognosis is less than two years' life expectancy;

- **Victoria** has released guidance for non-economic loss claims for injuries giving rise to an imminent risk of death, where there is no or only minimal recovery and the worker's life expectancy reasonably is 12 months or less (with some consideration allowable if the life expectancy is within 12-18 months but must not be greater than 24 months); and
- **Commonwealth** superannuation funds may make lump sum payments for a terminal medical condition if the illness or injury is likely to result in the person's death within 24 months after certified by medical specialists.

Complexities for certifying terminal conditions and 2019 amendment

To be eligible for terminal compensation, a worker must be certified as having a terminal condition by a doctor. Doctors must use their clinical judgement to make this certification after considering a range of factors, such as the worker's injury, their prognosis and overall health, available treatments, and previous medical history.

Certifying a terminal diagnosis is a complex clinical decision for doctors, and a worker's prognosis may be uncertain. For some conditions, such as those where the disease and its progression are medically well understood, doctors may be able to make this certification with a higher degree of certainty. However, for other conditions, doctors may be required to provide a more speculative assessment.

It is recognised that, despite their best clinical judgement, doctors are often unable to predict with certainty when a worker may die. The level of uncertainty and speculation increases significantly the further into the future doctors are required to make this assessment, particularly over very long periods.

Prior to 2019, the impact of speculative diagnoses was limited as the Act specified that a worker was only entitled to terminal compensation if a doctor diagnosed the condition would end the worker's life within two years. A two-year timeframe was applied to the original definition of 'terminal condition' for accessing common law damages since the Act's commencement in 2003 and became applicable for latent onset terminal compensation when this compensation was introduced in 2005. This timeframe was consistent with eligibility requirements for similar benefits, such as accessing death and terminal illness benefits through superannuation.

On 30 October 2019, the definition of terminal condition was amended to remove this two-year timeframe. No other amendments were made to the eligibility requirements and the insurer retained discretion to accept a doctor's diagnosis as to the terminal nature of the condition. This amendment coincided with the emergence of silicosis in the engineered stone benchtop industry and was made in response to uncertainty in medical prognosis for stonemasons with accelerated silicosis. At that time, the disease was not well understood, and clinicians were providing ranges of life expectancy for young workers in their 30s and 40s of between three to five years.

The policy intent underlying the amendment was to ensure these workers were not disadvantaged due to this uncertainty; and to alleviate the need for lengthy common law proceedings, allow access to palliative care and to plan for the financial needs of their family when facing the uncertainty around their diagnosis and the potential progression of their injury.

It was not the policy intent for claims many years into the future, such as those for workers whose condition may end their life 10 or even 20 years in the future, to be within scope of this change. It was considered claims of this nature would be vetted by insurers through their discretion about whether to accept, or not accept, the doctor's certification of the terminal diagnosis (see section 39A(2) of the Act), with workers advised to reapply for terminal compensation once their injury had progressed within scope of the policy intent.

Following the amendment in 2019, insurers noted a significant increase in claims for terminal compensation beyond accelerated silicosis. Because these claims were not in scope of the amendment, insurers considered it appropriate these claims would either benefit from further monitoring or other

support available under the scheme. Subsequently, the Regulator received a large number of review applications from workers seeking terminal compensation.

In April 2021, the Regulator published guidance to assist doctors and insurers with making decisions about terminal conditions (see **Attachment 3**). This guidance was based on the policy intent, and it was circulated widely to key stakeholders for comment before publication.

Key factors outlined in the Regulator's guidance for determining whether a worker was within the policy intent of terminal compensation included considering:

- the current progression of the worker's injury (e.g., is the injury stable or deteriorating?);
- whether a sufficient period of time passed since the worker was diagnosed with their injury to enable the doctor to assess the trajectory of the injury or if further observation time is needed;
- whether the worker's injury can be cured;
- if the worker is currently undertaking any treatment and, if so, the likely course of the treatment and its impact on the worker's life expectancy;
- the worker's life expectancy if they had not suffered from their injury, and how this determination was reached by the doctor; and
- whether the worker suffers from any co-morbidities not related to their injury and, for example, whether these co-morbidities were more probable to ultimately end the worker's life.

Decisions on terminal conditions, by both insurers and the Regulator when determining reviews and appeals of insurer decisions, were made following this guidance from approximately April to December 2021.

Queensland Industrial Relations Commission (QIRC) decision

On 2 December 2021, the QIRC allowed the appeal in *Blanch v Workers' Compensation Regulator* [2021] QIRC 408 (*Blanch*). This decision overturned previous decisions of a self-insurer and the Regulator to reject Mr Blanch's application for terminal compensation.

Mr Blanch's doctor certified that, on the balance of probabilities, he would die from chronic obstructive pulmonary disease (COPD) at approximately the age of 82 (a reduction in his previous life expectancy of two years), and which was approximately 17 years in the future.

In allowing the appeal, the QIRC held there was to be no time limit to be imposed on when a worker can access terminal compensation. It was the QIRC's finding that terminal compensation is payable on certification by a doctor, and there is no discretion for an insurer not to accept this certification unless there is medical evidence to the contrary.

The QIRC also rejected additional factors set out in the Regulator's published guidance and relied on by the self-insurer, as being relevant considerations (e.g., age, illness, symptoms, need for palliative care and the imminence of death).

As the QIRC found there was no time limit to be imposed, the decision may allow workers who have life expectancies 30 to 40 years into the future to access terminal compensation well before it is needed to assist the worker in the final stages of their illness. For these workers, once they have received terminal compensation, they will not be able to access support from the scheme such as ongoing compensation entitlements, rehabilitation, vocational counselling, or re-training. These funds are also highly likely to have dissipated by the time the worker and their family are in most need of it. There is also likely to be a psychological impact to workers and their families from receiving a diagnosis of a terminal condition.

Amendments in the Bill (clause 58)

Importantly, the Bill does not prevent workers from accessing terminal compensation, as it instead confirms when the entitlement arises.

The Bill confirms the policy intent of when a worker's entitlement to terminal compensation arises by inserting an explicit timeframe of three years in the definition of terminal condition in section 39A of the WCR Act. This three-year timeframe will apply to latent onset terminal conditions sustained on or after 31 January 2015.

Three years is considered appropriate as it aligns with the policy intent of the 2019 amendment (and the explanatory notes at that time) by providing an additional year buffer compared to the original provision where there is medical uncertainty about a worker's prognosis.

Three years is also considered appropriate (compared to a longer period) on the basis the greater the timeframe, the more speculative the doctor's prognosis becomes as it is difficult to predict with certainty that death will occur from the work-related condition (noting some workers will have complicating non-work-related conditions). The further the anticipated death of a worker is into the future, the more likely the scheme will incur claims and costs associated with cases that would have never previously made it to the point of a terminal claim.

The Bill also includes transitional arrangements to ensure the policy intent is applied appropriately over the same period as the 2019 amendment. The 2019 amendment included a transitional arrangement to apply the more flexible definition of terminal condition to injuries sustained on or after 31 January 2015. The Bill applies this same timing to the new, three-year timeframe. This approach is necessary to limit inequity between workers who do not yet have an entitlement or have not claimed, as well as limiting the financial impacts to the scheme.

However, for those workers who have already received terminal compensation, the transitional arrangement confirms they are not impacted by this Bill. These workers are able to continue relying on the 2019 definition of terminal condition if they pursue a common law claim.

It is also important to note that workers who are not yet eligible for terminal compensation will not be left without access to other lump sum compensation should their condition deteriorate but is not yet terminal. Workers with pneumoconiosis can access additional lump sum compensation based on the severity of their disease and their age to a maximum of $130,800. Further, workers who have previously received either lump sum compensation or damages for their pneumoconiosis may be entitled to a further additional lump sum compensation of up to a maximum of $130,800 if their condition deteriorates and, if they received damages, their damages settlement did not account for this progression.

As noted in the explanatory notes, while the proposed amendment, on commencement, will apply to injuries sustained on or after 31 January 2015, the practical impact of this is considered negligible because:

- it does not affect workers who have already received their terminal compensation;
- it does not prevent workers, who are yet to lodge a claim or even identify they have an injury, from accessing terminal compensation. Instead, the proposed amendment confirms when the entitlement arises. This ensures workers receive terminal compensation at the critical time when it is intended to support them through this phase, and not risk exhausting these funds prior to this time;
- since the 2019 amendments, it is unlikely workers would have an expectation of receiving terminal compensation so far into the future, in particular the explanatory notes for the Bill and the guidance material issued by the Regulator noted the policy intent of the 2019 amendment. This expectation only arose due to the *Blanch* decision on 2 December 2021;
- it provides certainty for all parties and prevents inequity between workers i.e., does not create different cohorts of workers who may have the same injury yet different access to terminal compensation; and
- in any case, the proposed amendment is still more generous than any other jurisdiction in the country and the former provision which had a two-year time limit.

Political donation caps under the Electoral Act

Background

On 1 July 2022, new part 11, division 6 of the Electoral Act will commence, as inserted by section 22 of the *Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Act 2020.* Relevantly, new part 11, division 6 provides for various caps on political donations. The Bill will achieve its objectives by addressing two issues identified in relation to the implementation of the political donation caps.

Payment of fundraising contributions into State campaign accounts

The Bill will correct an unintended policy outcome regarding the ability to deposit fundraising contributions in the State campaign account.

Under section 216(1)(h) of the Electoral Act, a fundraising contribution may be paid into the State campaign account of a registered political party or candidate, other than to the extent the contribution or amount is a political donation. In line with section 250(1)(b) of the Electoral Act, the relevant action that causes a fundraising contribution to be considered a political donation, is that it is accompanied by a donor statement. Therefore, provided a donor does not give a donor statement when making the fundraising contribution, the contribution will not be considered a political donation. This provides an unintended avenue for fundraising contributions to circumvent the political donation caps and may allow for fundraising contributions of any amount to be deposited in the State campaign account.

The original intent was for fundraising contributions to be dealt with in line with the definition of "gift" in section 201 of the Electoral Act. That is, a fundraising contribution may be paid into the State campaign account to the extent the contribution is *not* a gift, meaning an amount up to $200 could be paid into the account without being subject to the political donation caps.

Disclosure requirements

The ECQ has requested additional disclosure requirements that will assist in monitoring compliance with the political donation caps.

Currently, there is no requirement for a disclosure return to specify whether or not a gift is a political donation. For example, a gift for administrative purposes would not be a political donation and is not subject to the caps.

Furthermore, the ECQ has requested additional disclosure requirements to monitor compliance with the political donation caps as they relate to electoral committees. Currently, section 203 of the Electoral Act applies the donation caps to an electoral committee as if it were the endorsed candidate of the political party that established it. This ensures the integrity of the donation caps, as it is ultimately the candidate endorsed for the electoral district that will benefit from the donations received by the electoral committee.

However, section 203 of the Electoral Act does not deal with the disclosure provisions, meaning a registered political party (being the entity that established the electoral committee) continues to be responsible for disclosing political donations received for the electoral committee. When providing a disclosure return in these circumstances, the registered political party discloses the gift as being received by the party and is not required to specify that it was received for an electoral committee. This results in the ECQ not having the necessary information to determine the amount of political donations received by an electoral committee for the purpose of determining compliance with the political donation caps.

Amendments in the Bill (Clauses 3-12)

Payment of fundraising contributions into State campaign accounts (clause 4)

The Bill will amend section 216(1)(h) of the Electoral Act to provide that a fundraising contribution may be paid into the State campaign account, other than to the extent the contribution or amount is a "gift". This will ensure that the part of a fundraising contribution, to the extent that it exceeds $200, cannot be paid into the State campaign account unless it is treated as a political donation and is subject to the political donation caps.

Disclosure requirements (clauses 5-10 and 12)

The Bill will amend sections 261, 262, 264, 265, 272 and 290 of the Electoral Act so that disclosure returns provided under those sections for gifts to registered political parties or candidates must specify whether or not the gift is a political donation. This will assist the ECQ in calculating the total amount of political donations given and received to monitor compliance with the caps.

The Bill will amend the disclosure requirements for registered political parties under sections 265 and 290 of the Electoral Act to provide that, for political donations received by a registered political party for an electoral committee, the disclosure returns must name the relevant electoral district. Additionally, to ensure that disclosure returns between donors and recipients reconcile, the Bill will amend section 251 of the Electoral Act so that a donor statement must also name the electoral district in the same circumstances. This will ensure that the ECQ can determine the amount of political donations received for electoral committees, and monitor compliance with the political donation caps as they apply to electoral committees.

Financial implications

Claim farming – personal injuries scheme

The State Government will incur an additional cost to support the Commissioner in implementing the proposed claim farming reforms. Funding will be provided for approximately six Full-Time Equivalent (FTE) staff during the establishment and implementation phases of the reforms, transitioning to four FTEs after 18 months for ongoing monitoring and compliance matters. One off funding will also be provided to undertake necessary information technology and software capability improvements, advertising and awareness campaigns, education, and stakeholder engagement, as well as set up and workspace fit-out equipment costs for new personnel.

Claim farming – workers' compensation

The amendments will ensure the workers' compensation scheme is not burdened by the cost of unnecessary workers' compensation claims and injured Queenslanders will be able to access more efficient rehabilitation and compensation for their claims. As such, the implementation of this Bill protects the ongoing viability of the scheme, rather than risking inflating premiums and by extension, providing an income stream for claim farmers. It is likely that workers that have been claim farmed will ultimately end up incurring additional costs, as lawyers seek to recoup the amount paid for the claim file.

The costs of investigating and prosecuting the claim farming offences will be borne by the Regulator. This will include the costs relevant to the engagement of an investigator in accordance with the new special investigation powers. The financial impact will be closely monitored, noting there is limited data to estimate costs due to limited scheme experience with claim farming activity.

Terminal compensation

Queensland's workers' compensation scheme is funded by employers. Employer's insurance policies cover any costs that may be incurred from their workers' injuries (including common law claims) and they pay an annual premium to meet the cost of this insurance. The 2020–21 average premium rate is $1.20 per $100 of wages, however, actual premium paid is calculated using an Experience Based Rating model.

The Experience Based Rating model uses wages, industry rate, and performance to calculate premium. Performance takes into account claims cost experience (the past three years of statutory claims costs, followed by the preceding one year of common law claims costs) and business size relative to industry (i.e. wages).

As an employer's claim cost experience varies from year to year, so does the premium paid. Employers who invest in injury management and safety systems can reduce their overall claims cost and ultimately premium they pay by reducing the likelihood and severity of workplace injuries.

Terminal compensation costs are already borne by the scheme. As shown in Table 1, in the three financial years preceding the 2019 amendment, terminal compensation claim numbers and costs were relatively stable. However, increased awareness since the *Blanch* decision regarding the removal of the timeframe resulted in a large increase in the number of claims paid terminal compensation. The total cost to the scheme almost doubled in 2020–21 compared to payment years prior to the amendment.

Table 1 – Number of claims with terminal compensation paid and total sum paid by year

Year payment made	Claims paid	Total terminal benefits paid
2016–17	96	$52 million
2017–18	89	$47 million
2018–19	99	$53 million
2019–20	147	$87 million
2020–21	158	$96 million

Terminal compensation costs for the 2021-22 financial year are not yet finalised. However, further increases to claim costs are expected, particularly given insurers have noted increased applications for this compensation following the *Blanch* decision in December 2021.

WorkCover advises that in the two months following the *Blanch* decision, they paid a further 70 claims for terminal compensation with another 37 pending a decision. Prior to *Blanch*, WorkCover estimates less than 10 terminal compensation claims were paid each month.

Note, the above figures are only for those claims paid and do include the large number of claims that were not accepted by insurers (prior to the *Blanch* decision) as being eligible for terminal compensation.

In undertaking approximately 41 administrative reviews of insurer decisions on terminal compensation between June 2020 and March 2022, WCRS notes many of these reviews involve workers with life expectancies more than 15 years in the future, with some projected more than 30 or 40 years in the future. In many of these cases, doctors commented it was too early to diagnose with certainty terminal nature of the worker's condition and considered further monitoring over time was necessary.

If the *Blanch* decision is not corrected and the scheme is left unfettered, the sustainability of the Queensland workers' compensation scheme is at risk. As outlined above, workers who have life expectancies 30 to 40 years into the future may potentially be eligible for terminal compensation if a doctor has certified it is their work-related injury that will end their life. This will place significant cost pressures on the scheme due to:

- claims liability provisioning being brought forward by tens of years; and
- more claims falling in scope who otherwise would not, such as workers who may have passed away from accidents or other non-work-related reasons before progressing to the terminal phase of their condition.

Electoral matters

In relation to the electoral amendments, changes to the electronic disclosure system administered by the ECQ can be implemented from within existing resources.

Implementation

Claim farming

In relation to claim farming, the new special investigation powers in the LP Act (new chapter 6A and the specific claim farming offences (new part 2, chapter 3), information sharing provision and the amendment to section 73A (proceedings) of PIP Act will commence on assent. Similarly, in the WCR Act the claim farming offences (new chapter 6B part 4), the special investigation provisions and associated amendments (new chapter 12A part 1A, amendment of section 575, and amendment of section 579), and information sharing provisions (new section 573A), will commence on assent. Further, the amendments to the 50:50 rule in the LP Act will commence on assent. These provisions do not require any significant implementation work to support their operationalisation.

Those provisions relating to law practice certificates will commence on proclamation. This reflects the need for lead in time to enable regulators, insurers, and relevant law practices to establish the necessary policies and procedures which will underpin scheme. A proclamation date as soon as practicable after passage will be settled in consultation with stakeholders. The LSC and OIR will lead the implementation of the legislation.

The OIR, the LSC, and MAIC have formed a working group to coordinate the implementation of consistent provisions across schemes. The agencies have held an initial meeting to consider issues such as: minimising administrative burden for law practices and insurers, creating a single approved form modelled on the existing MAIC law practice certificate, to be adopted across the schemes and drafting a memorandum of understanding to facilitate effective information sharing.

Terminal compensation

The provisions regarding terminal compensation will commence on assent. OIR will work with insurers on a communications strategy to ensure any workers affected are advised of their right to make a further application when their entitlement to terminal compensation arises i.e. being certified that their condition will terminate their life within three years. These provisions do not require any significant implementation work to support their operationalisation.

Electoral matters

The amendments dealing with the payment of fundraising contributions into the State campaign account will commence on assent, while the other amendments dealing with disclosure returns commence on 1 July 2022 in line with the commencement of the political donation caps. The ECQ will also provide education to election participants (including political parties and candidates) on their new obligations as a result of the proposed amendments.

Stakeholder consultation

An exposure draft of the amendments to the LP Act and PIP Act was released for targeted stakeholder consultation with the LSC, Queensland Law Society (QLS), Bar Association of Queensland (BAQ), Australian Lawyers Alliance (ALA) and Insurance Council of Australia (ICA) on 25 February 2022, with a further exposure draft circulated and in some instances stakeholder meetings convened, in the lead up to introduction.

Workers' compensation key scheme stakeholders were briefed on the proposals in late 2021 and during preparation of the Bill in February and March 2022. This included the legal stakeholders mentioned above as well as:

- Asbestos Disease Support Society – terminal compensation only;
- Association of Self-Insured Employers Queensland;
- Australian Industry Group;
- Australian Rehabilitation Providers Association;
- Australian Workers' Union;
- Construction Forestry Maritime Mining and Energy Union – construction and mining divisions;
- Queensland Council of Unions; and
- WorkCover Queensland.

Additionally, for terminal compensation, OIR consulted widely with key stakeholders on guidance clarifying the policy intent of terminal compensation prior to its publication in 2021. No substantive issues were raised by stakeholders and feedback was incorporated into the guidance as appropriate. The Bill reflects the policy intent set out in the guidance.

Stakeholder feedback resulting from these consultation processes was considered and incorporated into the Bill where appropriate.

Fundamental legislative principles

Potential breaches of the fundamental legislative principles (FLPs) raised by the amendments and the justifications for the potential breaches are outlined in detail on pages 9-16 of the explanatory notes to the Bill.

Human rights impacts

The human rights issues and justifications are outlined in detail in the Statement of Compatibility for the Bill.

Attachment 1 - Law Practice Certificate requirements under the *Personal Injuries Proceedings Act 2002*

Requirements of law practice certificates

A law practice certificate is a certificate in a form approved by the Legal Services Commissioner (Commissioner) which states the matters mentioned in proposed section 8B of the *Personal Injuries Proceedings Act 2002* (PIP Act), such as:

- that the supervising principal and each associate of the law practice did not give or receive consideration for referring a claimant or potential claimant (proposed section 8B(2));
- that the supervising principal and each associate of the law practice did not personally approach or contact another person to solicit or induce them to make a claim proposed section 8B(3); and
- that the costs agreement relating to a speculative personal injury claim complies with section 71E of the PIP Act or section 347 of the *Legal Profession Act 2007* (LP Act), where the claim is a speculative personal injury claim (proposed section 8B(4)).

The certificate must be signed by the supervising principal and verified by statutory declaration (proposed section 8B(5)).

A flow chart of the law practice certificate requirements at the various stages of proceedings under the PIP Act is provided on page 2.

Before claimant gives notice of claim/urgent proceedings started

Law practice must give claimant law practice certificate (proposed section 8C)

Law practice sale – current law practice must give certificate to new law practice and copy to the claimant (proposed section 8F(2).

If new practice does not receive law practice certificate, it must notify the Commissioner (proposed section 8F(3)).

When claimant gives notice of claim

For medical negligence cases - Claimant must give, with the **initial notice**, a ***copy*** of the law practice certificate given to them by the supervising principal under section 8C/8F (section 9A(3A)).

If not previously given under section 9A, the claimant must provide with the **notice of claim,** a ***copy*** of law practice certificate given to them by the supervising principal under section 8C/8F (proposed section 9(2))

After claimant gives notice of claim

Claimant retains law practice after notice of claim—law practice must give respondent law practice certificate (proposed section 9C)

If a respondent waives the requirements relating to giving notice or is presumed to be satisfied that notice has been given and a certificate has been completed but not given to the respondent, the supervising principal must give respondent (and their insurer) a copy of the certificate as soon as practicable (proposed section 13A(2))

In cases involving waiver or presumption where the law practice has not given the certificate, the supervising principal must complete and give the certificate to the respondent, and a copy to the claimant and respondent's insurers (if known) within 1 month (proposed section 13A(4))

After settlement/finalisation of claim

On settlement or judgment, the supervising principal of the law practice retained by the claimant, must complete a fresh law practice certicate and give it to the respondent and a copy to the claimant and the respondents insurer (if known) within 7 days (proposed section 61(2)

Failure to comply with law practice certificate requirements

It is an offence not to complete and give certificate under sections 8C, 8F, 9C, 13A and 61

It is an offence to sign, or give claimant or insurer, false or misleading certificate (proposed section 8E)

The law practice must, within 14 days, refund all fees and costs including disbursements (and must not charge or recover any further fees or costs) if, because it did not give the certificate, the claimant cannot comply with the requirements in section 9(2) and they end their engagement with the law practice (proposed section 9B)

If convicted of offence against section 61, 71(1) or (2) and 71B, the law practice is not entitled to recover fees and costs including disbusements and must repay amounts received (proposed section 71D)

Reporting non-compliance with the law practice certificate requirements

Proposed section 71G imposes an obligation on the supervising principal of a law practice acting for a respondent and respondent's insurers for a claim under the PIP Act to notify the Commissioner if they (or an associate of the law practice) reasonably believe a person is contravening a law practice certificate requirement (i.e a requirement under proposed sections 8C, 8E, 8F, 9C, 13A and 61). The notification must occur within 14 days after the belief is formed or a longer period agreed by the Commissioner. Failure to comply with this obligation may constitute unsatisfactory professional conduct or professional misconduct under the LP Act.

If the insurer reasonably believes a person is contravening a law practice certificate requirement or section 71 or 71B, the insurer may give the Commissioner the information the insurer has in relation to the contravention.

Statutory Claim

Before claimant commences statutory claim

Law practice sale – current law practice must give certificate to new law practice and a copy to the claimant (proposed section 325M(2)).

If the new practice does not receive the law practice certificate, it must notify the insurer (proposed section 325M(3)).

During claim

(**A**) If a law practice is retained by a claimant, the law practice must provide a LPC to the claimant within one month after the application for compensation is lodged, or otherwise, a month after the day the law practice is retained by the claimant (proposed 325I).

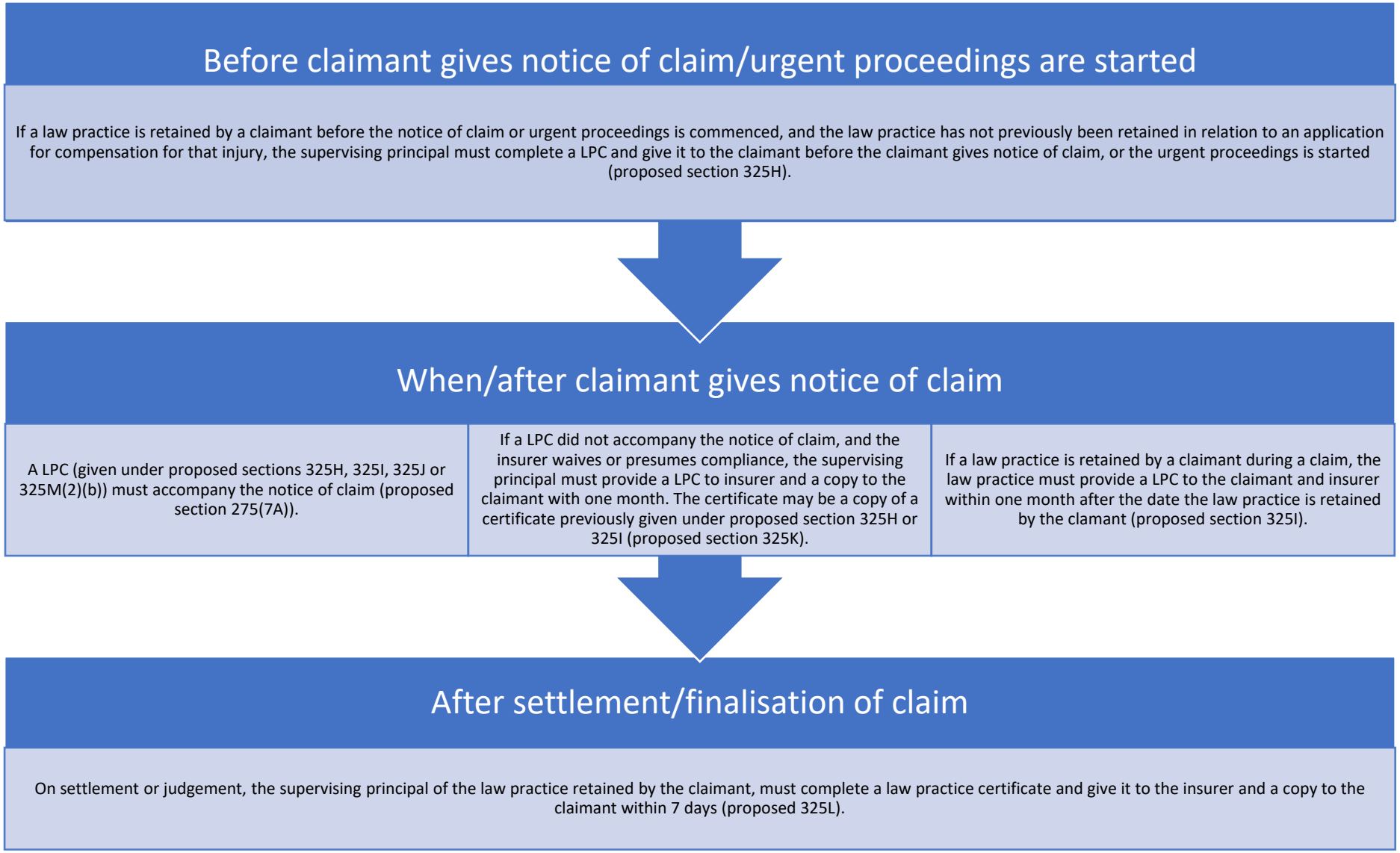
(**B**) When a law practice transmits an authority to an insurer to release funds directly to a law practice (proposed section 325J), the law practice must also provide a LPC to the insurer, and a copy to the claimant (proposed section 325J (2)).

If the insurer receives a payment direction from the claimant, and it is not accompanied by a LPC, the law practice must, within 7 days after receiving an insurer request, provide a LPC to the insurer and a copy to the claimant (proposed section 325J (3,4,5)).

End of statutory claim

If a certificate has not been given as per (**B**), and the claimant is paid an amount under a lump sum provision, unless there is a reasonable excuse, the supervising principal must within 7 days after the amount is paid, complete a LPC and give it to the insurer, and a copy to the claimant (proposed section 352J(6,7,8)). If the claimant is paid more than one amount of lump sum compensation, the LPC only needs to be provided in relation to the first payment.

Common law claim



Failure to comply with law practice certificate requirements			
It is an offence not to complete and give certificate under sections 325H, 325I, 325J, 325K, 325L and 325M.	It is an offence to sign, or give a claimant or insurer, a false or misleading certificate (proposed section 325P).	The law practice must, within 14 days of the claimant terminating the engagement, refund all fees and costs including disbursements (and must not charge or recover any further fees or costs) if, because it did not give the certificate, the claimant cannot comply with the requirements in section 275(7A) within the period that a claimant may bring a proceeding for damages (proposed section 325O).	If convicted of offence against section: 325J, 325L, 325R(1) or (2) or 325T, the law practice is not entitled to recover fees and costs including disbursements and must repay amounts received (proposed section 325V).

Terminal condition lump sum compensation eligibility

Workers and eligible dependents can claim lump sum compensation if their work has caused an injury or illness which is expected to end their life in the immediate to short term—for example a worker with mesothelioma.

Although workers can seek common law damages, for some the prompt assessment and payment of this additional lump sum alleviates the immediate need to seek common law damages. It allows them to spend more time with their family at this crucial time. This compensation also supports workers who need palliative care and ensures they can plan and attend to the financial needs of themselves and their families.

Lump sum compensation for terminal conditions is not intended for workers whose condition will result in a short decrease in their life expectancy, or whose life is predicted to end a considerable time into the future. Other compensation for loss of function and/or impairment is available for these workers who will be better supported through ongoing compensation entitlements and access to rehabilitation, vocational counselling and re-training.

What is a terminal condition?

Terminal conditions are generally considered as a work-related illness or an injury that is likely to result in the death of the person in the immediate to short term (for example, usually two or three years but up to five years from diagnosis) and is not able to be cured.

A condition is terminal if:

- it is certified by a doctor as being a condition that is expected to terminate the worker's life
- the insurer accepts the doctor's diagnosis of the terminal nature of the condition.

There is no set list of terminal illnesses. Examples of common workers' compensation claims for terminal conditions include:

- accelerated silicosis with progressive massive fibrosis
- mesothelioma
- end stage work-related cancers.

When does a worker have a terminal condition?

A doctor must first certify the worker's condition is terminal. A doctor must use their clinical judgement considering a range of factors, such as the nature of the worker's injury, their prognosis, available treatments, their overall health and personal medical history.

Reaching a terminal diagnosis is a complex clinical decision and a worker's prognosis may be uncertain. For some conditions, such as those where the disease or its progression are medically well understood, a doctor may be able to make this certification with a high degree of certainty. However, for other conditions, such as the emergence of accelerated silicosis in the engineered stone industry, doctors may be required to provide a more speculative assessment of a worker's life expectancy where there is limited knowledge about the disease or its progression is not well understood.

The *Workers' Compensation and Rehabilitation Act 2003* (the Act) provides insurers with discretion to accept the doctor's diagnosis that the worker's condition is terminal. This provides insurers with flexibility to consider each worker's claim on its own merits and ensure workers who are in the final stage of their illness, particularly those needing palliative care, are able to access vital financial support.

Insurers are expected to exercise their discretion reasonably, in accordance with the beneficial nature and objectives of the workers' compensation scheme. In making these determinations insurers will need to consider the standard and contemporaneous nature of medical advice available.

Factors considered in determining to accept the terminal nature of a worker's injury may include:

1. What is the current progression of the worker's injury (e.g. is the injury stable or deteriorating?)
2. Has a sufficient period of time passed since the worker was diagnosed with their injury to enable the doctor to assess the trajectory of their injury or is further observation time required? If further observation time is required, how much time does the doctor anticipate before the relevant assessment can be made?
3. Can the injury be cured?
4. Is the worker currently undertaking any treatment and, if so, what is the likely course of treatment and its impact on the worker's life expectancy (e.g. is the worker responding to the treatment?)
5. What would the worker's life expectancy have been if they did not suffer from their injury and what is the basis for the doctor's estimation of this life expectancy?
6. Does the worker suffer from any co-morbidities not related to their injury? If so, what is the expected course and impact of these co-morbidities on the worker's life expectancy (e.g. is it more probable than not that any of these co-morbidities will end the worker's life?)
7. Does the doctor expect the worker's life will end due to their compensable injury? If so:
    a. What is the doctor's estimation of when the worker's life will end? (e.g. generally months or less, in the next two years)
    b. What is the doctor's explanation of the process of how the worker's injury will cause the end of their life?
    c. At what stage of the injury is the worker at? (e.g. needs a caregiver, palliative care, terminal phase).

Each case must be considered and determined based on its own particular circumstances.

What if I disagree with the insurer's decision?

If the insurer decides not to accept a worker's condition is terminal, it does not mean the worker is precluded from accessing terminal compensation in the future. If the worker's claim remains open and their condition deteriorates or further medical evidence becomes available, the insurer may make a new decision in the future to accept the worker's condition is terminal.

It may be more appropriate to monitor the worker's condition and assess at a later point in time if the worker is stable, has a capacity for work, is not adversely affected by the condition or its symptoms, or is unlikely to die of their condition in the immediate to short term.

There are important safeguards for workers and employers to seek an independent review by the Workers' Compensation Regulator if they are not satisfied with an insurer's decision, including whether to accept a condition is terminal. Read more about the review process.

Last updated 23 April 2021