Queensland Law Society

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Office of the President

22 April 2022

Our ref: ACTL:HS

Committee Secretary
Legal Affairs and Safety Committee
Parliament House
George Street
Brisbane Qld 4000

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

Dear Committee

Personal Injuries Proceedings and Other Legislation Amendment Bill 2022

Thank you for the opportunity to provide feedback on the Personal Injuries Proceedings and Other Legislation Amendment Bill 2022 (**the Bill**). The Queensland Law Society (**QLS/the Society**) appreciates being consulted on this important piece of legislation.

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. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled by the QLS Accident Compensation and Tort Law Committee, whose volunteer members are practitioners with substantial expertise in this area.

The Society wholeheartedly supports legislative reform to prohibit the insidious practice of personal injury claim farming in Queensland. The Society recognises the considerable effort taken by the Office of Industrial Relations and the Department of Justice and Attorney-General to prepare the Bill and appreciates having been consulted by those agencies in relation to the draft of the Bill prior to its introduction, albeit in a very compressed timeframe.

Despite the constructive consultation process, QLS has serious residual concerns about aspects of the Bill, including:

- the multiplicity of law practice certificates required in some claims introduces excessive compliance burden and regulatory risk for law practices;

- the model for provision of law practice certificates under the *Personal Injuries Proceedings Act 2002* is flawed;
- the regulatory authorities overseeing the claim farming scheme must share information and behave consistently;
- the investigation powers introduced by the Bill conflict with fundamental legislative principles;
- changes to the definition of *terminal compensation* should not be retrospective;
- there is a drafting issue with the amendment to the 50/50 rule.

Law Practice Certificates

To the extent that the Bill relates to claim farming, the primary aim of outlawing that practice is to be achieved by prohibiting:

- the giving or receiving of consideration for claim referrals: proposed s71 *Personal Injuries Proceedings Act 2002* (**PIPA**) and proposed s325R *Workers' Compensation and Rehabilitation Act 2003* (**WCRA**); and
- approaching or contacting a person for the purpose of making a claim: proposed s71B PIPA and proposed s325T WCRA.

It is proposed that law practice certificates (**LPC**) be required at various stages of claims to require law practice principals acting for claimants to declare that claim farming has not taken place in relation to the claim. The certificates are to be provided to claimants, the workers' compensation insurer (in the case of WCRA claims), respondents and respondents' insurers (in the case of PIPA claims) at various times.

QLS understands that the intention is to require LPCs primarily at the commencement of claims and at the time they are resolved (and additionally where law practices are engaged part way through a claim or where law practices conducting claims are sold). This intention mirrors the intention of the *Motor Accident Insurance Act 1994* claim farming provisions.

The LPCs are a means by which claim farming can be detected rather than an end in and of themselves. It is essential that these additional bureaucratic requirements be simple and efficient to comply with, given that the vast majority of legal practitioners have no involvement in claim farming. There is no public good in law-abiding practitioners becoming overburdened by excessive certificate requirements or being prosecuted for inadvertent failure to comply.

The requirement to provide LPCs works well in respect of claims under the MAIA. In that Act, it is clear when the first and second LPCs are to be provided and there is a single central authority to whom certificates are given (the Motor Accident Insurance Commission - **MAIC**).

As the Bill is drafted, the LPC requirements are not easy to understand and, in some instances, LPCs arising out of the same injury will need to be given to a number of different entities at different times. This is particularly the case in so-called 'hybrid' claims where the claimant seeks compensation/damages via claims under both PIPA and WCRA or WCRA and MAIA or, less commonly, all three. QLS has been provided with a copy of the Australian Lawyers Alliance submission, including annexure A which highlights the multitude of occasions upon which LPCs will be required according to the Bill. The excessive LPC requirements are of great concern to the profession.

The Bill makes no provision to simplify the LPC requirements where there is a hybrid claim. At a minimum, a single approved form of the LPC applicable to all three claim farming schemes

must be developed and the three Acts should make very clear when a copy of an earlier certificate is sufficient versus when a new certificate must be signed.

At present, the proposed provisions of PIPA are sufficiently clear regarding the need for a *copy* of the law practice certificate already given to the claimant under proposed s8C to be given to respondents as part of an initial notice (s9A) or part 1 notice (s9), rather than a new certificate. Similarly the requirements for a second LPC to be given to the respondent (with a copy to the claimant and the respondent's insurer) at the time of judgment or settlement is straightforward (though, in the Society's submission, not the most efficient and effective model, as discussed below). The difficulty arises in respect of hybrid claims, as stated above, where certificates will need to be given under each Act at different times and in PIPA claims with multiple respondents, where it is not clear whether a new LPC must be given to the claimant before giving a notice of claim to second and subsequent respondents.[1]

The WCRA LPC requirements are more difficult to comprehend. Proposed s 275(7A)(a) should be amended to make clear that it is a *copy* of a certificate given under s325H, 325I or 325J that is required to be given with the notice of claim for damages.

Proposed s325I appears to impose excessive certificate requirements where solicitors are retained to act in relation to both a statutory claim for compensation and a common law claim for damages. That section is headed 'Law practice retained by claimant during claim' and appears to be intended to cover two situations: where the law practice is engaged to assist the claimant with a statutory claim for compensation and where the law practice is engaged by a claimant who has already given a notice of claim for damages (i.e. a common law claim).

QLS assumes that the intention is that where a claimant has engaged a law practice to assist in relation to their statutory claim for compensation and a claim for damages has not yet been made, an LPC must be given to the claimant only (i.e. not the insurer) within one month of lodgement of the application for compensation or within one month of being retained (proposed ss325I(2)(b)(i) and 325I(3).[2]

However, as drafted, where a claimant has retained the law practice to act in relation to both a statutory claim and a claim for damages, i.e. where the costs agreement covers both the statutory claim and a future damages claim, the law practice is required to give an LPC to both the claimant and the insurer (s325I(2)(ii)) within one month, even where, as is very common, the claim for damages cannot yet be commenced. An LPC will then need to be given again with the notice of claim for damages under s275.

The greatest risk for claim farming in respect of WCRA claims is where there is likely to be a substantial lump sum payment on a statutory claim or where there is a common law claim for damages. These risks are mitigated by requiring an LPC prior to a lump sum being paid into a law practice trust account and, in respect of common law claims, by the requirement that an LPC be provided with a notice of claim for damages and at the time the claim is finalised. QLS sees little benefit in LPCs being required at the commencement of every statutory claim, even if only to the claimant (who would be under no obligation to report non-compliance with that LPC requirement in any event). If, however, the requirement for an early LPC in statutory claims is to be retained the Society submits that the two purposes of s325I (LPCs in statutory claims and LPCs where a law practice is engaged after a common law damages claim has been

[1] It is quite common to add additional PIPA respondents as a claim progresses.

commenced) should be separated for ease of reading and to avoid additional certificates that serve no purpose.

Proposed s325J could be considerably simplified by providing that an insurer must not pay compensation to an account held by a law practice unless the insurer has received an LPC or copy of an LPC executed in relation to the claim. The requirement in s325J(7) relating to law practice certificates where lump sum compensation has been paid directly to a legally represented claimant could remain, though QLS questions the objective and practical utility of this requirement.[3]

Putting aside the Society's very serious concerns about the considerable difficulties that practitioners will face in complying with the LPC requirements as currently drafted, most importantly QLS is concerned that even if practitioners are able to comply, the model of the scheme in relation to PIPA claims will not necessarily result in claim farming practices being detected.

PIPA has an incredibly broad ambit and includes personal injury claims against property owners/occupiers, medical practitioners, product suppliers, governments, religious institutions, sporting associations and myriad other natural or corporate persons. Under PIPA, these entities are the respondent to the claim. Respondents are often, though not always, insured. Where insurers are involved, they are commercial insurers of varying size and area of focus and often based outside Queensland. These insurers operate for commercial benefit and not for any benevolent public purpose. This is a significant contrast to the workers' compensation and compulsory third party schemes where there are existing regulators closely involved and a limited number of insurers.

The proposed LPC regime in PIPA rests upon respondent's solicitors and/or insurers reporting non-compliance under proposed s71G.

As the Bill is drafted, insurers have a discretion to report non-compliance with an LPC requirement (or with a substantive claim farming provision i.e. ss71 or 71B). Commercial insurers operating for profit are likely to have no motivation to report contraventions of LPC requirements unless they notice a pattern of farmed claims impacting on their business. The provision of a discretion for insurers to report non-compliance creates a serious risk that the objective of the Bill in respect of PIPA claims will not be achievable.[4] There is no justification for insurers to have a discretion to report rather than being required to report.

According to the Bill, supervising principals acting for respondents/respondent's insurers must give information to the Legal Services Commissioner in relation to contraventions of LPC requirements that they reasonably believe are taking place. Failure to do so risks a finding of unsatisfactory professional conduct or professional misconduct.

Putting aside that this appears to place a disproportionate burden on solicitors acting for respondents or their insurers compared to the discretion granted to insurers, QLS is concerned that contraventions of LPC requirements will go unreported and claim farming activity will therefore go undetected. This is a product of the overly bureaucratic and burdensome approach of the respondent/insurer and their solicitor being unnecessarily inserted between the claimant's solicitor and the oversight body in handling LPCs.

[3] QLS considers that practitioners who would engage in claim farming are likely to insist upon payment being made to their trust account.
[4] It must be borne in mind that insurers may respond directly to claims without engaging external solicitors.

QLS is of the very strong view that the better model would be to require LPCs in PIPA matters to be given to a central authority (either the Society or the Legal Services Commissioner) at the outset of the matter and again at judgment/settlement. This would have the benefit of simplifying matters (negating the need for respondents to be provided with the LPCs) and acting as a stronger deterrent to claim farming practices, given that the LPC must be submitted to a regulator of the profession. Settlement sums should not be released until the designated central authority (Commissioner or Society) confirms that the second certificate has been received and complies with the Act (i.e. the respondent or their insurer would need to await confirmation before releasing funds, similar to the way insurers await statutory clearances). Ensuring that a regulator has direct knowledge of claims and the opportunity to check LPCs is a more effective monitoring mechanism than relying on insurers (who have a discretion to report) or their solicitors.

In regard to all of the LPC requirements and the approach to prosecution for claim farming offences generally, the three regulatory entities involved (Legal Services Commissioner, Workers' Compensation Regulator and MAIC) will need to not only appropriately share information but agree upon consistent practices for prosecuting offences. A siloed approach risks inconsistency and significant inefficiencies. Inconsistency in approaches to prosecutions will put the effectiveness of the claim farming reforms at risk – gaps and failings in enforcement will embolden claim farmers.

Consistency across the prosecuting authorities is also important in terms of fairness. MAIC has taken a pragmatic approach in relation to inadvertent failure to provide LPCs, giving practitioners a chance to remedy innocent oversights. It is essential that the other agencies also allow some grace in respect of innocent non-compliance.

Excessive investigation powers

The Society is concerned that the investigation powers in respect of claim farming proposed for the *Legal Profession Act 2007* (**LPA**) and WCRA (and indeed some of the equivalent powers enacted in the MAIA) represent legislative overreach and violate cornerstone principles upon which our legal system is based. The Bills' inconsistency with these fundamental legislative principles is acknowledged in the explanatory notes.

We have identified the following proposed provisions that invoke concerns previously raised by the Society when the equivalent MAIA provisions were introduced:[5]

- Proposed ss581C LPA and s532N WCRA: We are concerned about the potential scope of the provisions given that there are essentially no limits on the type of entity in relation to whom the Legal Services Commissioner may appoint a special investigator and that the type of entities in relation to which the Workers' Compensation Regulator may appoint an investigator may be expanded by regulation. The breadth of these powers requires further scrutiny.
- Proposed ss581D(2) and 581F(1)(c)(ii) LPA and ss532Q(2) and 532S(1)(c)(ii) WCRA which abrogate the right to silence.
- Proposed ss581G LPA and 532T WCRA (despite ss581N LPA and 532ZA WCRA) regarding privilege against self-incrimination and legal professional privilege. As stated in our letter of 4 July 2019:

[5] Set out in the Society's submission of 4 July 2019 regarding the MAIA.

> *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.*
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> *Appropriate protection from self-incrimination is a fundamental legislative principle. It is our submission that the evidential 'limited immunity' granted in proposed subsection 87ZQ* [here s581N LPA and s532ZA WCRA] *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)* [here s581G(2)(b) LPA and s532T2)(b) WCRA] *should be removed as:*
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> *(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.*
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> *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 ss581H LPA and 532U WCRA. As stated in our letter dated 4 July 2019 in relation to the equivalent MAIA provision, the requirement of the court to "inquire into the case" in subsection (2) is inappropriate in an adversarial system. We see no reason why the provisions should not simply provide for the investigator (or the Commissioner/Regulator as the case may be) to make an application to the Supreme Court seeking an order that the investigated entity or associated person comply.

QLS submits that the investigation powers should be drafted in the narrowest terms that will allow the legislation to achieve its purpose of eliminating claim farming and conform to fundamental legislative principles to the greatest extent possible. As an additional safeguard there should also be transparency around the use of the powers through reporting by the Regulator and Commissioner on the use of the powers and through a review of their use after, say, two years.

Terminal compensation – amendment to s39A WCRA and associated transitional provision

QLS acknowledges the intent of the change to the definition of *terminal condition* in s39A WCRA and takes no issue with the proposed change as a matter of policy for the government. QLS does, however, take significant tissue with the proposed transitional provisions which provide that the new definition will apply retrospectively.

As drafted, the new definition will have retrospective operation in relation to injuries sustained on or after 31 January 2015 (apart from latent onset injuries sustained after that date in relation

to which terminal compensation has already been paid under s128B or s128D or where a notice of claim for damages has been given to the insurer before commencement). This retrospective application will impact claimants who have taken steps based on section 39A as it has existed since the October 2019 amendments and unfairly interfere with their legitimate expectations arising from the law as it currently stands.

This will include claimants who have incurred costs (both legal and in relation to expert reports) relating to making claims for compensation and/or appealing denials of compensation and potentially invalidate claims commenced in court under s238 WCRA (which allows claimants with terminal conditions to commence court proceedings without complying with the pre-court procedure set out in the WCRA), sending the claimant back to the pre-court procedure and thereby incurring extra costs.

As a fundamental principle central to the rule of law, legislative changes that impact on a person's rights should not be made retrospectively except in the rarest of circumstances and with a strong evidential and public interest basis. The Society does not believe that retrospectivity is fair, necessary or justified in this instance and submits that the transitional provisions of the Bill should be amended such that the changes to the definition to not come into effect until the commencement date.

Legal Profession Act 2007 - Amendment of s347 - 50/50 rule

The Society is supportive of the change to the 50/50 rule to treat additional amounts as professional fees rather than disbursements. This increases the 'clear to you' amount that successful claimants will receive[6] and serves as a disincentive to unscrupulous billing practices that may hide claim farming referral fees or result in claimants paying excessive interest on loans or credit facilities used to fund disbursements.

However, we have identified a difficulty with the drafting of new s347(8)(b) which excludes amounts payable to a barrister for services provided after a notice of claim (or s9A initial notice) is given under PIPA from the operation of s347(8)(a)(i). We understand that the intention of s347(8)(b) is to ensure that where a barrister is engaged to undertake work such as drafting pleadings, payment for that work is not captured in s347(8)(a)(i). QLS considers this appropriate.

The difficulty is that the carve out should not only relate to work conducted after a notice of claim is given under PIPA but to all personal injury claims, including those commenced under the WCRA or MAIA and those that are commenced as urgent proceedings in court (i.e. where a notice of claim may not have been given).

We recommend that the Bill be amended as follows:

> *(b) does not include an amount mentioned in subparagraph (a)(i) paid or payable to a barrister engaged by the law practice for services provided after notice of a claim has been given under the* Personal Injuries Proceedings Act 2002, Workers Compensation and Rehabilitation Act 2003 *or* Motor Accident Insurance Act 1994 *or for services related to urgent proceedings*.

[6] In the event that the law practice is charging the upper limit imposed by the 50/50 rule.

Minor amendments

The definition of "claim farming provision" contains an error in the Bill in that it ought to refer to "chapter 2, part 1, division 1AA" PIPA rather than "chapter 2, part 1, division 1A."

The examples given in proposed ss325Q(2) WCRA, 70(2) PIPA and s74(4)(b) MAIA should be consistent.

The Society looks forward to providing any further assistance the committee may require. If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [redacted] or by phone on [redacted]

Yours faithfully

Kara Thomson
President