Speech By

Tim Nicholls

MEMBER FOR CLAYFIELD

Record of Proceedings, 21 June 2022

PERSONAL INJURIES PROCEEDINGS AND OTHER LEGISLATION AMENDMENT BILL

Mr NICHOLLS (Clayfield—LNP) (11.45 am): What a shemozzle! We have a bill that has operative provisions in relation to disclosure requirements under the Electoral Act that need to be in place by 1 July that are being debated in the last sitting week of the financial year and there are amendments to be moved to this legislation foreshadowed on the morning of debate. The committee delivered its report on 27 May—that is, over three weeks ago. What a shemozzle!

We have two amendments incorporated in this bill as it was presented in this House to an amendment to legislation that was made in 2019. All of this was under the auspices of the Minister for Industrial Relations and Minister for Education who should in fact be known as the 'minister for never getting a bill right in this place'. This is the minister who, as racing minister, introduced 200 amendments to a bill. Those amendments completely replaced the bill that had been presented by her predecessor, the former member for Rockhampton.

This is a bill that the entire resources of the Department of Justice and Attorney-General could not get right—as evidenced by the amendments foreshadowed this morning. This is a bill that the entire resources of the Office of Industrial Relations not only could not get right this time but also fouled up the last time they tried to do something about it in 2019.

This is an example of a government that has ministers who just do not know what they are doing, who are not across their briefs and who do not understand the import of legislation that they bring forward to this House and are always scrambling to fix up. This is now the third bill in a row that the Attorney-General has had carriage of—I have some sympathy for the Attorney-General because she always gets lumbered with fixing up other ministers' mistakes; although in this instance there are mistakes from her department as well—where she has had to move amendments to fix matters up.

These are matters that have been highlighted both by the committee—I thank the Legal Affairs and Safety Committee for highlighting these matters—and during review. This is a sign of a government that is rapidly running out of puff and running out of capacity to properly do its fundamental job which is to legislate for the betterment of the people of Queensland.

Dr Rowan: It's sloppy.

Mr NICHOLLS: I take the interjection from the member for Moggill who does a great job. I welcome the students from Moggill State School who are here today. Your representative does a fantastic job. Make sure your mum and dad keep voting for him for as long as they possibly can so he can continue to do a great job for you. No doubt, when you get to the age to vote, you will have the common sense to vote for the LNP as well.

In introducing this bill the government claims it addresses four policy objectives. They are in order: to stop so-called claim farming for personal injury and workers compensation claims; to prevent undesirable costs agreement practices by lawyers in those personal injuries claims; to confirm the policy intent for when an entitlement to terminal workers compensation arises—I will deal with that laughable

objective; and to make some technical and clarifying amendments to the Electoral Act pertaining to fundraising and disclosure—and I have already made some comments in passing in my opening on that.

While some of these objectives, such as stopping claim farming and preventing undesirable costs agreements, are sensible and desirable, they are handled poorly in this bill as it was presented to this House. That is abundantly clear from nearly every submission made to the committee during its review of this legislation—submissions made by the Australian Lawyers Alliance, submissions made by private legal practices, submissions made by medical indemnity insurance practices—again, the member for Moggill will be interested in that—and submissions made by individual representatives. Almost every submission made highlighted the failures of the government in terms of achieving the objective.

The so-called objective of providing confirmation of the policy intent for when a worker is entitled to a terminal payment is a complete furphy and is completely unsupported by the evidence that was given to the committee. The justification in the explanatory notes is a complete furphy, and I will demonstrate that.

The technical and clarifying amendments to the Electoral Act are just more confirmation, if any is needed, of this government's inability to get its own legislation correct. Remember that this government has been talking about this legislation and introducing legislation in relation to the Electoral Act and disclosure requirements for over two years. The fact that we are debating this bill in such a rush some nine days before the new fundraising and electoral expenditure caps come into force is ample evidence of that proposition, as are the amendments that have been circulated in the last hour—the amendments to the amendments to the 2019 amendments! This government simply cannot get it right.

Let me deal with objective 1, which is claim-farming provisions that are provided. Claim farming is a practice that is particularly invidious, reprehensible and ultimately costly to society. It is costly to all of us as it drives up the cost of insurance and it denies people who are entitled to compensation the full amount of their rightful claims. Unfortunately there are those lawyers and others who see it as an opportunity to make some big money. Some of these law firms are pretty big names you see on billboards around town. Sometimes those lawyers are referred to as 'ambulance chasers', and these few besmirch the reputation of the very many and good law practices who represent injured people fearlessly, ethically and diligently.

In fact, ABC's investigations team in June 2018 ran a lengthy story on the issue. In that story it was alleged that Slater & Gordon—one of the big names in personal injuries and 'no win, no fee' legal actions—used telemarketing firms to continually ring potential claimants, with the story of Sandra whose son had died being continually harassed by telemarketers to enter into a claim. In fact, it was estimated in that ABC investigation story that, over an 18-month period from 2016 to 2017, more than 800 personal injury matters were generated for Slater & Gordon this way—800 new matters. That is a big number. Slater & Gordon allegedly paid $1,290 for each client referral for a workplace or motor vehicle injury. It is no wonder that other lawyers slammed the practice as 'parasitic', which is what it is, after these claims were published. Slater & Gordon—you will see their name on billboards on the side of the highway and on flashing signs everywhere. This is part of their ethical practice as revealed by the ABC.

Since 2019 in Queensland the practice of claim farming for motor vehicle accidents has been outlawed with substantial penalties applicable if a law firm is found to have used one of these so-called claim farmers. While the evidence before the committee is not as comprehensive as we would like, we think it is sufficient to draw the conclusion that the 2019 legislation is having its desired effect and the number of claims arising from claim farming in relation to motor accident claims is declining.

The MAIC, Motor Accident Insurance Commission's, 2020-21 annual report shows the number of reported scamming complaints fell from 1,300 in 2019 to 448 in 2020-21—a fairly substantial drop of 900 in the space of a year. It is not entirely clear why that drop occurred. There may be other reasons including, for example, the COVID-19 lockdowns when people simply were not driving and so the number of accidents fell. It is a substantial decline, and we in the LNP think that there is sufficient evidence there to say that there has been some success as a result of that 2019 legislation.

Other figures around new claims being made—that is, the number of new claims coming into the system—and the number of claims that have been made that are being discontinued or lapsing for want of progress also tend to show success of the amendments. As the evidence before the committee itself demonstrated, it is very difficult to pinpoint one particular reason as to why the claims experience is changing.

What we are now seeing and hearing is that the claim farmers are moving to new fields of endeavour and opportunity. In particular, there are increasing reports of claim farming for personal injuries and workers compensation. In my role as shadow Attorney-General, I first started hearing reports about this type of activity last year from a number of law firms and representative bodies.

A significant developing area of this business is now known as 'survivor farming' or 'survivor advocacy' and is apparently for potential cases of institutional sexual abuse survivor claims. This is also taking place particularly amongst the prison population and with former prisoners both in and outside of prisons, as well as some specific communities that are being identified as particularly susceptible where there is some evidence that there are quite a substantial number of people who may have experienced institutional sexual abuse.

Evidence of this is quite extensive in the submissions to the committee by knowmore. If you look at pages 5 and 6 of the committee's report, you can see some of the claims that are being made there. I will touch on this briefly in relation to those submissions. On page 5 of the committee report, they state—

- Claim farming and related practices in respect of institutional child abuse claims is being engaged in by both claim farmers (referred to as 'survivor advocacy businesses') and the law firms associated with them.
- The claim farmers are paid referral fees by law firms for introducing survivor clients and passing on initial (often limited) information ...
- Survivors were being subjected to harassment, intimidation and high-pressure tactics.

On page 6 of that committee report, knowmore continues to provide further evidence to the committee in relation to the quite atrocious behaviour that is being engaged in by these people in trying to earn an income and trying to get more money—clients receiving unsolicited letters; clients being approached while attending court; clients being harassed for over a year by phone calls and correspondence from a law firm linked to a survivor advocacy business despite not having signed a costs agreement with the firm; a law firm with links to a survivor advocacy business 'aggressively pursued' a client to sign a costs agreement months after the client submitted an application to the National Redress Scheme; significant claim farming occurring in prisons; prisoners being susceptible to friendly cold-calling tactics; and some prisoners are alleged to have received cash deposits into their prison accounts for referrals of the names of abuse survivor prisoners to survivor advocacy businesses. There is quite a lot of evidence put before the committee about this activity occurring.

While all those who have suffered institutional abuse should be afforded every opportunity to test their claims and to receive compensation, this does not extend to a right for claim farmers and unscrupulous lawyers to unfairly and rapaciously chase claimants who are often amongst the most vulnerable and susceptible to a friendly voice and who sign up without fully understanding what they are signing up for. The LNP will support the objective of the bill in preventing this type of claim farming.

What we are very cautious about is the proposed method of enforcing the prohibition. In this respect we are very supportive of the first and second recommendations in the committee report. In addressing this I note again the amendments that have been circulated in the last hour and the comments made by the Attorney in her second reading speech just a few minutes ago. She mentioned a number of matters. Obviously, given the limited time since the government's response was tabled and my ability to receive it, I will comment on those more when we get to debate the amendments. Let me say that those amendments, as I said earlier, are really testament to the government not fully thinking through how this legislation is going to work.

The requirements around provisions of the law practice certificate are complex and impose significant obligations on both the claimant and respondent. Some of the comments made in respect of the requirements of the law practice certificate in the committee report on pages 9 and 10 are telling. A quick look at pages 9 and 10 provide some indication of the very poor view practising lawyers, insurers and the Law Society have of the government's drafting. Here are a couple of them: a 'minefield of requirements ... neither practical, nor ultimately necessary', said the Australian Lawyers Alliance; 'will add to administrative burdens, and ultimately to the cost of pursuing actions', again the Australian Lawyers Alliance; 'appears to impose excessive certificate requirements', according to the Law Society; 'in some instances, LPCs arising out of the same injury will need to be given to a number of different entities at different times', the Queensland Law Society. Arising out of the same action and out of the same injury you have to give certificates not only to workers comp but to the other bodies as well, adding to cost and complexity.

There is also a telling piece of testimony from officers of the department to the committee. The chair of the committee, the member for Toohey, asked, 'Because the ultimate cost will end up with the consumer, won't it?' The answer from the departmental officer was, 'Yes, we assume so.' There is the true outcome: increased cost for the consumer. The member for Toohey knows it, the lawyers know it, the departmental officers out the back there know it, and the government should stop it.

When we heard the Attorney a little earlier today talk about consulting the Legal Services Commission, we heard a lot about convenience for the Legal Services Commissioner and we heard a lot about the cost burden for the Legal Services Commissioner, but we heard nothing about the cost burden on the injured person. For whom is this government acting? Are they acting for the Legal Services Commissioner or are they acting in the best interests of the client of the law firm who has

suffered a workplace injury and who is seeking compensation? As the member for Toohey's question to the officer of the department reveals, the cost always goes back to the client and the consumer. The member for Toohey knows it and the government knows it as well. The cost shifting is going from the Legal Services Commissioner to the consumer of the legal service, and it is impacting on the amount they will receive.

This at a time when the Legal Services Commissioner, who is not also unknown to the member for Toohey, is taking inordinately long times to resolve complaints. The legal profession continually are now put to delays of up to 18 months while the Legal Services Commissioner attempts to resolve complaints, and now the Legal Services Commissioner has informed the profession that she has enough spare time to start a pro-active complaints investigation process.

Ms Fentiman: More money, more resources!

Mr NICHOLLS: I take the interjection from the Attorney-General, who said 'more money' because it was under this government that the Legal Services Commission in 2015 stopped pro-active investigations. They were being done up until 2015 and then they stopped. We have a government that is more interested in the Legal Services Commission than it is in the consumer getting a good deal and streamlining costs. In this case the LNP urges the government to acknowledge the legitimate concerns—and I acknowledge the Attorney-General has addressed some of those matters in the amendments circulated in the last hour—and bring in amendments to simplify and clarify the process for the law practice certificates. We will have a close look at those amendments and comment on those when the opportunity for debate on that arises.

Let me turn to the second objective of the bill which it seeks to address: undesirable costs agreement practices for personal injury claims. Part 4 provides for certain cost practices to be prohibited and for certain expenses that might be claimed otherwise as disbursements to be included as legal costs for the purpose of the so-called fifty-fifty rule. The fifty-fifty rule is designed to ensure that a claimant receives at least 50 per cent of a compensation award and lawyers do not get more than 50 per cent. Having said that, many lawyers do not charge 50 per cent. Many lawyers charge far less than that and they do the right thing. As I say, there are ethical and scrupulous lawyers who do do the right thing, but there are those who take on speculative claims and charge up to 50 per cent. I will touch on one of those in just a moment. That rule, simply put, seeks to ensure that no more than 50 per cent of an award of compensation a client receives is paid to the client's lawyers. Details of the changes are quite substantially covered in the committee's report, and the Attorney has indicated some other matters that are also to be included as a result of some further investigations. They will be moved in the amendments, and I anticipate we will have no problems with that amendment in relation to those additional fees.

There is one matter not touched on in the committee report but it was raised by the deputy chair in the hearings. It is covered under proposed new section 347(8)(a)(iv) in clause 16 of the bill and it relates to the definition of other expenses. This is particularly important given the way the fifty-fifty rule works and the very significant impact it has on the compensation available to injured parties. I want to have regard to the comments of Justice Applegarth in a recent decision of Adamson v Enever, delivered 31 August 2021. I think it is important that we understand exactly how concerned members of the Supreme Court are in relation to the charging practices of some legal firms. This case relates to the capacity of an elderly lady who received a compensation payment of $350,000. The report is publicly available, so if people want to have a look at it they can. I am not disclosing anything that is confidential. Justice Applegarth makes a comment in relation to costs. At paragraph 95 he says—

The first is the legal costs that she—

the claimant—

committed herself to paying Shine Lawyers and the substantial difference between their estimated amount and the standard costs that she is entitled to recover ... Any substantial costs differential will erode the settlement sum which was negotiated.

At paragraph 98 he goes on to say—

There was never an issue of liability.

This goes to the complexity of the claim and whether the costs being charged are reasonable. He continues—

Mrs Adamson ... entered into a costs agreement with Shine Lawyers on 26 October 2015.

Formal liability was admitted a few months later on 29 February. The judgement continues at paragraph 101—

There was no real dispute that Mrs Adamson suffered a serious head injury when her head and neck hit the pedestrian crossing. There was no dispute that she suffered a head injury, a back injury, a neck injury, an ankle injury and some psychological effects ... These matters became the subject of seven medico-legal reports commissioned by Shine Lawyers and six medico-legal reports commissioned by the insurer.

...

Against that background, the estimated legal costs (excluding disbursements) to which Mrs Adamson is said to be liable under her costs agreement with Shine Lawyers seem to me to be extremely high, indeed excessive. The disbursements seem high, but I have no information about the extent to which they are made up by the costs of medico-legal reports ... Shine Lawyers seemingly claim to be entitled to recover from Mrs Adamson not only a large amount of costs pursuant to its agreement with her on account of time which has been billed on her file but also what is described as an "uplift". Presumably its agreement entitles it to an "uplift" despite liability never being in serious issue.

Then he goes on to make some further findings about the difference between the estimated indemnity costs and the costs recoverable from the second defendant. He goes on to say that the court has a supervisory jurisdiction, but investigations are better undertaken by authorities to do so. He makes some comments in relation to the true costs of these claims.

He concluded by saying that policymakers may need to consider better ways to contain legal costs, which, as a well-known professor stated, 'must be borne by someone'. He then went on to specifically exclude, for example, the photocopying costs that were charged by the firm Shine Lawyers from the calculation of fees.

Whilst we are dealing with costs agreements and unfair costs agreements, we have very real and very live claims. This is an elderly lady who was awarded $350,000. A Supreme Court judge—who I think most people would hold in high regard, and who in fact, as head of the Queensland Law Reform Commission, delivered the report in relation to the termination of pregnancy laws and is conducting other reports—has said that policymakers need to have a good hard look at the practices of some of these lawyers and the way they go about calculating fees. He has demonstrated how these fees have a very real impact on the compensation amounts that people receive to compensate them for their loss or injury and that they are expected to live on for the rest of their lives.

This is something that has not been taken up in this legislation, although the member for Currumbin in her role did ask a number of questions of the department about it. Regrettably, the department in its answer said that it was unaware of any need to make these changes—despite this case, Adamson v Enever, being widely reported not only by the Supreme Court but also by the Law Society journal, the *Proctor*, last year and being referenced on a number of occasions.

The third objective of the bill seeks to address a so-called 'confirm the policy intent' for when an entitlement to terminal workers compensation arises under the act. What this is really is cleaning up yet another mistake of the industrial relations minister. Despite the claims in the explanatory notes, there is no misunderstanding of the policy intent of the 2019 amendments to the act made by the government. The mistake has been that the minister did not understand again the full impact of the changes she was making back in 2019 and now has to change those amendments back again to recover lost ground.

In doing so in the bill as presented, the Palaszczuk government under Minister Grace is removing the right for terminally diagnosed workers to claim terminal workers compensation benefits upon diagnosis of a terminal condition. To top it all off, the Palaszczuk government under Minister Grace originally was proposing to make the changes retrospective to 2015. Imagine the howls of indignation from those opposite and their union mates and the plaintiff lawyers if that change was made by any other colour of government.

We need to deal with the laughable claim that this is a misunderstanding of the policy intent of the 2019 amendments. That the claim is laughable is demonstrated easily. The policy intent was set out by the minister in her speech amending the legislation in 2019 and in the explanatory notes. A good exposition of this can be found in paragraph 48 on page 14 of the Industrial Relations Commission decision made by Commissioner Power in Blanch v Workers' Compensation Regulator. Commissioner Power was appointed by Minister Grace in July 2019 and is a former legal adviser for the AWU. Commissioner Power's decision neatly deals with the argument that the terminal compensation payment is for the provision of palliative care services and support for the worker in the final years of a shortened life. At paragraph 57, Commissioner Power referred to Minister Grace's first reading speech in which she said—

The payment of this lump sum allows the worker to be provided with palliative care—

tick—

and support—

tick—

and ensures that the worker can plan and attend to the financial needs of their family and dependents.

They get the terminal compensation payment so they can set themselves and their family up. They can pay off their mortgage. They can put in place arrangements for the schooling and education of their children. They can actually make a decision about their life which is going to end, as there is a diagnosis of it.

The claim that it needs to clear up a policy misunderstanding is clearly false because the minister in her first reading speech did not say, 'This is just for palliative care and support services.' She said that it was to enable palliative care and support services and to attend to the financial needs of their family and dependents. Quite clearly it is a blunder, and the Attorney-General has been sent back in to try to fix it. The government have realised the problems and have decided that they are not going to proceed with the original amendments, as suggested by Minister Grace's department, but will now extend the terminal diagnosis claim to five years, rather than three years, and make sure it is prospective not retrospective back to 2015. Obviously, pressure has been brought to bear, and I wonder who that was brought to bear by. Nonetheless, it is an amendment that is worthwhile and it is an amendment that we will obviously be supporting.

In relation to the other changes and reforms in relation to the Electoral Act, the Attorney-General has mentioned that they are technical and go to some of the fine-tuning that is required. It is a pity that they were not understood beforehand. I understand political parties of all sides are awaiting advice from the Electoral Commissioner of Queensland as to how to properly set up accounts for fundraising. Given that that will be taking place in the next nine days—and in evidence before the committee the Electoral Commissioner said he would be preparing that information—it is very short timing indeed.