



THE LAW SOCIETY
OF NEW SOUTH WALES

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Mr Mark Follett
Executive Director, Policy, Reform and Legislation Branch
Department of Communities and Justice
6 Parramatta Square
10 Darcy Street
PARRAMATTA, NSW 2150

By email: policy@dcj.nsw.gov.au

Dear Mr Follett,

DRAFT CLAIM FARMING PRACTICES PROHIBITION BILL 2025 (NSW)

Thank you for seeking the Law Society's views on the draft Claim Farming Practices Prohibition Bill 2025 (NSW) (**Draft Bill**). The Law Society's Injury Compensation, Criminal Law, Indigenous Issues and Ethics Committees have contributed to this submission, as well as our Legal Regulation Department.

Introductory comments

As noted in previous submissions to the Department of Communities and Justice on this issue, the Law Society considers that legislation to address the practice of claim farming should be focused on the situation where, within the context of a personal injury claim, a claim farmer refers potential claimants to a lawyer/law practice for financial reward. This type of conduct may cause harm to potential claimants and undermine the integrity and operation of the justice system.

The Law Society is aware of the concerns raised by knowmore in relation to claim farming in the context of cases of child sexual abuse. We agree that serious ethical issues arise in circumstances where claim farmers, posing as 'survivor advocacy organisations', run a business model whereby they harass, intimidate or otherwise take advantage of victim-survivors by referring them to a legal practice for financial consideration. This is unacceptable, and compounded in cases where victim-survivors may be unaware of the availability of free support services such as knowmore, or of the implications that making a civil litigation claim has on access to the National Redress Scheme. The Law Society supports in principle the introduction of legislation to ensure that victim-survivors of abuse are protected from exploitative conduct of this nature.

We are concerned, however, that the Draft Bill, in an attempt to prohibit predatory conduct as described above, may also criminalise legitimate referral practices made to and by solicitors in certain personal injury contexts. We support retention of s 6 of the Draft Bill with certain amendments, but suggest that s 5 should be deleted for the reasons set out below.



Offence 1: Soliciting a potential claimant

We are concerned that s 5 of the Draft Bill may result in the criminalisation of legitimate conduct by lawyers/law practices. The following examples may prove illustrative:

- 1) It becomes known that a potential claimant living in a small town has suffered a serious injury while tripping over a poorly maintained council footpath. A local lawyer runs into the potential claimant at a community event, explains the process of filing a public liability claim in NSW and the services offered by their practice. The lawyer's conduct may be prohibited under s 5(1)(a).
- 2) A medical practitioner or community service provider has been asked by a patient/consumer about legal options available to make a medical negligence claim. On the request of the medical practitioner/community service provider, the lawyer contacts the patient/consumer. The medical practitioner/community service provider may be in contravention of s 5(2) as they have arranged for a third party (the lawyer) to contact a potential claimant in contravention of s 5(1)(a), and would anticipate the lawyer might be retained and therefore could expect to receive or receive consideration 'because' or as a result of the contact with the potential claimant. The lawyer's conduct may also be captured under s 5(1)(a).
- 3) A potential claimant rings a lawyer (the **first lawyer**) to seek advice in relation to a personal injury matter under the *Civil Liability Act 2002* (NSW). The first lawyer is unable to take on the matter as it is outside their area of expertise, but quite properly, and in line with their professional obligations, refers the potential claimant to a second lawyer, who is more suited to act in the matter. The first lawyer may be in contravention of s 5(1)(b).
- 4) A lawyer is in contact with a potential claimant in relation to an intentional torts matter. The lawyer arranges for wrap-around support for the potential claimant, including by way of referral to allied health professionals, community service organisations and an accountant. If these support services could be expected to receive consideration because of the referral, the lawyer may be in contravention of s 5(1)(b).
- 5) A legitimate community group to support persons affected by medical negligence/malpractice makes arrangements for legal practices, upon the agreement of their members, to contact potential claimants to communicate legal options to them. The community group may be in contravention of s 5(2), and the lawyer who reaches out to the potential claimants in contravention of s 5(1)(a).
- 6) The NSW Trustee and Guardian arranges for a private lawyer to contact a potential claimant with capacity issues to discuss their options in relation to a claim for personal injury damages. The NSW Trustee and Guardian may be in contravention of s 5(2), and the lawyer who reaches out to the potential claimant in contravention of s 5(1)(a).
- 7) A lawyer acting in a historical abuse case, in the context of gathering evidence for that case, is approached by one of the witnesses to that matter who wishes to bring their own claim under the Act. If the lawyer were to refer that claimant to a third party in relation to the claim, the lawyer may be in contravention of s 5(1)(b).



We acknowledge that the question of whether the examples above are caught by s 5 will depend on the following:

- Whether the courts give a broad interpretation to the term ‘solicit’, which includes ‘induce’: see s 5(5).
- Whether the language in the exception in s 5(3)(a) – *if a potential claimant is contacted and no person expects to receive, and no person receives, consideration because of the contact* – is held to apply when a person receives payment because of the services they eventually offer in relation to the claim e.g., a referral to a lawyer who is subsequently retained by the potential claimant; a referral to a doctor who is subsequently paid to write a medico-legal report in relation to the claim.

We are concerned that s 5, as currently drafted, ignores the fact that in many communities, including smaller rural or regional communities, recommendations for a lawyer might occur through ‘word of mouth’. In these cases, a lawyer may be approached to reach out to a potential claimant in a genuine manner to explain the legal options available to them.

As set out in example 3, referrals often occur between lawyers. This includes legal practices which belong to professional networks/alliances which bring together like-minded practices for the purpose of making referrals in particular areas of law. It is unfortunate if this conduct was captured by ss 5(1)(b) or 5(2) of the Act, particularly in circumstances where the firm has express permission from the potential claimant to refer them to another lawyer/firm.

Further, it is often vital for lawyers to refer potential claimants to a third party in relation to their claim (e.g., to a medical practitioner to write a medico-legal report) or to other support services which fall outside the scope of a lawyer’s practice. As illustrated by example 4 above, the legislation as drafted may criminalise this conduct, if the third party expects to receive consideration because of the contact.

The Law Society agrees that it would be inappropriate in the examples provided above, if the lawyer were to exert undue pressure on a potential claimant to make a claim. Depending on the circumstances, particularly if a potential claimant were encouraged to make a fraudulent or illegitimate claim, such conduct may amount to unsatisfactory professional conduct or professional misconduct under the Uniform Law.

In our view, however, section 5 as currently drafted fails to distinguish with sufficient nuance between legitimate contact which may result in a person, particularly a lawyer, contacting the claimant or arranging for a third party to contact the potential claimant to explain the services offered by them, and the exploitative practices identified by knowmore that have given rise to the need for this kind of legislation.

We suggest that if s 5 is retained, even with a broader set of exceptions to cover the types of examples above, it may not be sufficient to contemplate the spectrum of legitimate referrals that may occur in practice. As set out below, we suggest that s 6 is more suited to address the issue.

Further, while s 6(2) makes an exception for claim referrals for consideration in the context of a sale of a law practice, s 5 does not appear to cover the circumstances whereby the legal practice which has inherited the files following a sale makes contact with the potential claimant. Our comments in relation to the drafting of s 6(2) are set out below.



Offence 2: Claim referrals for consideration prohibited

In our view, proposed s 6 more appropriately targets claim farming, namely the practice where a claim is referred to another person for consideration. We understand that this is the type of predatory business model that has been observed in relation to childhood sexual abuse claims and has been highlighted through knowmore's advocacy.

We recommend that clause 6(2) of the Bill be made consistent with Rule 6 of the Legal Profession Uniform Legal Practice (Solicitors) Rules 2015, which requires solicitors to make contact with their clients prior to the transfer of their practice to another solicitor.

The *Personal Injuries and Other Legislation Amendment Act 2022* (Qld) excludes a gift or hospitality with a value of less than \$200 from the definition of consideration. In our view, it is inadvisable to legislate a threshold under which the giving or receiving of a non-monetary benefit or a claim or potential claim is not an offence. If non-monetary gifts up to the value of \$200 were to be provided to a claim farmer for every referral, this may thwart the purpose of the legislation to disrupt the claim farming business model.

Limitation periods

We note the observation in the Background Paper that 'personal injury claims and proceedings routinely take longer than six months to resolve, and in some cases the offending conduct may not be discoverable until after the conclusion of the claim'. We agree with this observation and consider it appropriate to extend the limitation periods as proposed.

Impact on the Legal Profession Uniform Law

We note that the Law Council of Australia may need to review the impact of any changes on the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015, for which it has statutory responsibility, if the Government proceeds to enact claim farming legislation.

Other options to address issues specific to institutional abuse

In the experience of our members working with vulnerable populations seeking justice in relation to matters of institutional child sexual abuse, potential claimants are sometimes not made aware, with sufficient clarity, of the different reparation options available to them. It is of critical importance that potential claimants have these options explained to them so they can make an informed choice about what is appropriate for their situation. It is particularly concerning if clients are not informed of the National Redress Scheme as an alternative scheme to civil litigation, particularly because certain aspects particular to that Scheme, such as acknowledgement from the offending institution and support through counselling etc., may be highly valued by the client. It is also imperative, in our view, that clients are made aware that free legal advice is available to them in relation to institutional child sexual abuse matters.

While a failure to provide advice to clients in the manner above may amount to unsatisfactory professional misconduct or professional misconduct, it may nevertheless be warranted, given the conduct identified by knowmore, to legislate that for the duration of the National Redress Scheme, a lawyer advising a potential



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claimant on civil actions in relation to institutional child sexual abuse must inform the potential claimant of the matters set out above.

Thank you again for the opportunity to comment on the Draft Bill. Questions at first instance may be directed to Sophie Bathurst, Senior Policy Lawyer, at (02) 9926 0285 or Sophie.Bathurst@lawsociety.com.au.

Yours sincerely

Jennifer Ball

Jennifer Ball
President