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MP: HON. FENTIMAN MP	
Clerk's Signature: 	

## LEGAL AFFAIRS AND SAFETY COMMITTEE

Report No 27, 57<sup>th</sup> Parliament, May 2022

### Personal Injuries Proceedings and Other Legislation Amendment Bill 2022

### QUEENSLAND GOVERNMENT RESPONSE

#### INTRODUCTION

On 31 March 2022, the Honourable Shannon Fentiman MP, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, introduced the Personal Injuries Proceedings and Other Legislation Amendment Bill 2022 into the Legislative Assembly.

The objectives of the Bill are to:

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

After introduction, the Bill was referred to the Legal Affairs and Safety Committee (the Committee) for consideration. On 27 May 2022, the Committee tabled its report (No. 27, 57<sup>th</sup> Parliament) on the Bill.

The Queensland Government response to the recommendations made by the Committee is provided below.

#### RESPONSE TO RECOMMENDATIONS

##### Recommendation 1

The majority of the committee recommends that the Personal Injuries Proceedings and Other Legislation Amendment Bill 2022 be passed. However, the committee urges that the amendments to the Bill recommended in this report be made before the Bill is passed.

##### **Queensland Government response:**

The Government thanks the Committee for its consideration of the Bill and notes the Committee's recommendation that the Bill be passed.

The Government's response to the additional amendments proposed by the Committee is outlined below.

##### Recommendation 2

The majority of the committee recommends that the Bill be amended to stipulate:

1. That the recipient of the Law Practice Certificate for WorkCover statutory and common law claims be the Office of Industrial Relations.

2. That the recipient of the Law Practice Certificate for Personal Injury Proceedings and/or Institutional Child Sexual Abuse claims be the Legal Services Commission.
3. That the obligation in relation to common law damages claims is to provide one certificate to the Legal Services Commission at or shortly following the law firm being retained by the client in respect of a damages claim.
4. In relation to statutory claims pursuant to the Workers' Compensation Rehabilitation Act, the obligation to give the Law Practice Certificate to the Office of Industrial Relations should only be enlivened where the claimant is legally represented at the time the claimant accepts a lump sum offer in a Notice of Assessment including for any terminal condition, and prior to any payment being made to a law firm's trust account.

**Queensland Government response:**

**1. *Law Practice Certificates for workers' compensation claims to be provided to the Office of Industrial Relations***

The Government recognises stakeholders' desire for simplicity and efficiency with respect to the provision of Law Practice Certificates.

The Government does not support this recommendation which proposes amending the Bill to change the recipient of a workers' compensation Law Practice Certificate from scheme insurers to the Office of Industrial Relations.

Within the worker's compensation context, as drafted it will always be clear who is the appropriate insurer to provide a workers' compensation Law Practice Certificate to, as a workers' compensation claim is only able to be managed by one insurer.

The Government considers workers' compensation insurers are best placed to collect and validate Law Practice Certificates as they are able to recognise when a claimant may be legally represented, and to identify the stages in a claim when a Law Practice Certificate is required. Insurers are also likely to recognise the signs of claim farming due to the day to day management of claims and established relationships with claimants and their representatives.

If implemented, the recommendation will have the undesirable consequence of creating an intermediary step that may delay the processing of injured workers claims because the Office of Industrial Relations must first receive, validate, and pass on the Law Practice Certificate to the relevant insurer. In effect, the recommendation would create an increased administrative burden on insurers and the Office of Industrial Relations.

The Office of Industrial Relations will appropriately undertake scheme wide monitoring of compliance with Law Practice Certificate requirements. This is supported by the Bill placing an obligation on insurers to report to the Workers' Compensation Regulator without delay when breaches have been identified. This further ensures there is a timely response to suspected claim farming activity and limits the potential for claim farming entities to engage in activity to evade prosecution (such as phoenixing or destruction of evidence).

The Office of Industrial Relations is also committed to working with stakeholders to ensure a seamless integration into claim processes.

**2. *Law Practice Certificates for Personal Injury Proceedings and/or Institutional Child Sexual Abuse claims to be provided to the Legal Services Commission***

The Government does not intend to adopt the recommendation that the Legal Services Commission (Commission) be the recipient for the Law Practice Certificate for claims under the *Personal Injuries Proceedings Act 2012* (PIP Act). There would be no clear benefit in requiring all Law Practice Certificates to be given to the Commission as a matter of course. Given the expectation that law firms would more often than not be compliant with the Law

Practice Certificate requirements, the recommendation is likely to impose a significant, and potentially unnecessary, regulatory burden on the Commission. Further, providing certificates to the Commission would not facilitate a reconciliation of when a certificate has not been provided.

The obligation in the Bill on law practices representing respondents and respondent's insurers to receive certificates and monitor compliance has been adopted because these law practices are well placed to know whether a Law Practice Certificate has or has not been provided to them as required by the Act because it is their role to closely examine claim documentation to ensure compliance with the various legislative requirements applying to the claim.

3. *One certificate to the Legal Services Commission at or shortly following the law firm being retained by the client in respect of a damages claim.*

The Government does not intend to adopt the recommendation that only one Law Practice Certificate is to be provided during the claims process because the requirement for a Law Practice Certificate at various stages is intended to ensure there are no gaps in the certification process and maintain consistency with the requirements under the *Motor Accident Insurance Act 1994* (MAI Act). For example, the Government notes the comments of the Queensland Law Society in its submission to the Committee for the *Motor Accident Insurance and Other Legislation Amendment Bill 2019* that were supportive of the requirement for a law practice certificate to be provided on settlement or judgment – “We believe this will be when the claimant or plaintiff will feel most comfortable in revealing the source of the claim referral”.

4. *The provision of Law Practice Certificates in statutory workers' compensation claims*

The Government notes concerns raised by the Committee and legal stakeholders about the complexity of Law Practice Certificates being provided in the statutory phase. In particular they recommended the only Law Practice Certificate in the statutory phase be when a claimant is legally represented at the time the claimant accepts a lump sum offer in a Notice of Assessment (NOA), and prior to any payment being made to a law firm's trust account.

To respond to this element of the recommendation, it is proposed to omit the requirement to provide a Law Practice Certificate on retainment for a statutory claim (section 325(2)(b)(i) & (3)(a)). This approach will simplify the requirements for when a Law Practice Certificate is required to be given and ensures direct alignment with the MAI Act and the PIP Act by ensuring a Law Practice Certificate is only provided on retainment for a claim for damages across all the schemes. This amendment does not remove existing safeguards or change the fact that regardless of what stage a claim is at, claim farming is an offence.

No amendment is proposed regarding the Bill's current requirement to provide a Law Practice Certificate with a payment direction or after a lump sum payment as the Bill, as drafted, provides greater coverage and protection for statutory claims. Linking a Law Practice Certificate in the statutory phase to the NOA, as recommended by the Committee, would remove important safeguards. This is because not every payment is linked to a NOA as they are only provided with respect to a permanent impairment assessment. It is noted that substantial lump sum payments such as latent onset injuries, redemption payments and death benefits do not require an NOA.

In addition, requiring a Law Practice Certificate to be provided prior to payments being dispersed into a lawyer's trust fund could potentially cause delays in payment of funds to claimants; particularly where a law practice fails to issue a Law Practice Certificate in a timely manner.

### **Recommendation 3**

The majority of the committee recommends that the proposed new terminal condition definition in section 39A of the WCR Act have an operational date of 1 July 2022 or on proclamation.

#### ***Queensland Government response:***

The Government supports this recommendation in principle and recognises a diagnosis of a terminal latent onset injury has a profound and complex impact on a worker's life and is an incredibly difficult time for workers and their families.

The terminal compensation payment is designed to support workers and their family in the final stages of their illness and sadly, their life. Queensland is the only jurisdiction to offer broad ranging statutory terminal compensation of this nature.

The Bill as drafted clarifies the timing of when a worker is able to access a terminal compensation payment. That is, when they are in the final stages of their injury and their life. It does not remove a workers' right to access a terminal compensation payment into the future. Further it does not stop a worker from accessing other workers' compensation entitlements or common law, including weekly benefits, medical, rehabilitation and return to work support and lump sum payments, before their injury is in its final stages.

It is important the policy intent of this entitlement is confirmed to ensure funds are provided at the right time, so workers and their families receive it when they are most in need.

Prior to 2019, a worker needed to be certified as having a condition which would end their life within two years to access this payment. An amendment to the definition of terminal condition was made in 2019 to provide more discretion to insurers to accept cases that would have traditionally been just outside the two-year requirement. This amendment was introduced in the context of the response to uncertain prognoses of engineered stone workers with accelerated silicosis in their 30s or 40s and a life expectancy of only three to five years.

The Bill is in response to a December 2021 decision in *Blanch v Workers' Compensation Regulator* [2021] QIRC 408 (Blanch). The Government respectfully submits the Blanch decision expanded the application of this discretion to matters beyond the policy intent and is in conflict with the purpose of the definition of terminal condition and terminal compensation. For these reasons, it is necessary to reinsert a timeframe and confirm the policy intent of the 2019 amendment to the definition of terminal condition.

The Government acknowledges there will be some workers who have lodged or who have an accepted claim for a latent onset injury and have advised their insurer that they have medical advice in relation to the terminal nature of their condition. Further that these workers may have developed an expectation that their claim will be progressed in line with the Blanch decision. Drawing from the Committee's comment that it "recommends that the Bill not operate retrospectively, particularly in relation to those who have already lodged a claim based on the law as it currently stands and whose claim is not decided prior to commencement of the proposed Act" (p.32) and to respond to similar concerns raised by scheme stakeholders, it is proposed to amend the transitional arrangements to allow those workers with current claims or disputes on foot and have provided medical evidence to their insurer of a terminal condition before 1 July 2022 to continue relying on the current definition. All other claims will be subject to the new definition. It is also proposed to amend the timeframe for the new definition to five years, instead of the three years as currently drafted. This approach responds to the concerns raised and balances fairness for workers with current claims in the scheme with the need to clarify the policy intent of the 2019 amendment in light of the Blanch decision.