Queensland Law Society

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Office of the President

22 March 2023

Our ref: HS:ACTL

Dr James Popple
Chief Executive Officer
Law Council of Australia
19 Torrens Street
Braddon ACT 2612

By email [redacted]

Dear Dr Popple

Inquiry into the operation of the National Redress Scheme

Thank you for the opportunity to provide input regarding the Joint Standing Committee on the Implementation of the National Redress Scheme's inquiry into the operation of the National Redress Scheme (**Inquiry**). The Queensland Law Society (**QLS**) appreciates being consulted on this important matter.

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

We note the Law Council intends to focus its submission on item 4 of the Terms of Reference and the recommendations made by the Joint Select included on page 2 of your memorandum.

In respect of the majority of those issues, QLS repeats its views expressed in the enclosed submission dated 13 November 2020. However, in so far as the issue of claim farming is concerned, we wish to highlight the recent developments in Queensland, which could serve as a model for any claim farming offences to be introduced to the National Redress Scheme.

Claim farming offences and law practice certificates.

Claim farming is now prohibited in Queensland in respect of claims for damages for personal injuries arising out of motor vehicle accidents, claims for compensation or damages for workplace injuries, and all other claims for damages for personal injuries.

This has been achieved through creating offences relating to giving or receiving of claim referrals and soliciting or inducing a person to make a claim. These provisions are similar across the relevant Acts, being:

- Part 5AA of the *Motor Accident Insurance Act 1994* (Qld) (**MAIA**) in respect of motor vehicle accidents;

- Part 4 of Chapter 6B of the *Workers' Compensation and Rehabilitation Act 2003* (Qld) (**WCRA**), in respect injured workers; and
- Part 2 of Chapter 3 of the *Personal Injuries Proceedings Act 2002* (Qld) (**PIPA**), which covers all other claims for damages for personal injuries, including civil claims for damages for institutional sexual abuse.[1]

QLS was a strong proponent of the MAIA claim farming prohibitions and likewise supported the addition of similar prohibitions to WCRA and PIPA when concerns emerged that claim farmers were pivoting their business model to prey on potential claimants under those Acts. A large part of the Queensland Government's motivation for expanding the prohibition on claim farming related to claim farmers preying on potential institutional abuse claimants.[2]

QLS considers the farming of redress claims to be equally reprehensible to the farming of personal injury claims for damages and would support legislative prohibitions on the farming of redress claims. QLS recommends that consideration be given to amending the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth) to include offences similar to those in place in Queensland regarding referrals and soliciting/inducing claims.

In terms of how claim farming is detected, in Queensland, law practices are required to provide law practice certificates (**LPC**) at various stages of claims, declaring under oath that the claim farming provisions have not been breached. The precise point at which LPCs are required to be given and to whom they are given varies between the three acts but the general idea is that an LPC is given at an early stage in the claim and a further LPC is given at the time of settlement. Under MAIA and PIPA, claimants are also required to complete a certificate declaring whether they were approached or contacted by a person and solicited or induced to make the claims. Failure to comply with LPC requirements can constitute an offence, has consequences for the progress of the claim and impacts the entitlement of the law practice to recover costs.

While QLS expressed concerns about the complexity of the LPC requirements introduced in the Queensland Acts (particularly where there are claims under more than one Act), we think that the basic idea of law practices and claimants confirming that a claim has not been farmed is sound and could be applied to the redress scheme.

Changes to the 50/50 rule

Our submission of 13 November 2020 discussed the '50/50 rule', which limits the amount of claim-related costs that a law practice may charge and recover from a client for work done in relation to a speculative personal injury claim.[3]

Under the 50/50 rule, disbursements and statutory refunds are deducted from the amount the claimant is entitled to receive before that net amount is multiplied by 0.5 to calculate the maximum amount a law practice can charge and recover.

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[1] The claim farming provisions in respect of motor accidents were introduced in 2019. The relevant provisions in the other two acts commenced on 30 June 2022 and were introduced by the *Personal Injuries Proceedings and Other Legislation Amendment Act 2022*.
[2] See for example the Attorney-General's Second Reading speech.
[3] Section 347 of the *Legal Profession Act 2007*. NB that a *speculative personal injury claim* is limited under s346 to a claim for, or substantially for, damages for personal injury and therefore does not cover a redress claim.

The *Personal Injuries Proceedings and Other Legislation Amendment Act 2022* (Qld) amended the 50/50 rule to provide that certain 'additional amounts' are not considered disbursements, thereby reducing the claimant's liability to the law practice for those amounts if the law practice is seeking to charge and recover the maximum amount.

Additional amounts include payments made to third parties for preparing statements or taking instructions in relation to a claim, which are activities often undertaken by claim farmers, generally for a sum that does not reflect the (limited) value of such work to the progress of the claim and in fact attempts to hide a referral fee.

While QLS does not at this stage express a settled position on applying the 50/50 rule to redress claims (we continue to rely on our previous comments regarding fee caps and legal practitioners' general obligations in relation to costs), we highlight these changes as important to consider if there is appetite to apply something similar to the 50/50 rule to redress matters.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [redacted]

Yours faithfully

[redacted]

Chloé Kopilović
President

Queensland Law Society

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13 November 2020

Our ref: [MC-LP]

Confidential

Mr Michael Tidball
Chief Executive Officer
Law Council of Australia
GPO Box 1989
Canberra ACT 1601

By email: [redacted]

Dear Mr Tidball

Second anniversary review of the National Redress Scheme

Thank you for the opportunity to provide feedback on the Second anniversary review of the National Redress Scheme (**the Review**). The Queensland Law Society (**QLS**) appreciates being consulted on this important issue.

This response has been compiled with the assistance of members of the QLS Ethics and Practice Centre and with some initial feedback from members of the Accident Compensation, Litigation Rules and Access to Justice Committees.

Specifically the Law Council has sought the views of Constituent Bodies on the necessity and appropriateness of recommendations proposed by Knowmore Legal Service to the two-year review of the National Redress Scheme (**NRS**). Due to the limited time available, we have been unable to provide detailed responses to the issues raised by Knowmore's recommendations. We raise the following issues for your consideration:

Recommendation 30

That before 31 December 2020, legislative and policy amendments be introduced to:

a. cap the fees that lawyers can charge for services delivered with respect to NRS applications;

The proposition that caps on legal fees is a solution for the concerns raised is too simplistic and fails to consider the problems caps create. Caution and careful consideration is needed before imposing a cap on fees for work done. This applies to all legal work. The *Legal Profession Act* 2007 (Qld) (**LPA**) provides that practitioners are only entitled to charge proper

and reasonable fees for work done. Some of our members have suggested that it may be appropriate to consider analogous protections to those already in place in Queensland[1] in relation to personal injury matters, such as the "50/50" rule for speculative personal injury claims.

The "50/50" rule is found is section 347 of the LPA and provides that, for speculative personal injuries claims, a law practice is not able to charge fees of more than 50% of the balance of the compensation/damages paid to a client after disbursements and statutory refunds are deducted. Section 346 of the LPA provides that "speculative personal injuries claims" are claims for damages for personal injury. Section 49 of the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth) confirms that a redress payment is not damages. Hence, the "50/50" rule is not thought to apply to these claims, however, in the time available to seek feedback on these issues, our members would not object to something similar for redress payments. The adoption of such a provision does, however require careful consideration as it too has its critics.

The following issues must be considered before a decision to cap legal fees is adopted:

- The legal profession is already carefully regulated across Australia and legal practitioners are only able to charge for what is fair and reasonable (for Queensland, see Part 3.4 of the LPA and particularly section 319 "On what basis are legal costs recoverable".)

- There are a number of checks and balances now in place to ensure that legal fees are reasonable. Clients may be able to request an itemised bill (section 332 of the LPA) and apply for an assessment of the whole or any part of legal costs (section 335 of the LPA).

- Clients can complain to the Legal Services Commission in Queensland.

- It is extremely challenging for a practitioner to determine in advance an appropriate legal fee for every case. Each case turns on its own facts and circumstances which will influence the complexity of the advice required. A lawyer may be able to make an assessment in each case so as to give a fee estimate to a client, but imposing a specific amount or cap in advance, before any assessment of the client's circumstances, will be problematic.

- It is essential that the legal advisor is able to take all reasonable steps to provide appropriate advice to their client, in accordance with their professional and ethical obligations. Imposing an artificial cap on fees for NRS applications could potentially discourage qualified practitioners from accepting complex claims, which may also affect the capacity of a survivor to obtain appropriate and adequate advice. This could create significant access to justice issues.

b. make it unlawful for lawyers to charge contingency fees for services delivered with respect to NRS applications;

[1] See ss 345 -347 of the *Legal Profession Act* 2007 (Qld) and Ch 3, Part 1 of the *Personal Injuries Proceedings Act* 2002 (Qld).

The charging of contingency fees by solicitors is expressly prohibited in Queensland (section 325 LPA). The blanket prohibition applies to NRS applications. It therefore seems unnecessary to specifically prohibit contingency fees for NRS applications. At this stage, further information as to the extent of any potentially exploitative practices would assist more detailed consideration of this issue.

c. impose a legal obligation on lawyers to advise a potential client of the availability of free services (knowmore and the Redress Support Services), and to certify such advice has been provided, before executing a costs agreement for an NRS application;

The obligation to advise a client of the availability of free services and to certify that such advice has been given is an example of a proper exercise of a solicitor's fiduciary obligation. We do not consider that any additional statutory obligation is needed. It must also be acknowledged that clients should be allowed to make their own informed choices when seeking legal advice. It is essential it is an informed choice. We also note that pursuant to section 323(d) of the LPA, a conditional costs agreement "must contain a statement that the client has been informed of the client's right to seek independent legal advice before entering into the agreement".

d. make it an offence for any person to:

i. contact a person without their consent and solicit or induce them to make an NRS application; or

ii. give or receive any money or other benefit in exchange for a referral to make an NRS application;

Again, we are of the view that further information is required in relation to the nature and extent of these alleged practices to enable a consider ed response to be adppted .

Solicitors are subject to existing ethical obligations in relation to referral fees. Rule 12 of the Australian Solicitors Conduct Rules 2012 (**ASCR**) deals with referrals and conflicts concerning a solicitor's own interests and the Society has published Guidance Statements with respect to the paying and receiving of referral fees. The *Personal Injuries Proceedings Act* 2002 (Qld), in addition to prohibiting payment of referral fees, also sets out restrictions with respect to personal injury advertising and touting in Ch 3, Part 1.

e. establish a set of expected practice standards for lawyers and survivor advocates providing services with respect to NRS applications; and

In our view the ASCR is already in place to ensure practitioners act ethically in accordance with common law and fiduciary duties. It may be that some specific additional guidelines may assista, particularly with respect to issues like, how a firm should split costs between work

done for an NRS application and investigations for a common law claim. It may be more prudent to await the outcome and findings of the Review before advocating for a particular response.

> *f. establish a specific complaints process within the Scheme to deal with concerns about the conduct of lawyers and representatives from survivor advocacy businesses.*

As noted earlier, the Legal Services Commission in Queensland already deals with complaints with respect to unsatisfactory professional conduct and professional misconduct of solicitors. We therefore query the purpose and benefit of a separate (and potentially overlapping) complaints process unless it was proposed to only receive complaints with respect to lay advocates. Further information about this proposal is needed, including any perceived gap in the existing protections.

We recently provided a submission to the Joint Select Committee on Implementation of the National Redress Scheme (**Join Select Committee**). The submission has not yet been published on the Committee website, we have **attached** a copy of the draft for your information.

You requested information on whether the conduct highlighted by Knowmore has come to the Society's attention. We are not aware of any specific complaints. However, when seeking feedback for the Joint Select Committee response, we received a response about these issues which noted that redress payments do not include any amount for costs so fees paid to practitioners are commonly deducted from the redress payment.

Concerns were also raised about some firms paid Google advertising which means that some law firms appear in the search results before the official NRS page. Whilst the Legal Services Commission has published information in relation to personal injury advertising (with respect to content)[2] including on search engines and non-lawyer websites, the ordering of search results is a separate matter which may require some further consideration.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [redacted].

Yours faithfully

[redacted]

Luke Murphy
President

[2] https://www.lsc.qld.gov.au/__data/assets/pdf_file/0004/655996/regulatory-guide-5-advertising-pi-serevices-on-internet-search-engines-august-2020.pdf.

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Office of the President

3 November 2020

Our ref: MC

Committee Secretariat
Joint Select Committee on Implementation of the National Redress Scheme
GPO Box 149
Parliament House
Canberra ACT 2600

By email: [redacted]

Dear Committee Secretariat

Second Interim Report on Implementation of the National Redress Scheme

Thank you for the opportunity to provide feedback on the Implementation of the National Redress Scheme (**NRS**). The Queensland Law Society (**QLS**) appreciates the opportunity to contribute to this important review.

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 with the assistance of members across several of our legal policy committees, whose members have substantial expertise in this area.

Generally, our members have raised concerns that the NRS requires improvement so that survivors are appropriately supported and informed throughout the claim and decision making processes. Adequate funding for free counselling and legal services are also critical aspects of ensuring the NRS is accessible to survivors.

Our submissions are based on the experiences reported by our member practitioners, who provide legal advice to survivors and institutions.

Communication issues (delays and transparency)

Our members have reported delays in accessing the NRS. We understand that solicitors often need to contact the NRS for updates and are only contacted when a decision has been made. We understand that more independent decision makers have recently been appointed and it is our members' hope that these additional appointments will go some way to alleviating delays.

There is an absence of guidance for survivors explaining how determinations with respect to compensation are made. This absence fuels concerns that have been raised with and by our members about a lack of transparency in the decision making process.

The lack of informative and timely updates and the absence of guidance about the process causes greater anxiety for clients who worry their case has been forgotten and will never be decided. It is paramount this issue is addressed as the abuse survivors who are claiming, are already vulnerable. It would be of great assistance if, in addition to informed guidance being provided, NRS administrators could provide timely meaningful updates on what *has* been progressed or what is awaiting finalisation.

Communication and support of clients by the provision of regular updates on a background of informed guidance is crucial and provides a greater sense of control over claims. Improvements should be made to ensure both informed guidance and more timely and substantial updates are provided between lodgement and decision making.

A need for additional guidance and information

With respect to enhanced guidance, our members have suggested the following further guidance would be of assistance to survivors and institutions.

Guidance for survivors

There is an absence of available guidance on what constitutes grounds for a $50,000 extreme circumstances case. This means survivors have no real indication of whether the circumstances of their case mean it is likely to satisfy the 'extreme circumstances' case.

Many institutions have maintained their own internal redress schemes which mirror the NRS Assessment Framework but seek to provide more expedient outcomes for survivors, as an alternative pathway. The lack of information regarding the 'extreme circumstances' payment within the NRS means that an institution's internal redress assessment has no means of determining which cases would be eligible for this additional sum, thereby creating potential unfairness and inequity amongst survivors.

The absence of any extreme circumstances guidelines makes it impossible for our members to meaningfully advise their clients on this issue.

Guidance for institutions

It would assist if more guidance was provided to institutions about the information sharing provisions of the legislation, particularly in regards to the circumstances where they receive a civil claim from someone who has had a previous redress claim. There is a real tension between ss 37, 92, 93 of the Act which are the protected information provisions and ss 3, 11, 38, 42 and 43 which allow for the release from civil liability.

Breaches of these provisions are serious offences. It would assist with the interpretation of the legislation for the NRS to provide general guidance on the intended navigation and joint operation of these sections. Consultation with institutions may also be of some benefit, to identify the type of guidance which would be of assistance.

Survivor support

Our members have also raised concerns about NRS processes which may act as a barrier to survivor access to the scheme. For example, outbound contact by the survivor to the NRS must be made by phone. For some claimants this is a stressful proposition and written contact would be preferable. It may be prudent to allow a written option as an alternative to assist survivors in contacting the NRS. This may be of additional assistance to self-represented survivors so that they can have someone explain the process or response to them in writing.

Another more practical issue is that the online NRS forms are not in a fillable PDF format, this may mean survivors will need to print the form, fill and scan into a digital format before submitting. This can prove difficult for self-represented survivors or people who do not have access to a computer, printer and scanner.

Counselling funding arrangements

We are informed that when a survivor receives an offer they are told they can receive up to 20 hours of counselling, with more on application. However, the assessment framework provides for a specific dollar amount for counselling depending on the circumstances of the abuse. More guidance is needed in the offer letter on this particularly if there is a monetary cap for counselling. Interestingly and somewhat confusingly, this differs from State to State and the institution has to pay the dollar amount, irrespective of how much counselling is utilised.

There is potential here for the NRS to have surplus funds from institutions, when survivors do not use, or do not use all of the value of counselling funds paid by the institution. Consideration should be given to this potential outcome and how best any surplus funds can be utilized. This includes whether it might be appropriate to refund the amount to institutions to assist with other redress payments or form part of the claimant's compensation entitlement for future counselling or other out of pocket expenses.

Next steps

If the outcome of the review is to recommend changes to the NRS, we recommend that consultation occur with all stakeholders involved in the scheme, including institutions. Any reforms that are proposed may have a significant impact on the participants in the scheme and it is important that any unintended consequences of proposed reforms are identified early. All stakeholders, including institutions, can assist in this process.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [redacted]

Yours faithfully

[redacted]

Luke Murphy
President