

**Submissions on behalf of Carroll & O’Dea Lawyers to the NSW Department of
Communities and Justice regarding the draft *Claim Farming Practices Prohibition Bill 2025***

Claim Farming Reforms

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7 February 2025

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Who We Are

Carroll & O’Dea Lawyers was founded in 1899. Since then, we have evolved to become a diverse partnership with offices across urban and regional New South Wales, including the Sydney CBD, Parramatta, Campbelltown, Newcastle and Wollongong. We have also opened offices more recently in Melbourne and Hobart. The firm employs around 240 people across all of our offices, with over 100 lawyers in legal practice.

Our practice areas today include Compensation (Personal Injury), Personal Services, Community & Associations and Business. We act for individuals and associations, for community organisations and institutions, and for business and commercial enterprises.

We have a long and proud history of providing access to justice for vulnerable and injured Australians. Across the practice, our firm represents claimants and respondents in compensation claims.

Contact Information

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Introduction

Carroll & O’Dea Lawyers welcomes the opportunity to provide submissions in respect of the draft *Claim Farming Practices Prohibition Bill 2025* to address actual or potential claims farming behaviour in relation to personal injury claims to which the *Civil Liability Act 2002* (NSW) applies, as well as personal injury claims arising from intentional torts.

Carroll & O’Dea Lawyers supports the prohibition of claims farming and to prohibit any practice which adopts high-pressure and misleading tactics to encourage a claimant to lodge a civil compensation claim.

We believe that the prohibition on contacting a person should be balanced against the ability to advise injured people and victims of their possible entitlements and their right to have access to appropriate legal representation.

The legislation to address and prevent claim farming should not:

1. inhibit injured people or victim survivors of abuse being told about their rights to make claims and receive compensation, and then being assisted by lawyers to access the compensation and justice to which they are entitled; and/or
2. prohibit a potential claimant from being contacted through legitimate referral processes, which do not involve inappropriate tactics, payments, or pressure.

Submissions and Recommendations

Section 5 – prohibited contact in relation to potential claims.

Carroll & O’Dea Lawyers submits that section 5 should be significantly revised.

In our submission, the provisions as currently drafted, may impact upon legitimate referral processes that are not considered to be claims farming and not intended to place undue pressure on potential claimants.

Section 5(1) is quite broad, particularly in relation to subparagraph (a) prohibiting a person (including a lawyer) from contacting a potential claimant.

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The exemptions in Section 5(3) are very specific and do not cover a wide range of other potential legitimate scenarios, thereby preventing anyone (including a lawyer) from being able to contact a potential claimant to advise them of their possible entitlements.

Section 5(3)(a) refers to “no person” expecting to receive any consideration arising from contact with the potential claimant. However, this indicates that if a lawyer contacts a potential claimant and ultimately that lawyer represents the claimant and receives legal costs, then the lawyer is in breach of Section 5(1), if the other exceptions in section 5(3) do not apply.

Section 5(3)(d)(i) only provides exemptions for referrals by community legal services and industrial organisations.

We note that a lawyer may receive a direct referral from other sources, where the exemption should still apply, as the referrer may reasonably believe that the potential claimant has consented to the referral to the lawyer in accordance with section 5(3)(d)(ii) and the lawyer has not paid the referrer for the potential claimant’s contact details.

Often, injured persons and survivors of abuse in particular, have immense difficulty reaching out directly to legal representatives.

For example, a lawyer may be requested to contact a potential claimant by any of the following legitimate referrers:

- Personal referrals, former clients, from friends, family, and acquaintances,
- Clients and witnesses in ongoing civil claims,
- Treatment providers, such as:
 - Counsellors,
 - General Practitioners
 - Medical specialists
- Barristers, other law firms and members of the judiciary,
- Employees or members of State or Federal services,
- Community organisations (which are not community legal services),
- Social workers,
- Support workers,
- Support groups for specific categories of injured claimants, such as those affected by different categories of medical negligence and road trauma,
- NSW Trustee and Guardian, tutors and guardians ad-litem.

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We also highlight the following scenarios which may be in breach of the proposed legislation:

1. If a current client asks their lawyer to contact a witness or family member for the purpose of their claim or to ask the lawyer to provide advice to that person, the lawyer should not be prevented from contacting that witness or family member, and speaking with that person in relation to their possible entitlements.
2. If a barrister refers a claim to a lawyer, who then briefs the barrister on the matter once the matter has been prepared, the barrister could well be in breach of the proposed draft bill on the basis of having received consideration (i.e. from receiving the brief and future work).
3. If the injured person is in receipt of NDIS or funds management (such as with the NSW Trustee and Guardian), and a representative of the NDIS or the funds manager referred the injured person to a lawyer and receives settlement funds at the conclusion of the claim, which are paid or invested, then arguably, as they received a financial benefit from the claim, they could be in breach of the provisions in the draft bill. A similar situation could arise for a tutor who refers a claimant to a lawyer.

Focus questions 1 and 2 of the Background Paper

For the reasons indicated above, we submit that there are representatives of other organisations that should be permitted to request that a lawyer contact a potential claimant. Also, further exemptions should be considered, to take into account other scenarios, such as those indicated above.

Or alternatively, the provision should allow a lawyer to contact a potential claimant, except when the lawyer has provided consideration to a third party for that contact, whereby “consideration” would be defined in a way to exclude the unintended scenarios above involving barristers, tutors, financial managers, guardians ad-litem and the like.

In our submission, there should be no restriction on representatives of any organisations requesting that a lawyer contact a potential claimant, where there is no intention to receive, nor receipt of, consideration (directly or indirectly) by that representative for that contact.

We also submit that there should be a separate exemption that a person can contact a potential claimant if the potential claimant has expressly consented to that contact, where that person has no intention to receive, nor receipt of, consideration (directly or indirectly) by that person for that contact.

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Section 6 – buying or selling a claim referral

Please refer to the paragraphs above in relation to the potential breaches of section 6(1) in scenarios involving referrals from barristers, financial managers or tutors, which would be contrary to the intentions of the proposed Bill to prohibit claim farming. As such, we submit that section 6(2) should be broader to incorporate further exemptions.

Focus questions 3, 4 and 5 of the Background Paper

We agree that there should be a defined threshold, under which the giving or receiving of a benefit or consideration for a referral is not an offence under the proposed section 6.

Section 8 -General exemption for Public Advertising.

We submit that this exemption may need to be clarified to allow advertising which seeks specific information from the public in relation to current claims.

Schedule 1 transitional provisions

Focus question 10

In our submission, further clarification is required to define arrangement or agreement, and when this has occurred, for any particular claimant.

The legislation will need to define at what point an arrangement or agreement is entered into in order to determine which referrals could be the subject of prosecution under the proposed Act. Otherwise, many pre-existing agreements or arrangements may avoid the effects of the proposed Bill and the prohibition on claim farming.

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Clarifying various definitions

We submit that Section 3 should also include further detail regarding:

- the definition of “*claimant*” to capture individuals or organisations who make claims on behalf of potential claimants (tutors, guardians ad-litem and NSW Trustee and Guardian etc),
- the definition as to ‘when’ the agreement or arrangement is made should be defined,
- further clarity around the meaning of contacting claimants to include “*whether in person or by mail, telephone, email, another form of electronic communication, or via social media platforms*”,
- the definition of “*industrial organisation*” under Section 3 – it is submitted that a definition similar to section 10 of the *Legal Profession Uniform General Rules 2015* should be adopted which defines “*industrial organisation*” to mean an organisation (however described) that is registered or otherwise recognised under a law of the Commonwealth, a State or a Territory,
- As indicated above, the definition of “*consideration*”, needs to be further clarified. Also, the definition could exclude any financial benefit received by way of performing work on behalf of a claimant by referrers such as barristers, tutors, financial managers, guardians ad-litem and the like.

Conclusion

Carroll & O’Dea Lawyers welcomes the opportunity to provide submissions in respect of the draft *Claim Farming Practices Prohibition Bill 2025* to address actual or potential claims farming behaviour in relation to personal injury claims to which the Civil Liability Act 2002 (NSW) applies, as well as personal injury claims arising from intentional torts.

We would be pleased to accept an invitation to further discuss the contents of these submissions, if appropriate and if it would be of benefit.