NEW SOUTH WALES
BAR ASSOCIATION

Our ref: DIV25/264

16 February 2025

Mr Mark Follett
Executive Director
Policy Reform and Legislation Branch
NSW Department of Communities and Justice

By email: <mark.follett@dcj.nsw.gov.au>

Dear Mr Follett,

Draft Claim Farming Practices Prohibition Bill 2025

1. The NSW Bar **Association** thanks the NSW **Department** of Communities and Justice for the opportunity to comment on the exposure draft of the Claim Farming Practices Prohibition Bill 2025 (**draft Bill**) and accompanying Background Paper.

2. For the reasons set out in this letter, the Association opposes the enactment of the draft Bill.

The absence of evidence supporting the existence of claim farming

3. The Association observes at the outset that the Department does not cite any direct evidence to substantiate the existence of claim farming, much less to establish that it is a pervasive problem in New South Wales that justifies legislative intervention. The Background Paper refers to anecdotal reports of claims being sold to law practices. However, legislation would only ordinarily be introduced in response to issues that are supported by clear evidence. As stated in our letter dated 29 May 2024 (**enclosed**), in response to the Department's Issues Paper on Claim Farming, the Association maintains that its members who practise in institutional abuse proceedings have not reported encountering the practice.

The unclear scope of conduct targeted by the draft Bill and its rationale

4. It is unclear what specific conduct the draft Bill intends to prohibit and the rationale behind it.

5. In this area of legal practice, it is not uncommon for solicitors to advertise for witnesses who can support the claims of existing clients pursuing legal action against individuals involved in high-profile child abuse cases. In some instances, these witnesses may subsequently become clients. Media reports have also referred to organisations that gather detailed statements from alleged victims, which are then used by law firms in the preparation of the matter. While we do not know, we presume that the organisation would receive compensation from the law firm, either directly or upon the conclusion of the matter. The Association lacks sufficient information about this practice to say whether it could be described as "claim farming" or would be more accurately characterised as investigative or forensic services for individuals who are not living in the community and are difficult to reach, such as those incarcerated.

6. Regardless, if the intermediary is not engaging in fraudulent activities, such as prompting or promoting false allegations of abuse, the Association fails to see how such conduct justifies legislative intervention. Self-evidently, in circumstances where a person is encouraging another person to manufacture a fraudulent claim (which is not our understanding of what the practice of "claim farming" is), this can and should be dealt with under the criminal law.

7. The same must be said in relation to the involvement of practitioners, who would also be liable criminally and for professional misconduct in the event of involvement in conspiracy to defraud. While certain conduct in this area may warrant regulation, the approach proposed in the draft Bill appears overly broad and disproportionate to the potential issue at hand.

8. The Background Paper does not provide any explanation as to why this type of personal injury claim is being regulated while others are not. Part 2 of the draft Bill applies solely to claims for personal injury damages within the meaning of section 11 of the *Civil Liability Act 2002* (NSW) (**CLA**), but excludes the categories of claim specified in sections 3B(1)(b)–(h). In the context of community standards, it is difficult to understand why dust disease cases, motor accident cases, and workers' compensation cases should be exempt from claim farming while medical negligence or product liability cases are not.

An unnecessary barrier to justice for vulnerable claimants

9. The Association is concerned about the potential for reduced access to justice arising from the prohibitions proposed in the draft Bill.

10. For instance, the draft Bill may reduce the capacity for marginalised groups, particularly those with limited ability to contact the outside world, such as prisoners, to be informed of the availability to them of an entirely legitimate cause of action. There is no public policy reason for restricting access to justice by threat of criminal sanction on intermediaries who seek to contact potential claimants and refer them to law firms for consideration.

Proposed amendments to the draft Bill

11. While the Association opposes the enactment of the draft Bill, if it were to proceed, the following amendments to the draft Bill are recommended.

<u>Define “claim farming”</u>

12. “Claim farming” is not a well-known or well-understood term in legal practice and the draft Bill does not provide a clear definition of this term. The Association suggests that “claim farming” should be clearly defined in the draft Bill.

<u>Limit the proposed offences of soliciting a potential claimant and buying or selling a claim referral</u>

13. Proposed section 5 of the draft Bill prohibits the contacting of potential clients, unless that contact falls under one of the listed exemptions at subsection 5(3). In the Association’s view, this is a flawed approach. It is unclear from the drafting of section 5 which party bears the burden of establishing or disproving that an exemption. If the accused person is to bear the onus, that would impose an unreasonable burden, and one that is inconsistent with the usual principle that the prosecution bears the onus of establishing the elements of the offence.

14. While the exemptions at subsection 5(3) partly address concerns raised in the Association’s previous submission dated 29 May 2024 (**enclosed**), there remains concern that, as currently drafted, the Bill could potentially lead to prosecutions for advising a person that they may have a claim under the CLA.

<u>Remove the proposed additional consequences for legal practitioners</u>

15. The draft Bill appears to overlook that the *Legal Profession Uniform Law 2014* (NSW) already provides an appropriate response to law practices that encourage individuals to make a claim that is without a proper basis. Legal practitioners can be found guilty of unsatisfactory professional conduct or professional

misconduct and face costs orders for commencing proceedings without a reasonable basis for the claim. The *Civil Procedure Act 2005* (NSW) also permits the ordering of costs against practitioners in certain circumstances.

16. The proposal to prohibit costs, where claim farming is involved, is also, in the Association's view, a disproportionate response. The client (who has, in the circumstances, necessarily succeeded in their action) has benefited from legal services. If no costs were to be payable, the State would unfairly receive a windfall.

17. The claims which are to be caught under the draft Bill are claims requiring a legal practitioner to certify under clause 4 of schedule 2 to the *Legal Profession Uniform Law Application Act 2014* (NSW) (**the Application Act**) that there are "reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim for damages in these proceedings has reasonable prospects of success". The Association considers that there should be no impediment to bringing a claim with a reasonable prospect of success, regardless of how the claim came to the attention of the law practice.

18. Regarding the proposed amendment to schedule 2 of the Application Act, section 61A does not make clear whether all persons involved in the claim are not to be paid and are to refund monies paid for work performed or whether it is only the "law practice" convicted of an offence. The Association believes that individuals who have provided professional expertise to deliver a result for a claimant should be properly compensated for that work.

19. However, if section 61A is retained, it should specifically exclude the work of counsel briefed by a law practice after the plaintiff has retained that law practice. Counsel, in such cases, should not be penalised for the provision of their professional services if, at an earlier stage when counsel was not involved, a law practice engaged in conduct considered to be claim farming, unbeknown to the barrister.

20. The objective of the legislation is better achieved by a provision that prohibits charging or recovering the consideration for the referral (as identified in proposed sections 5(3) and 6(1) of the draft Bill) and requiring a refund of that consideration. Such a provision should properly be included in the proposed new act and not in the *Legal Profession Uniform Law Application Act 2014* (NSW) as it would operate more broadly.

Conclusion

21. Thank you for the opportunity to comment on the draft Bill and for your consideration of the issues raised. For the reasons set out in this letter, the Association opposes the enactment of the draft Bill.

22. If you wish to discuss, or if the Association may be of further assistance, please do not hesitate to contact [redacted].

Yours sincerely

Dr Ruth Higgins SC
President

Encl. Letter from the NSW Bar Association to the Department of Communities and Justice, dated 29 May 2024

NEW SOUTH WALES
BAR ASSOCIATION

Our ref: 24/202

29 May 2024

Policy Reform and Legislation Branch
Department of Communities and Justice
10 Darcy Street
Parramatta NSW 2150

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

Dear Department of Communities and Justice,

Response to the Department of Communities and Justice Issues Paper – Claim farming

1. The New South Wales Bar **Association** thanks the Department of Communities and Justice (**DCJ**) for the invitation to respond to its May 2024 Issues Paper on Claim farming.

2. At the outset, the Association notes that its members who practise in institutional abuse proceedings describe no exposure to the practice of claim farming. In light of this, the DCJ may be better assisted by the input of organisations with solicitor membership and solicitors themselves.

3. In the event the DCJ proceeds to regulate claim farming, the Association would welcome the opportunity to be consulted on any proposed draft legislation. In the meantime, the Association broadly notes the following concerns.

4. Access to justice must be at the forefront when considering the possible regulation of claim farming, including the ability of victims of abuse to obtain information about possible legal redress in a trauma-informed manner. Notifying victims of their legal rights is important, and relevant in the context of the current expiration of the National Redress Scheme in 2027 (subject to the extension of the Scheme). In addition, and in particular, the Association emphasises the risk of access to justice being impeded when institutional defendants seek permanent stays of claims in circumstances where the plaintiff has not brought their claim in a timely manner.

5. The regulation of claim farming may also impact upon the ways in which class action claims identify and connect with class members. The advantages of class actions from the perspective of victims are numerous, including possibly reducing administrative and emotional burdens, and reducing legal fees. Any impact on the notification and ability to connect with class members should be considered when proposing to regulate claim farming.

6. It is not known whether the problem in New South Wales is of a similar kind and magnitude to that which precipitated regulatory reform in other jurisdictions, including Queensland, Western Australia and South Australia.

7. Self-evidently, in circumstances where a person is encouraging another person to manufacture a fraudulent claim (which is not our understanding of what the practice of 'claim farming' is), this can be dealt with under the criminal law without necessitating further regulation. The same must be said in relation to the involvement of practitioners, who would also be liable criminally and for professional misconduct in the event of involvement in conspiracy to defraud.

8. The Association thanks you in advance for considering this correspondence and looks forward to being consulted on any proposed regulation. If you wish to discuss or if the Association may be of further assistance, please do not hesitate to contact [redacted] [redacted].

Yours sincerely

Dr R Higgins SC
<u>President</u>

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