

# SUBMISSION BY THE NSW PROVINCE AND EPARCHIES (DESCRIBED BELOW) IN RESPONSE TO THE NSW GOVERNMENT'S DRAFT CLAIM FARMING PRACTICES PROHIBITION BILL 2025 (NSW)

## Introduction

1. This submission is made on behalf of the Catholic:
  - Archdiocese of Canberra and Goulburn (partially located NSW and partially located in the Australian Capital Territory);
  - Archdiocese of Sydney;
  - Diocese of Armidale;
  - Diocese of Bathurst;
  - Diocese of Broken Bay;
  - Diocese of Lismore;
  - Diocese of Maitland-Newcastle;
  - Diocese of Wagga Wagga;
  - Diocese of Wilcannia-Forbes;
  - Diocese of Wollongong;collectively, "**NSW Province**"<sup>\*</sup>; and the
  - Melkite Catholic Eparchy of Australia, New Zealand and All Oceania;
  - Maronite Eparchy of Australia, New Zealand and All Oceania; and
  - Chaldean Eparchy of Australia and New Zealand;collectively, "**Eparchies**".
2. The NSW Province and Eparchies welcome the opportunity to provide this submission to the NSW Government in response to the release of the NSW Draft Government Bill, *Claim Farming Practices Prohibition Bill 2025 (draft bill)*, and the Background Paper prepared by the NSW Department of Communities and Justice.
3. The bishops of the NSW Province and Eparchies have a longstanding commitment to child protection and to justice for survivors of child sexual and serious physical abuse. The NSW Province and Eparchies share the concerns about claim farming that are identified in Part 3 of the Background Paper published by the Department of Communities and Justice (**Background Paper**). For this reason, they are pleased that legislative action is proposed to be taken in NSW to address the practice of claim farming.

## Background

4. Since the commencement of the *Limitation Amendment (Child Abuse) Act 2016 No 5 (NSW)*, substantial numbers of claims for historic child abuse have been brought against institutions,

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<sup>\*</sup> It is noted that the Catholic Diocese of Parramatta, which is also part of the Province, will be making a separate submission in relation to the draft bill.

including the NSW Province and Eparchies. Many claims are genuine, and the NSW Province and Eparchies seek to resolve them through informal dispute resolution processes where possible, including by payments in settlement of civil claims. However, the NSW Province and Eparchies are aware of the longstanding existence of claim farming practices, in NSW and nationally, including among vulnerable populations in prisons and remote communities. The NSW Province and Eparchies are deeply concerned that claim farming increases the potential for illegitimate claims. Such claims (and the increased potential for them) diverts resources away from genuine survivors of historic child abuse, as well as from vital social and community services provided by the NSW Province, Eparchies and similar institutions.

5. The NSW Province and Eparchies make the following comments in respect of the draft bill, with a view to strengthening this legislative reform in support of its aims.

### **Limitation period for offences**

**Focus question 8:** Is the limitation period for the offences under proposed section 5 (Offence 1) appropriate?

**Focus question 9:** Is the limitation period for the offences under proposed section 6 (Offence 2) appropriate?

6. Section 8 of the current draft bill imposes a strict 2-year limit for the commencement of proceedings after the date on which an offence is alleged to have been committed.
7. The NSW Province and Eparchies are concerned that the proposed 2-year time limit:
  - (a) does not appropriately allow for the 'discoverability' of claim farming offences; and
  - (b) will therefore severely undermine the impact of the proposed legislation, particularly in claims for child abuse.

### Discoverability

8. Often, respondents to civil claims will not know that a claim has been brought as a result of claim farming practices until more than 2 years after a claim process first commenced (if at all).
9. It is the NSW Province and Eparchies' experience that, for various reasons, plaintiff law practices often notify claims for child abuse a substantial time (sometimes years) after instructions were first received.
10. Claims for historic child abuse tend to take longer to progress than other personal injury proceedings. The lapse of time between the notification of a historic child abuse claim and resolution of that claim may be affected by factors such as repeated and sometimes extended loss of contact with claimants, who may be affected by issues such as recidivism and incarceration, lack of regular and reliable access to communication devices, homelessness or transience, substance use, and addiction. The abolition of the limitation period for child abuse

claims (s. 6A *Limitation Act 1969 (NSW)*) may also have an impact on the timing of such claims, in that solicitors will usually not need to worry about strict deadlines and are not subject to the same time constraints as apply to other proceedings.

11. The occurrence of a claim farming offence might only be revealed when a claim reaches a mediation or ADR stage, or resolves fully, at which point a plaintiff law practice might disclose to their client or the respondent a 'referral fee' or similar within their legal costs or disbursements. The emergence of one claim farming offence may lead to discovery of other offences by the same person.

#### Effectiveness of the legislation

12. The factors identified above in terms of discoverability mean that many breaches (whether unintentional or flagrant) may go unpunished. Parties who have knowingly committed offences will be incentivised to delay progress of claims to reduce the risk of timely detection.

#### Submission

13. The NSW Province and Eparchies submit that section 8 of the draft bill should be amended to align with section 73A(2A) of the *Personal Injuries Proceedings Act 2002 (QLD)*, which reads:

*A proceeding for an offence against a claim farming provision must start within the later of:*

*(a) 2 years after the commission of the offence; or*

*(b) 6 months after the commission of the offence comes to the knowledge of the complainant. (emphasis added).*

The 'complainant' for the purposes of the Queensland provision is Queensland's Legal Services Commissioner.

14. Introduction of a similar limitation provision in the NSW legislation will allow offences to be prosecuted in circumstances where the conduct giving rise to the offence may be concealed and/or may not come to the notice of a complainant until shortly before, or any time after, the 2-year period expires. Such a provision would also allow for the factors that are commonly found in historic child abuse claims, as identified in paragraph 10 above.

#### **Transitional provisions**

**Focus question 10:** Are there any other saving or transitional provisions that the Department should consider including?

15. Schedule 1, Part 2(2) of the draft bill currently provides that an offence under section 6 will not have occurred if consideration is provided or received *after* the commencement of the Act, in relation to an arrangement or agreement entered into *before* the commencement of the Act.

16. The NSW Province and Eparchies are concerned that this transitional provision, as drafted, may encourage plaintiff law practices to enter into ‘umbrella’ type agreements, or to extend existing agreements and arrangements, with professional third-party claim farmers prior to the commencement of the Act, to ensure that any payments made to those claim farmers or referrers are not captured by the Act. As currently drafted, Schedule 1, Part 2(2) may have the effect of perpetuating the prohibited practices for an extended period after the commencement of the Act, solely on the basis that an agreement was drawn up prior to its commencement.
17. The NSW Province and Eparchies submit that Schedule 1, Part 2(2) of the draft bill should be revised to ensure that the only consideration provided or received after the commencement of the Act, which does not give rise to an offence under the Act, is for any work already completed as at the commencement of the Act.
18. Alternatively, should any pre-existing agreements or arrangements be exempted, it is submitted that Schedule 1, Part 2(2) of the draft bill should be amended to include a final “cut-off” time-limit of, say, 6 months following the commencement of the Act, following which any consideration provided or received would be an offence under the Act.

#### **General comments on the proposed draft bill**

19. The NSW Province and Eparchies consider that the NSW Government should adopt certain features of the claim farming legislation adopted by the State of Queensland in its amendments to the *Personal Injuries Proceedings and Other Legislation Amendment Act 2022* (QLD) and the *Legal Profession Act 2007* (QLD) (**QLD legislation**), and proposed by the State of South Australia in the *Statutes Amendments (Claim Farming) Bill 2024* (SA) (**SA bill**).
20. The NSW Province and Eparchies make specific submissions on:
  - (a) the exception proposed by section 5(3)(c), which would allow a law practice to contact a potential claimant to whom the practice had previously provided previous legal services;
  - (b) the general exception for advertisements of legal services contained in section 7 of the draft bill; and
  - (c) the inclusion of extraterritorial provisions which would mirror those in the SA bill.

#### **Unsolicited contact with previous clients**

21. Section 5(3)(c) of the current draft bill provides that a law practice will not commit an offence under s. 5 of the draft bill if the law practice has previously provided the potential claimant with legal services, and reasonably believes the potential claimant will not object to the contact.

22. Although the rationale for this carve-out has not been specified in the Background Paper, the NSW Province and Eparchies understand that it falls within the broad aims of not removing existing pathways to justice for victim-survivors, and of protecting and encouraging legitimate practices that facilitate access to justice by ensuring members of the public are informed of their legal rights. The NSW Province and Eparchies acknowledge the importance of these aims.
23. However, many law practices have been in existence for decades, and may have a database of many thousands of current and former clients to whom they have provided legal services that were entirely unconnected with potential abuse claims. The carve-out would permit the mining of that entire database for claim farming purposes, and is unnecessarily broad in this respect.
24. The NSW Province and Eparchies submit that, in the context of claims for historic child abuse, s. 5(3)(c) of the draft bill should allow law practices to contact former clients:
- (a) to inform them of the potential right to revisit earlier settlements of such claims, as is provided by Part 1C of the *Civil Liability Act 2002 (NSW)*; or
  - (b) to offer legal services to pursue an abuse claim in circumstances where the law practice knows, or reasonably believes, that the former clients have grounds to bring such a claim.
- subject in either case to the law practice having a reasonable belief that the potential claimant will not object to the contact.

### **Exceptions for advertisements of legal services**

25. Section 7 of the draft bill currently provides a general exception to the claim farming offences for a person or law practice advertising, marketing or promoting a law practice to the public.
26. The NSW Province and Eparchies are aware of plaintiff law practices publishing targeted advertisements, in remote communities of vulnerable individuals, about “*investigations*” being undertaken by the law practice. The advertisements disclose information (such as the name of an alleged perpetrator of child abuse, the years in which that alleged perpetrator worked in a particular school, church or town, and details of offences). Such advertisements may both prompt a vulnerable or unscrupulous person to make an illegitimate claim, and arm them with details to render the claim more credible.
27. In fact, these targeted advertisements have resulted in numerous claims being made, in almost identical terms. One diocese within the NSW Province and Eparchies is currently facing over 70 claims of historic child abuse brought by four different law practices, which use very similar, if not identical language in both the notification of the claims and the statements of the claimants, all relating to one specific school in a remote vulnerable community.
28. The NSW Province and Eparchies consider that such practices do not constitute the mere advertising of a law practice or its general services, but rather, at their core, comprise claim

farming of the kind which the draft bill aims to prevent. Such practices should be similarly prohibited under the draft bill.

29. The NSW Province and Eparchies submit that the exception contained in s 7 of the draft bill should be qualified to prevent advertisements of the kind described in paragraph 26 above. The NSW Province and Eparchies would be happy to provide the NSW government with further information in relation to the kinds of targeted advertisements mentioned above.

### **Extraterritorial application**

30. The NSW Province and Eparchies note that the current draft bill does not include any provision going to the extraterritorial reach of the Act, as is contained in section 42E of the SA Bill, and section 568A of the *Legal Profession Act 2007 (QLD)*, which applies to the investigations of claim farming contraventions under the *Personal Injuries Proceedings Act 2002 (QLD)*.
31. It is the experience of the NSW Province and Eparchies that claims for historic child abuse are often made by claimants living in states other than NSW, and/or may pertain to historic child abuse alleged against multiple institutions both within and outside of NSW.
32. The NSW Province and Eparchies are concerned that the current draft bill may not apply to claim farming conduct that occurs at least partly outside of NSW and generates a claim within NSW. The NSW Province and Eparchies submit that it would be beneficial for the proposed NSW Act to contain a provision (similar to those in the Qld Legislation and SA Bill) stating that the Act is intended to have extraterritorial application insofar as the legislative powers of the State permit. As far as possible, the NSW Act should allow for the investigation and prosecution of claim farming conduct occurring interstate where the claim is ultimately brought in NSW.

### **Conclusion**

33. The NSW Province and Eparchies appreciate the opportunity to provide these submissions to the NSW Government. They would be pleased to engage in dialogue with, and to further assist, the NSW Government regarding the draft bill.

Date: 5 February 2025.