

Personal Injuries Proceedings and Other Legislation Amendment Bill 2022

Statement of Compatibility

FOR

Amendments to be moved during consideration in detail by the Honourable Shannon Fentiman MP Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 38 of the *Human Rights Act 2019* (the HR Act), I, the Honourable Shannon Fentiman MP, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, make this statement of compatibility with respect to the amendments moved during consideration in detail (ACiDs) of the Personal Injuries Proceedings and Other Legislation Amendment Bill 2022 (the Bill).

In my opinion, the ACiDs for the Bill are compatible with the human rights protected by the HR Act. I base my opinion on the reasons outlined in this statement.

Overview of the Bill

The objectives of the Bill are to:

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

The objectives of the ACiDs are to:

- expand the exclusion from 'additional amounts' of barristers' fees incurred after the part 1 notice of initial notice for claims under the *Personal Injuries Proceedings Act 2002* (PIP Act) (see section 347(8) of the *Legal Profession Act 2007* (LP Act) as amended) to claims

under the WCR Act and the *Motor Accident Insurance Act 1994* (MAI Act) and for urgent proceedings;

- address concerns raised during the parliamentary committee process that the proposed claim farming offence in the PIP Act relating to approaching or contacting a person for the purpose of soliciting or inducing them to make a claim may not apply where the contact or approach is made by way of bulk communications to vulnerable groups;
- respond to Legal Affairs and Safety Committee (Committee) recommendations to streamline the provision of law practice certificate requirements in the workers' compensations scheme, particularly during a statutory claim;
- amend the timeframe to be inserted into the definition of terminal condition in the WCR Act to five years;
- amend the transitional arrangements to allow the 2019 definition of terminal condition to continue to apply to any claim or dispute on foot if the worker has provided medical evidence to their insurer about the terminal nature of their condition before 1 July 2022; and
- ensure the amendments in the Bill operate as intended by making minor technical and cross-referencing changes.

The ACiDs achieve these objectives by:

- amending the proposed definition of 'additional amounts' in new section 347(8) of the LP Act inserted by clause 16 of the Bill so that the exclusion in (b) also refers to claims under the WCR Act and MAI Act and urgent proceedings;
- amending the proposed new offence in section 71B (Approach or contact for the purpose of making a claim) of the PIP Act, inserted by clause 51, to clarify that a person may be contacted either individually or as a member of a class of persons;
- amending the definition of 'claim farming provision' utilised in clauses 36, 52, 53 and 62 to refer to 'division 1AA';
- clarifying clause 42 by replacing the reference to 'a law practice certificate has not previously been given by the law practice under section 9A(3)(j)' with a reference to 'section 9A does not apply in relation to the claim';
- for the definition of *related body corporate*, removing reference to 'in this section' in limb (b) given the definition is in the schedule;
- amending section 275(7A) of the WCR Act to confirm a copy of a certificate previously given may accompany a notice of claim;
- amending new section 325I, inserted by clause 60, to omit the requirement for a law practice to provide a certificate on retainment during a statutory claim;
- inserting a timeframe of five years into section 39A of the WCR Act;
- amending the transitional arrangements in new sections 744 and 745 to allow claims or disputes on foot to continue under the 2019 definition of terminal condition if the worker has provided medical evidence to their insurer about the terminal nature of their condition before 1 July 2022; and
- amending the commencement provision to ensure the 'Act amended' clauses and part headings commence on assent.

Human Rights Issues

Human rights relevant to the amendments (part 2, divisions 2 and 3, HR Act)

In my opinion, the human rights relevant to the ACiDs for the LP Act and PIP Act are:

- freedom of expression (section 21 of the HR Act); and
- property rights (section 24 of the HR Act).

If human rights may be subject to limitation if the Bill is enacted – consideration of whether the limitations are reasonable and demonstrably justifiable (section 13, HR Act)

ACiDs to the LP Act

Property rights (section 24)

(a) the nature of the right

The protection of property rights under section 24 of HR Act encompasses ‘free use, enjoyment and disposal of all [one’s] acquisitions’. It protects the right of all persons to own property (alone or with others) and protects individuals from the arbitrary deprivation of their property, including real property, shares, etc. In a human rights context, ‘arbitrary’ means capricious, unpredictable, unjust or unreasonable in the sense of not being proportionate to a legitimate aim sought.

Under sections 345 to 347 of the LP Act, a law practice is entitled to charge a client in a speculative personal injury matter no more than half the amount to which the client is entitled under a judgment or settlement after deducting any refunds the client is required to pay and the total amount of disbursements for which the client is liable (commonly called the 50:50 rule). Currently, barristers’ fees are generally treated as a disbursement and outside the scope of the 50:50 rule.

However, as a result of the amendments contained in the Bill, fees paid or payable to a barrister engaged by a law practice in obtaining instructions or preparing statements are to be treated as legal costs, with those fees incurred after the part 1 notice or initial notice under the PIP Act is given, continuing to be treated as a disbursement. The human rights implications of the amendments to the 50:50 rule are dealt with in the Statement of Compatibility for the Bill.

One of the ACiDs will amend the proposed definition of ‘additional amounts’ in new section 347(8) of the LP Act (inserted by clause 16 of the Bill) to clarify that barristers’ fees incurred after a notice of claim is given under the WCR Act and the MAI Act or in relation to urgent proceedings will continue to constitute a disbursement and are therefore outside the scope of the 50:50 rule. Treating these barristers’ fees as disbursements, rather than as claim related costs, may increase the amount which a law practice that retains the barrister may charge the client.

(b) the nature of the purpose of the limitation to be imposed by the amendments if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the limitation is to allow barristers’ fees for claims under the WCR Act and the MAI Act to be treated consistently with barristers’ fees for claims under the PIP Act. This is consistent with the status quo generally for barristers’ fees, allowing the 50:50 rule to apply to the award of damages after these disbursement.

(c) the relationship between the limitation to be imposed by the amendments if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The limitation achieves the purpose by maintaining the status quo for the treatment of these barristers’ fees.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the amendments

There are no less restrictive and reasonably available ways to achieve the purpose of the amendments.

(e) the balance between the importance of the purpose of the amendments, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On balance, taking into account the nature and extent of the limitation on property rights and having regard to the information and analysis detailed above, I consider the need to maintain the status quo under the 50:50 rule for the fair treatment of barristers' fees incurred after a notice of claim is given under the WCR Act and the MAI Act outweighs any possible negative impact on the property rights of clients.

ACiDs to the PIP Act.

Freedom of Expression (section 21)

(a) the nature of the right

Section 21 of the HR Act provides that every person has the right to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds – whether orally, in writing, in print or by way of art or other medium. The right to freedom of expression and the free flow of information and ideas is central to a healthy and democratic society.

Amendment 9 of the ACiDs extends the application of proposed section 71B, that is the offence relating to personally approaching or contacting another person without their consent and soliciting or inducing them to make a personal injury claim, to capture an approach or contact facilitated by way of bulk communications to individuals or classes of people. This ACiD will engage the right to freedom of expression as individuals will be prevented from initiating contact with classes of people and seeking information from, or imparting information to, those classes of people with the intention of soliciting or inducing the person to make a claim.

(b) the nature of the purpose of the limitation to be imposed by the amendments if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

This ACiD is proposed to address concerns raised by knowmore in its submission to the Legal Affairs and Safety Committee that the section as drafted might be inadequate to prevent survivor advocacy businesses and/or law practices from engaging in claim farming practices targeted at groups of survivors in “specific settings of particular circumstances of vulnerability”. Examples of such conduct include the bulk mailing of letters to prisoners, residents of a small community or former students of a particular school.

The primary motivation of claim farmers is not to support or inform claimants to access compensation or promote their rights; rather it is to generate income from selling the claim to a law practice.

Protecting vulnerable groups from conduct which targets and exploits them for financial gain is consistent with a free and democratic society based on human dignity, equality and freedom.

(c) the relationship between the limitation to be imposed by the amendments if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The limitation on the freedom of expression of claim farmers will promote the intended purpose of stopping claim farming practices particularly those which target vulnerable groups.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the amendments

There are no less restrictive and reasonably available ways to achieve the purpose of the amendments. The limitation on the freedom of expression will not prevent genuine interactions with potential claimants or the ability of potential claimants to seek, or persons providing, genuine advice, assistance, or support, including discussing options to obtain legal advice or otherwise navigating the claims process.

Rather, to the extent these prohibitions limit the right to freedom of expression, the limitation is reasonable and demonstrably justified to ensure that potential vulnerable claimants are protected from being harassed, induced or incentivised into make a personal injury claim.

In turn, the prohibitions will also safeguard a potential claimant's right to privacy, as the provisions will disincentivise claim farmers from contacting potential claimants without their consent and then selling or transmitting information to a third party. .

(e) the balance between the importance of the purpose of the amendments, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On balance, taking into account the nature and extent of the limitation on the freedom of expression and having regard to the information and analysis detailed above, I consider the need to clarify that the offence captures a person who contacts another person either individually or as a member of a class of persons to solicit or induce them to make a claim (thereby capturing bulk communications to a vulnerable cohort), outweighs the negative impact on the freedom of expression of those who would otherwise engage in claim farming practices.

ACiDs to the WCRA relating to terminal compensation

As the amendments relating to terminal compensation do not change the scope of workers intended to be captured by the Bill, the human rights that are relevant to the amendments are the same as those identified and analysed in the statement of compatibility drafted for the introduction of the Bill and considered by the Committee during its inquiry.

As such, in my opinion, the clauses proposed for amendment during consideration in detail engage the following human rights:

- recognition and equality before the law (section 15 of the HR Act); and
- privacy and reputation (section 25 of the HR Act).

Recognition and equality before the law (section 15)

(a) the nature of the right

Section 15 of the HR Act encompasses the right to recognition as a person before the law and

the right to enjoy human rights without discrimination. This right reflects the essence of human rights; that every person holds the same rights by virtue of being human and not because of some particular characteristic or membership of a particular group.

(b) the nature of the purpose of the limitation to be imposed by the amendments if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

All people who are ‘workers’ with a work-related injury, including a latent onset injury, are entitled to seek workers’ compensation. The Bill confirms the policy intent of terminal compensation by re-inserting a requirement that a worker’s latent onset injury is only a terminal condition if this condition will end the worker’s life within five years from the date certified by a doctor.

Providing an eligibility criteria may limit the right to recognition and equality before the law for those workers with a latent onset injury that is, or may progress, to a terminal condition. This limitation is only to the extent of the timeframe when the entitlement to compensation arises. It is important to note that all workers with a terminal condition remain entitled to this compensation once the timeframe requirement has been met.

(c) the relationship between the limitation to be imposed by the amendments if enacted, and its purpose, including whether the limitation helps to achieve the purpose

Consistent with all eligibility measures within the WCR Act, the aim of this limitation is to ensure workers receive necessary and reasonable compensation at the appropriate time for their work-related injury. Benefits provided through the workers’ compensation scheme must also be balanced to ensure the ongoing financial sustainability of the scheme, largely funded by employers through their workers’ compensation premiums, to ensure fair entitlements are accessible by all Queensland workers.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the amendments

There is no less restrictive way and limitation to this right is considered reasonably and demonstrably justifiable as it will:

- protect the ongoing financial sustainability of the workers’ compensation scheme for the benefit of all Queensland workers;
- ensure workers access terminal compensation in the period it was intended, such as when the worker needs palliative care or for workers to provide financial security for their families when facing the imminence of the end of their life; and
- consistent with the objectives of the WCR Act, ensure workers with long life expectancies are able to continue accessing entitlements, rehabilitation, vocational counselling or rehabilitation opportunities offered through the workers’ compensation scheme, which is no longer possible once they have received terminal compensation as this effectively ends their claim.

(e) the balance between the importance of the purpose of the amendments, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On balance, taking into account the nature and extent of the limitation on the right to recognition and equality before the law and having regard to the information and analysis detailed above, I consider ensuring appropriate eligibility criteria to protect the financial sustainability of the workers’ compensation scheme for the benefit of all workers outweighs the negative impact on the right of including an explicit timeframe for terminal compensation.

Privacy and reputation (section 25)

(a) the nature of the right

Section 25 of the HR Act provides that a person has the right not to have their privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and not to have their reputation unlawfully attacked.

(b) the nature of the purpose of the limitation to be imposed by the amendments if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

Throughout the course of claim, a worker is required to provide, or consent to release, personal and medical information. This information assists workers' compensation insurers in making informed decisions, often in conjunction with the worker and their treating doctors and rehabilitation providers, about how best to meet a worker's medical, treatment, rehabilitation and return to work needs.

The assessment of whether a worker has a terminal condition under section 39A of the WCR Act is also facilitated through personal medical information provided by doctors. This may give rise to limiting a worker's right to privacy and reputation.

(c) the relationship between the limitation to be imposed by the amendments if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The limitation ensures informed decision-making on workers' compensation claims to best meet the worker's needs.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the amendments

There is no less restrictive way and this purpose is consistent with a free and democratic society because it is appropriate to ensure informed decision-making on workers' compensation claims to best meet the worker's needs. However, as for all personal information obtained for workers' compensation claims, the requirement to provide this information is mitigated by insurers, and other professionals in connection to claims, having strict obligations and responsibilities for confidentiality including the collection, storage, use and sharing of a worker's information. It is also noted a worker is entitled to revoke their consent at any time.

(e) the balance between the importance of the purpose of the amendments, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On balance, taking into account the nature and extent of the limitation on the worker's right to privacy and having regard to the information and analysis detailed above, I consider ensuring informed decision-making by insurers and providing terminal benefits at the appropriate time in a worker's illness outweighs the potential negative impact on the right of workers having to provide private and medical information in support of their terminal claim.

Conclusion

In my opinion, the ACiDs for the Bill are compatible with the human rights protected by the HR Act because they limit human rights only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the Act.

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