The Law Society of Western Australia
The voice of the legal profession in Western Australia

1 March 2024

The Hon Rita Saffioti MLA
Deputy Premier; Treasurer; Minister for Transport; Tourism
13th Floor, Dumas House
2 Havelock Street
WEST PERTH WA 6005

By email: Minister.Saffioti@dpc.wa.gov.au

Dear Minister

INSURANCE LEGISLATION AMENDMENT (MOTOR VEHICLE CLAIMS HARVESTING) BILL 2023 (BILL)

Lack of consultation in respect of the Bill

I have been informed that the above Bill was introduced into Parliament on the last sitting day of last year without prior provision of any draft bill to the Law Society, and without any notice to the Society that the Bill was about to be introduced into Parliament.

The former President of the Law Society sent a letter dated 14 December 2023 to the Hon Sue Ellery MLC concerning the lack of consultation relating the above Bill. The Society was advised by email from the office of the Hon Sue Ellery MLC that the letter was passed on to your office. A copy of that letter is attached.

Notwithstanding that letter being sent, there has been a continuing lack of consultation with the Law Society in relation to the matter of amendments to the *Motor Vehicle (Third Party Insurance) Act 1943* (**Act**) proposed by the Insurance Commission of Western Australia (**ICWA**), culminating in the Bill.

Part 7 of the Bill

The Bill has been promoted as a bill directed, at least primarily, towards eliminating 'claims harvesting'. The title of the Bill, and the manner of its promotion to date, has obscured the purpose of Part 7 of the Bill, entitled *"General procedural matters".*

Part 7 comprises the greater part of the Bill. Part 7 is entirely unrelated to the issue of claims harvesting.

Part 7 of the Bill is unworkable for the reasons explained below.

Part 7 would undermine the rule of law in that, for the reasons set out below, it would impair claimants' existing rights to compensation, a fair hearing and the impartial determination of their claim by a court.

The Bill, and in particular, Part 7 of the Bill, has now been considered by many members of the Law Society including lawyers practising in the area of personal injuries, lawyers from within government, legal academics, barristers, including Senior Counsel, and solicitors

practising in a wide range of areas. Our members who have considered this Bill collectively bring a wealth of knowledge, expertise and experience relevant to the matter, and an understanding of the importance of defending the community from the erosion of the rule of law that would be effected by Part 7 of the Bill.

I draw your attention to the following specific concerns of the Law Society in respect of Part 7 of the Bill following detailed consideration of the Bill by its members.

Pre-action requirements

1. Section 29 of the Bill requires, before any action can be commenced, all of the following:

    1.1. notice of the claim having been given to ICWA as soon as practicable after the motor vehicle accident;

    1.2. the provision of any information requested by ICWA;

    1.3. a *"pre-action conference"* with ICWA, attended by the claimant, in respect of which the following requirements apply:

        1.3.1. at least 7 days prior to the pre-action conference, the provision of particulars of damages and discovery;

        1.3.2. if the claimant is not legally represented, a statement verifying the completeness of both the particulars and the discovery; and

        1.3.3. if the claimant is legally represented, a certificate of readiness signed by a lawyer verifying the completeness of the particulars and the discovery, certifying that the claimant is in all respects ready to settle the claim at the conference and certifying that a costs statement has been provided by the lawyer to the client; and

        1.3.4. the claimant and, if the claimant is represented, the claimant's lawyer, must attend the conference and *"actively participate in good faith in an attempt to settle the claim"*.

2. These provisions ignore the fact that the complexity of some injuries, and the time required in order to obtain expert evidence relating to those injuries, makes it impossible to certify that the claimant is in all respects ready to settle their claim within the 3-year limitation period that applies to the commencement of proceedings. In this respect, the Bill is unworkable - neither claimants nor their lawyers can give a false certification, but without the certification, the limitation period cannot be complied with, and the claimant's right of action may be irretrievably lost.

3. There is no mechanism in the Bill to avoid this outcome. There are provisions which allow for ICWA to dispense with the pre-action conference, but these provisions are not directed to the above problem because, even if the pre-action conference is dispensed with, a pre-action offer nevertheless must be given within 28 days of the dispensation. No offer should be made by or on behalf of a claimant before the extent of the claimant's injuries and resulting loss and damage can be adequately assessed. It would be negligent to settle their claim prematurely.

4. It is insupportable to require claimants and their lawyers to *"actively participate in good faith in an attempt to settle the claim"* if the severity of the claimant's injuries is unknown

and/or if the effect of the claimant's injuries on matters such as the claimant's future loss of earning capacity and the claimant's requirement for future care is not yet assessable.

Pre-action offers

5. If a claim is not settled at the pre-action conference, both ICWA and the claimant must, at the conclusion of the conference, submit to the other party *"a written, final offer"* (**pre-action offer**).

6. At the time of commencing legal proceedings, the claimant must file with the court their pre-action offer *"in a sealed envelope".*

7. The reference to a sealed envelope indicates a concerning lack of appreciation for the way in which documents are filed in the District Court of Western Australia. The Society apprehends that there is no capacity for the District Court to manage any system involving sealed envelopes associated with every action commenced in that Court under the Act. A requirement for physical filing of a sealed envelope is archaic in circumstances in which both the District and Supreme Courts employ electronic filing, it is inefficient, it adds the unnecessary cost of a client having to go to the registry and it increases the difficulty of complying with the 28-day limitation period (referred to below).

8. Whilst this issue could easily be fixed, the fact that such a provision has been drafted is suggestive of a lack of consultation with the relevant heads of jurisdiction and the Principal Registrar of the District Court in relation to the Bill.

The costs of legal proceedings after expiry of the pre-action offers

9. The court must have regard to the pre-action offer in determining costs, as follows:

    9.1. if the claim is settled before the pre-action offer expired, costs are to be awarded to the claimant on party/party basis;

    9.2. pursuant to proposed section 29G(5), the claimant must not be awarded any costs in respect of the introduction of *"unnecessarily repetitive"* evidence. The example of calling two witnesses from the same field of expertise is set out as a note; and

    9.3. proposed section 29G(6) provides that no costs may be awarded in relation to the gathering of evidence after the expiry of a pre-action offer unless an unforeseen matter arose. An example of the claimant's medical condition suddenly and unexpectedly deteriorating is given.

10. All of these mandated considerations ignore the matters referred to at paragraphs 2 and 3 above. Their application, in those circumstances, would be unjust.

11. These provisions would prevent the exercise of the court's discretion in relation to the awarding of costs according to well established legal principles on which the Rules of the Supreme Court (**RSC**) and the District Court Rules (**DCR**) are based. These provisions would apply in place of Order 24A RSC and rule 42A DCR, rules that are designed to achieve the outcome to which this section of the Bill appears to be directed.

12. The interplay between these provisions and the common law relating to *Calderbank* offers is left unclear.

Proposed section 29G(5)

13. The question as to whether evidence has been gathered that is "unnecessarily repetitive" is not a matter that could properly be determined other than by a trial judge following a trial. Until that stage, a claimant is not obliged to explain their forensic rationale for calling particular experts. There may well be proper reasons why a claimant intended to call two experts from the same field.

Proposed section 29G(6)

14. Proposed section 29G(6) is corrosive of the rule of law. It precludes the claimant recovering costs in respect of experts' reports obtained after expiry of the parties' pre-action offers. That proposed provision is as follows:

The court must not award costs to a party in relation to an investigation or gathering of evidence by the parties after the pre-action offers' (sic) end date.

15. Lawyers must ensure that medical evidence is obtained to establish when their client's claims are assessable. As mentioned above, this may not occur before the compulsory processes referred to above, necessitating further reports within the period referred to in proposed section 29G.

16. Lawyers would be negligent if they failed to obtain up-to-date evidence when assessing the value of their clients' claim. Lawyers are obliged to ensure that up-to-date medical evidence is available at the time of a pre-trial conference, mediation, listing conference and trial.

17. Obtaining expert evidence (medical and non-medical) is expensive. Proposed section 29G(6) would prevent or deter many claimants from seeking to have their claims properly assessed before settlement or judgment. It would have the effect of compromising a claimant's right to a trial because the costs of proper preparation for trial would inevitably be subtracted from their eventual award, giving rise to a disincentive to proceed.

18. There is no fair rationale for this provision. If the claimant is awarded a sum greater than that which ICWA had offered (before proceedings were commenced, by way of its written, final "*pre-action offer*") the claimant ought to have the benefit of a costs order reflecting that outcome, including the costs of obtaining the necessary expert evidence to make out their claim at the time of settlement or trial.

The 28-day limitation period

19. Section 29H of the Bill provides that the claimant may commence an action in a court only within 28 days after the expiry of a pre-action offer, or a further period that may be agreed or fixed by an order of the court. Otherwise, the claimant requires leave to commence the proceedings.

20. This limitation period does not take into account the way in which time is reckoned under the RSC and the DCR, further heightening the injustice of such a short limitation period.

21. It is to be expected that such a short limitation period will frequently be breached. The District Court will be required to administer and hear the inevitable resulting applications for leave to proceed out of time. Claimants will incur irrecoverable costs in making those applications.

Interaction with section 14 of the Limitation Act 2005 (LA)

Proposed section 29I

22. Section 14 of the LA imposes a limitation period of 3 years in relation to actions for damages relating to a personal injury.[1]

23. The only safeguard against an irretrievable time bar caused by a failure to commence proceedings within with the limitation period imposed under the LA (which breach may have been caused by a failure to meet all of the above requirements) is proposed section 29I.

24. Proposed section 29I would extend the 3-year limitation period (or an extended period under section Part 3 of the LA) only in limited circumstances.

25. Proposed section 29I requires the claimant seeking an extension of time to meet all of the following requirements (from hereon, collectively referred to as the **Requirements**) before an extension can be granted:

    25.1. before expiry of the limitation period, the claimant must have provided a notice of claim to ICWA. If that notice was defective, then, before expiry of the limitation period, the claimant must have made an application under proposed section 29A(3) for leave to commence the action notwithstanding that defect); and

    25.2. the claimant must have:

        25.2.1. given ICWA any additional information ICWA has requested about the claim and the circumstances out of which it arises (as required by proposed section 29(1)(b));

        25.2.2. complied with all of the pre-action conference requirements (unless a pre-action conference has been dispensed with by an agreement under section 29B(4)). These requirements consist of:

            a) the requirement to attend a pre-action conference under proposed section 29B(2);

            b) the requirement to provide to ICWA a statement in an approved form giving particulars of the heads of damages claimed and supporting documents, full discovery and a certificate of readiness, as required by proposed 29D(3); and

            c) the requirement to attend the pre-action conference (unless they have a reasonable excuse not to do so) and actively participate in good faith in an attempt to settle the claim, as required by proposed section 29E(2)); and

[1] Longer limitation periods are available for minors under Part 3 of the LA. Further, there is a limited right to extend the limitation period under s 39(3) of the LA refers rarely arise because claimants injured in motor vehicle accidents are able to commence proceedings against ICWA under s 8(5) of the existing legislation if the negligent driver cannot be identified or served.

25.2.3. the claimant must have:

a) commenced proceedings within 28 days of the pre-action offer, as required by section 29H(2); or

b) commenced an action in accordance with an order of the court,

provided that this has been achieved within 9 months after the notice of claim was given under proposed section 29(1)(a) or within 9 months after leave to commence the action was given under proposed section 29A(3)(a) (or such longer period as is allowed by the court).

The impact of the Requirements

26. The Requirements, both individually and collectively, are onerous. The imposition of the Requirements as a pre-requisite to seeking leave to proceed after expiry of the limitation period imposed by the LA would result in unjust outcomes for claimants, as set out below.

<u>The time required to comply with the Requirements</u>

27. It is not unusual for injured claimants (including claimants injured as a result of a motor vehicle accident) to learn of the need to commence proceedings only shortly before expiry of the limitation period under the LA. Solicitors address that situation by filing a generally indorsed writ. In respect of motor vehicle accident claims under the Act, this is a simple task. It is often achievable on the same day as the receipt of instructions.

28. The imposition of the Requirements would cause claimants to lose their right to commence proceedings.

29. Not infrequently, there would be no extension available under Part 3 of the LA, which legislation was enacted without consideration for pre-action requirements such as the Requirements.

<u>Failure to give notice of the claim before expiry of the limitation period under the LA</u>

30. A failure to provide a notice of claim to ICWA before expiry of limitation period would deprive a claimant from commencing proceedings to recover compensation. There is no mechanism in the Bill to avoid such an unjust outcome.

31. While not of direct application, section 54 of the *Insurance Contracts Act 1984 (Cth)* (**ICA**) is instructive as the unfairness of this proposed requirement. Section 54 of the ICA prevents an insurer from refusing to pay a claim by reason of an act of the insured person solely by reason of that act. If an insurer (to which the ICA applies) was not prejudiced by, for example, a failure to notify the insurer of the claim within a particular period, the claim could not be denied solely on account of that failure. The ICA is an example of a successful piece of legislation which has stood the test of time - 2024 being its 40th anniversary.

<u>Failure to comply with the pre-action conference requirements</u>

32. As noted above, the pre-action conference requirements would be impossible to comply with in some cases, and yet, failure to comply with them would deprive a claimant from commencing proceedings to recover compensation.

Proposed section 29E(2)

33. The requirement imposed by proposed section 29E(2), to have *'actively participated in the conference in good faith in an attempt to settle the claim'* is particularly problematic.

34. The provision would give rise to an extraordinary erosion of the without prejudice privilege for both ICWA and motor vehicle accident claimants.

35. As noted at paragraph 4 above, it is impossible for claimants and their lawyers to negotiate in good faith for the final resolution of a claim if the value of the claim is not yet assessable.

36. The proposed provision is insensitive to the experience of a claimant who may be attending such a conference when they are young, elderly, non-English speaking, unfamiliar with such conferences, overwhelmed, distressed, embarrassed, offended and/or aggrieved, and while suffering the effects of the injuries in respect of which they may be entitled to compensation.

37. Such conferences presently occur on a without prejudice and confidential basis. Any record of what occurred at such a conference, and any information as to the conduct during such a conference of the claimant, the claimant's lawyer, ICWA and ICWA's lawyers is (save in respect of the exceptions mentioned below) subject to the jointly held without prejudice privilege, and cannot be communicated to the court, at any time.

38. If ICWA considered that the claimant had not properly participated in the conference, then, on an application for leave to proceed after expiry of the limitation period, the court would need to determine how the claimant behaved at the conference. The court would be required to enquire into and adjudicate on the matter even before legal proceedings relating to the claim had been commenced, heard and determined.

39. The proposed provision is vague as to what 'participation' or lack of participation would offend the provision. The question as to what would constitute 'active participation in good faith' would be contentious. A hearing about such a matter is likely to be distressing to the claimant and difficult for the court to resolve.

40. Every conference participant must comply with proposed section 29E(2). If ICWA argued that the claimant's lawyer, on instructions, had behaved in a way which breached the provision, that allegation, if made out, could potentially deprive a suitably participating claimant from a right to seek an extension to the limitation period.

41. The proposed provision gives rise to undue pressure on lawyers participating in such conferences. Lawyers should be able to speak for their clients on a without prejudice basis without having to consider what conduct on their part might be regarded by ICWA as offending section 29E(2). The provision is unnecessary. The without prejudice privilege does not protect unprofessional conduct, including fraud, dishonesty and discourtesy. If ICWA considers that there are lawyers engaging in unprofessional conduct at without prejudice conferences, it may make reports to the Legal Practice Board, which Board may investigate and, if appropriate, commence disciplinary proceedings under existing law.

The consequences of irretrievable loss of the cause of action

Represented claimants

42. Represented claimants who lose their right of action as a result of failure to meet all of the Requirements may have a right of action against their solicitors.

43. Claims against solicitors would be rendered complex if there were difficulties for solicitors in obtaining the necessary instructions to meet all of the Requirements within the required timeframes. If such a difficulty was caused by a delay in responses from a third party, the unresponsive third party may be joined to proceedings brought against the solicitors. Potential third parties would include experts such as forensic specialists, chemists, engineers, pharmacologists and medical practitioners. Joinder of such parties would involve further insurers. The liability to compensate the injured claimant would be unfairly shifted to private insurers from ICWA (the statutory function of which is to provide the relevant insurance).

44. The potential complexity and the uncertainty as to the outcome of such proceedings would give rise to the potential for claimants to incur further legal costs, only to fail in the action against their former solicitors and/or other professionals, leaving them to cover their own costs and those of the professional indemnity insurer or insurers, in addition to the wasted costs incurred in attempting to meet the Requirements in order to obtain compensation to which they were legally entitled.

Unrepresented claimants

45. Unrepresented claimants would be particularly vulnerable to becoming irretrievably time-barred by failing to meet all of the Requirements within the required timeframes.

46. That vulnerability would be heightened in relation to children injured in motor vehicle accidents, including child pedestrians, claimants affected by disabilities and claimants disadvantaged by other barriers to taking timely action, or understanding the need to do so, whether cultural, linguistic or socio-economic.

Costs of seeking leave to proceed

47. Where applications for leave to proceed were available because the Requirements had been met, costs would be incurred in relation to the application for leave to proceed outside of the limitation period.

48. An unsuccessful claimant would be ordered to pay ICWA's costs in respect of the application and, in addition, would be required to pay their own costs of that application.

49. Even in cases in which the claimant succeeded in obtaining the necessary leave to proceed, it is unlikely that the claimant would obtain an order that ICWA to pay the successful claimant's costs in respect of the leave application. Applications for leave involve the seeking of an indulgence from the court, a circumstance which generally deprives the party seeking the indulgence from recovering their costs from the opposing party, and, generally, gives rise to an order that the party seeking the indulgence pay the opposing party's costs.

The proposed provisions relating to 'claims harvesting'

50. Section 25C of the Bill would prohibit paying referral fees and provide for a fine of $10,000. This provision is redundant given that section 20(1) of the *Civil Liability Act 2002* (**CLA**) provides:

A person must not provide or offer to provide, or receive or seek to receive, a fee for the soliciting or inducing of a potential claimant to make a claim. Penalty: $10 000.

51. Section 25D of the Bill would prohibit soliciting a person to make a claim or to refer the person to a lawyer. This provision partially overlaps with section 19 of the CLA, which prohibits touting at the scene of an accident (a provision that is obviously directed to preventing the payment of referral fees in respect of motor vehicle accidents).

52. The Law Society has sought up-to-date data from ICWA that would support its contention that claims harvesting is prevalent in Western Australia in relation to motor vehicle accident claims. No data has been provided in response to that request. If the practice is currently prevalent, such that there is a need for further laws specifically directed claims harvesting in respect of motor vehicle accident claims, those laws should be developed following a proper process of consultation involving courts, the legal profession, including all relevant professional associations of lawyers, and the insurance industry. The relevant provisions of the CLA ought to be taken into account to avoid inconsistency between laws of the State.

53. If ICWA is aware of solicitors who are paying referral fees in respect of referrals of claimants injured in motor vehicle accidents, or if ICWA has a reasonably based suspicion that particular solicitors are paying referral fees, a report about that matter should be made to the Legal Practice Board (or its counterpart in other States, if applicable). As noted above, fines can be levied against practitioners guilty of this practice in the same amount as would be imposed by the provisions of the Bill.

The position of the Western Australian Bar Association

54. The President of the Western Australian Bar Association has advised the Law Society that its Council has considered the terms of this letter as set out above and has unanimously resolved to endorse the terms of this letter.

I would be grateful to have an opportunity to meet to discuss these concerns before the passage of the Bill is further advanced.

If you have any queries regarding the above, please contact Susie Moir, General Manager Advocacy and Professional Development on (08) 9324 8646 or smoir@lawsocietywa.asn.au.

Yours sincerely

Paula Wilkinson
President

CC: The Hon. John Quigley MLA: Minister.Quigley@dpc.wa.gov.au
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The Western Australian Bar Association: executiveofficer@wabar.asn.au

The Law Society of Western Australia
The voice of the legal profession in Western Australia

14 December 2023

The Honourable Sue Ellery BA MLC
Minister for Commerce
12th Floor, Dumas House
2 Havelock Street
WEST PERTH WA 6005

By email: minister.ellery@dpc.wa.gov.au

Dear Minister

INSURANCE LEGISLATION AMENDMENT (MOTOR VEHICLE CLAIMS HARVESTING) BILL 2023

I refer to the attached letter dated 9 February 2023 from the former Premier the Hon. Mark McGowan, informing the Law Society of Western Australia (the Law Society) that the draft Insurance Legislation Amendment (Motor Vehicle Claims Harvesting) Bill 2023 (Bill) will be provided to us once it is in a form suitable for consultation.

The Law Society has not received any further information as to the progress of the draft Bill and is now aware that a Bill was introduced into the Parliament on the 30 November 2023. The Law Society is disappointed that it was not given the opportunity to be consulted on a draft Bill before it was introduced to the Parliament.

Given the Bill has now been second read in the Parliament, the Law Society would like to know if there will any further opportunity to provide comment to government on the Bill, and how that process with be undertaken by the Government.

If you have any questions in relation to this correspondence, please contact Jane Morgan, Acting General Manager Advocacy and Professional Development at the Law Society on jmorgan@lawsocietywa.asn.au or by telephone 9324 8652.

Yours sincerely

Ante Golem
President

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Premier of Western Australia

Our Ref: 59-358473

Ms Rebecca Lee
President
Law Society of Western Australia
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info@lawsocietywa.asn.au

Dear Ms Lee

CLAIMS HARVESTING

Thank you for your letter of 14 December 2022 regarding claims harvesting.

The Insurance Commission of Western Australia has not yet received the first draft of the bill being prepared to address claims harvesting activity in relation to motor injury insurance claims.

The draft bill will be provided to you once it is in a form suitable for consultation. Representatives of the Insurance Commission would be happy to meet with you to discuss the proposed legislative amendments. Please contact Alison Wilson, General Manager Governance and Stakeholder Relations on 9264 3453 or alison.wilson@icwa.wa.gov.au to arrange such a meeting.

Yours sincerely

Mark McGowan MLA
PREMIER; TREASURER

09 FEB 2023

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The Law Society of Western Australia
The voice of the legal profession in Western Australia

14 December 2022

The Honourable Mark McGowan MLA
Premier
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WEST PERTH WA 6005

Email: wa-government@dpc.wa.gov.au

Dear Premier

CLAIMS HARVESTING

In 2021 representatives from the Insurance Commission of Western Australia provided the Law Society with a confidential briefing on the policy framework for the draft legislation in 2021. The Law Society has now been advised that the Government is proposing to introduce draft legislation to regulate "claims harvesting" in the first session of Parliament in 2023.

In this context the Law Society is requesting a copy of the draft Bill so that it can provide a submission to you about any adverse implications that the amendments may have for plaintiffs. The Law Society will only be adopting a position that supports amendments that are consistent with the rule of law.

Another request for consultation on the draft Bill has been referred to your office at officer level and to date a response has not been received.

If you have any questions regarding this matter please contact Mary Woodford, General Manager Advocacy and Professional Development on 9324 8646.

Yours sincerely

Rebecca Lee
President

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