



17 Kildare Street,  
Dublin 2.  
9<sup>th</sup> July 2019

Mr Charles Flanagan TD,  
Minister for Justice and Equality,  
Department of Justice and Equality,  
51 St. Stephen's Green,  
Dublin 2.

Dear Minister Flanagan,

Thank you for your response of 21<sup>st</sup> June, which we have taken some time to consider; and which for ease of reference I have annexed (**Annex A**) with paragraph numbers at the rear of this note.

Regarding your paragraph 5; While we accept this is your point of view, it is not one with which we concur. The failure to remove obstacles to the functioning of the legal market is noted yet again in the current Semester Report<sup>1</sup> by the EU Commission. Legal and insurance costs are noted to be on the rise. The Commission states that the 'degree of ambition' in the LSRA to increase competition and reduce legal costs 'remains to be seen' a sentiment with which ISME agrees.

Re your paragraph 7; Again, we do not concur with your perception of the nature of amendments made by your department to the LSRA, which went far beyond technical amendments to Part 13. The scope of the amendments made to the LSRA as noted by Isolde Goggin's 'Does the law protect incumbents?'<sup>2</sup> paper speaks for itself. We show her table of amendments at **Annex B**, and we agree with her conclusion that 'it appears that the rights and views of those with vested interests in the status quo were prioritised.' We believe that these vested interests must be tackled in the current reform program.

Re your paragraph 8, it is our position that material insurance reform has stalled. Notwithstanding the welter of actions and reports conducted by the CIWG, and as I wrote to Minister of State D'Arcy in June,<sup>3</sup> these reforms do not meet any threshold of materiality where insurance costs are concerned. As explained to MOS D'Arcy, people may be very busy on this issue, but they are not effective. Materiality will be evident in reduced insurance premia, not in CIWG reports.

Re your paragraphs 9, 10 and 11, while all reforms to tackle the insurance fraud noted by Mr Justice Kearns are welcome, they are several places down the order of priority for ISME, after reduction in quantum for all soft tissue injuries, tackling exaggerated claims, reduced legal costs, defamation

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<sup>1</sup> [https://ec.europa.eu/info/sites/info/files/file\\_import/2019-european-semester-country-report-ireland\\_en.pdf](https://ec.europa.eu/info/sites/info/files/file_import/2019-european-semester-country-report-ireland_en.pdf)

<sup>2</sup> <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/05/Does-the-law-protect-incumbents-FINAL-29APR16.pdf>

<sup>3</sup> <https://isme.ie/wp-content/uploads/2019/06/ISME-to-MOS-DArcy-re-AG-05.06.19.pdf>

reform, equality of arms for defendants in personal injuries actions, reform of occupiers liability, and moral hazard for plaintiffs in court.

Re your paragraph 12, we are not happy that the CIWG shelved plans for a claim-by-claim database, when a functional version is already available to the members of Insurance Ireland. Wider access to this database should be provided in a regulated manner.

While we understand the Garda Commissioner's views that insurance fraud will be managed at Divisional level, this will only succeed in the context of a dedicated, specialist unit in Garda HQ controlling, advising and leading the divisional effort. Insurance fraud is a white-collar crime of a technical nature, and requires expert professionals to investigate and prosecute. We were most unhappy with the suggestion by MOS D'Arcy that Government could not task An Garda Síochána in this regard; that is not our understanding of Sec 20 of the Garda Síochána Act. As you know, Ireland is unique (bar Malta and the Vatican) in having a single generalist police force. Most states have multiple police forces organised on a regional basis, a functional basis, or in the case of the UK, both. If AGS does not demonstrate an immediate and aggressive determination to tackle what is a large and lucrative area of white-collar crime, responsibility should be spun off to a specialist enforcement agency along the lines of the *Guardia di Finanza* in Italy.

Re your paragraphs 14 And 15, it is a matter of huge frustration to us that the urgency of reducing quantum for minor injuries was emphasised by Justice Kearns 12 months ago, yet no urgency has been noted in enacting his prescriptions. It is also noteworthy that the Judicial Council route was not Justice Kearns's first recommendation. In fact, his first recommendation, redacted from the final report presumably at your Department's behest, was a legislative cap on damages (**Annex C**). In light of the remarks made by the Chief Justice in his February letter to you of 27<sup>th</sup> February (**Annex D**) that new guidelines must have 'a clear legal basis' and 'be fully articulated in statute,' it is hard to see how the judiciary will be able to depart from 'the going rate' for soft tissue injuries without an explicit legislative cap.

The Judicial Council Bill process entirely lacks the urgency sought by Justice Kearns last year. Even the amended time schedule for the Personal Injuries Guidelines Committee means that it will be 21 months from the establishment of the Council before we have published guidelines. In the context of a Personal Injuries Commission that sought an interim solution by the end of 2018, this is simply unacceptable.

Your paragraph 16 is the one with which we take the greatest exception. It is entirely bogus to suggest that there is any constitutional impediment to the introduction of a legislative cap on damages. We understand many commentators, particularly those who are practitioners in personal injuries litigation, hold the view that such a cap would be unconstitutional. Beyond them, however, the overwhelming weight of legal opinion suggests otherwise:

1. The Civil Liability Act 1961, which caps damages for fatalities, has survived 58 years without constitutional challenge; a fact most inconvenient for those who dispute the issue.
2. As noted above, Justice Kearns's first recommendation of the Personal Injuries Commission (PIC) was to introduce a legislative cap on damages. He further set out the broad parameters within which he suggested that a bill to cap damages would survive constitutional challenge at this year's PIAB conference.<sup>4</sup>
3. The Constitution guarantees rights of access to the courts, not to given levels of quantum. The CIWG has consistently ignored this distinction.

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<sup>4</sup> <http://isme.ie/wp-content/uploads/2019/05/ADDRESS-TO-CLAIMS-MANAGEMENT-CONFERENCE-2019-3.pdf>

4. The award of general damages was only assigned to judges in 1989, it rested with juries before that.
5. The Chief Justice, in his letter to you of 27th February makes clear that any reduction in general damages below the 'going rate' reflected in the Book of Quantum will require legislative change.
6. The Chief Justice also suggests that assigning responsibility to the judiciary for recalibrating damages could expose them to the challenge that they were involved in the 'discharge of the statutory function of an executive agency' which might subsequently be 'subject to scrutiny by the courts,' an effective breach of the separation of powers. Essentially, the Chief Justice is alerting your Department to the risk that tasking judges alone to set damages is equivalent to requiring them to set and correct their own homework. Further, by asking them to enter the policy-setting sphere, the Government is asking them to make laws, a matter which is constitutionally the sole prerogative of the Oireachtas. It is their job to adjudicate, it is your job to legislate.
7. Last, but not least, if Government had doubts about the constitutionality of capping damages via legislation, it would have asked the Attorney General for an opinion on the matter. It has not done so.

If the ultimate outcome of the Judicial Council process is that a new judicial damages-setting regime fails a constitutional challenge, we will have wasted three years in the pursuit of lower quantum for minor injuries. For this reason, we consider your decision to refer Senator Anthony Lawlor's Civil Liability (Capping of General Damages) Bill 2019 to the Law Reform Commission to be unwise. Given the views expressed by the Chief Justice, it may prove the case that the Judicial Council will need something very similar to Senator Lawlor's bill for it to pass the tests set by the Chief Justice.

Re your paragraph 18, it remains to be seen whether the Personal Injuries Assessment Board (Amendment) Act 2019 will pass the 'materiality' test in time. The changes are nonetheless necessary, and much appreciated.

The changes to Sections 8 and 14 of the Civil Liability and Courts Act 2004 will hopefully bring some modicum of fairness (if not genuine equality in arms) for defendants in PI actions, and is also most welcome. However, and even after amendment, the complete failure of the authorities to enforce Section 14 since its enactment is unacceptable. This is not an area of law enforcement that requires a lot of policing resource, nor does it require *Hercule Poirot* levels of policing nous. See my comments on AGS insurance fraud investigation above.

Re your paragraph 20, it is a common misconception, repeated here in your note, that jurisprudence of the Court of Appeal (COA) will mitigate awards levels. This is factually and legally untrue. To quote Justice Kearns at the PIAB conference again: 'the reach of the Court of Appeal does not extend to minor whiplash/soft tissue injuries.' The COA's 'reach' is effectively into the High Court only, and it will therefore mitigate only those awards over the current €60,000 threshold.

While I note your observation on recent declines in the cost of private motor insurance, this is not reflected in commercial insurances. ISME's most recent Trends Report<sup>5</sup> shows increases in commercial motor, public liability and employer liability insurances. Similarly, while the recently released Courts Service Annual Report 2018<sup>6</sup> shows a small reduction in the number of cases incoming, as well as a significant reduction in High Court awards, awards in the Circuit and District Courts continued to rise. There is no sign that this is going to change.

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<sup>5</sup> <https://isme.ie/wp-content/uploads/2019/07/Trends-Q219-Press-Release.pdf>

<sup>6</sup> [http://www.courts.ie/Courts.ie/library3.nsf/\(WebFiles\)/C2B4BFC1AFEC7B098025842D00473F25/\\$FILE/Courts%20Service%20Annual%20Report%202018.pdf](http://www.courts.ie/Courts.ie/library3.nsf/(WebFiles)/C2B4BFC1AFEC7B098025842D00473F25/$FILE/Courts%20Service%20Annual%20Report%202018.pdf)

The Courts Service also notes a substantial rise in the number of defamation cases being taken. We have written to you in this regard before. Defamation litigation is very severely impacting businesses, particularly in the forecourt, fashion and convenience retail sectors. We have a member company which provides security to the retail sector that receives an average of nine defamation actions per year. Aside from the commentary made by the ECHR about the wider failings of our defamation regime, this abuse of the defamation statute is appalling, and requires an urgent response from your Department.

Regarding your commentary on insurers' profits in paragraph 21, and notwithstanding the fact that ISME does not represent underwriters, I would ask you to note the following:

- Insurers are obliged by Irish and EU law to make profits.
- With the advent of Solvency II, we believe (and I have pursued the Central Bank on this to no avail) that their profitability is increasing due to having to make higher provisions.
- The annual report from FBD noted that €26.9m of their profits were due to release of reserves (provisions).

In short, you cannot decry insurers for that which you charge them in law to do. We have referred complaints about the insurers to DG COMP, and have asked that their investigations in Ireland be widened to include commercial motor, public liability and employer liability insurance. We hope we will enjoy your support in this endeavour.

We do not make the point on insurers by way of suggesting you are compromised by your professional qualification. Nor are we bothered by your social engagements with the Law Society and Bar Council. However, we suggest that it is imperative for you to remain (and be seen to remain) absolutely objective in your dealings with the legal lobby and the underwriting lobby, *both* of which ISME hold blameworthy for high insurance costs. Our estimate of how much lawyers made from PI work in 2015, the last available year of Blue Book data, was €350m. We have shown the derivation of this calculation in Appendix V of our submission to the Joint Oireachtas Finance Committee.<sup>7</sup> All efforts to control insurance costs will therefore be vigorously opposed by that minority of the legal profession for whom PI work represents the majority of their turnover.

For the avoidance of doubt, we would consider full delivery of Justice Kearns's twin imperatives of lowering quantum and reducing fraudulent claims to represent a merely a good start to the issue of insurance costs. We prioritise the action areas as follows:

1. Reduced quantum for minor injuries.
2. Tackling exaggerated claims.
3. Reform of the duty of care<sup>8</sup> under the Occupiers' Liability Act 1995. The current judicial interpretations are unsustainable.
4. Reform of the rules of court to ensure equality in arms for defendants, and that costs follow the event. At present, they don't. Costs, especially High Court costs, are used to bully defendants into settling cases that have no merit. This will likely require the introduction of an Irish equivalent to the LARA<sup>9</sup> statute in the United States.
5. Reduction in legal costs. This will almost certainly require the introduction of a comprehensive schedule of costs, as applies currently in the District Court.
6. Comprehensive reform of the Defamation Act, as we requested of you in March.<sup>10</sup>
7. Successful enactment, and vigorous enforcement, of the Perjury Act, which we greatly appreciate your support of.

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<sup>7</sup> <https://isme.ie/wp-content/uploads/2019/04/ISME-Submission-to-Finance-Committee.pdf>

<sup>8</sup> <https://www.kildarestreet.com/wrans/?id=2019-06-25a.594>

<sup>9</sup> <https://www.congress.gov/bill/115th-congress/senate-bill/237>

<sup>10</sup> <http://isme.ie/wp-content/uploads/2019/03/ISME-to-Minister-of-Justice-and-Equality-re-Defamation-Act.pdf>

We understand that this represents a significant ask. But unless the Government is happy to continue to watch Irish businesses go under, and unless you are willing to endure the reputational damage the current legal situation is inflicting on Ireland, you must act.

The current situation threatens the jobs and livelihoods of tens of thousands of small business owners and their employees. You would be naïve in the extreme to believe this will not become an issue for those people come the next general election. On a purely political note, I should advise you that those who are most aggressively haranguing the ISME executive on this issue are people who publicly support, or are members of, your party.

Having set out our mutual positions, I would welcome the opportunity to discuss the way forward at a meeting with you. Could I suggest weeks commencing 12<sup>th</sup> or 19<sup>th</sup> August might be suitable?

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Neil McDonnell', with a long horizontal flourish extending to the right.

Neil McDonnell  
Chief Executive

CC: Leo Varadkar TD  
Paschal Donohoe TD  
Heather Humphreys TD

## Annex A

[Per email 21.06.19]

Mr. Neil McDonnell  
[neil@isme.ie](mailto:neil@isme.ie)

Minister's Reference: DJE-MO-01849-2019

Dear Mr. McDonnell,

1. I refer to your previous correspondence in which you had sought a meeting in relation to the reform of the insurance costs regime while also raising a number of items of proposed legislation which you consider will materially affect the cost of insurance.
2. The first point I wish to make in response to your letter is that we have an entirely open legislative system in this jurisdiction under which there is no existing impediment to ISME or any other body making submissions on legislation which is being proposed before the Houses of the Oireachtas.
3. This is the case whether such legislation is being proposed by the Government or by Members of the Houses in their own right in the form of Private Members' Bills. Moreover, the legislative process falls within the independent remit of the Oireachtas which manages its own affairs under the Constitution including the publication of any amendments to legislation whether proposed by the Government or by individual Members of both Houses.
4. Many such Bills are shaped by the submissions that stakeholders and other interested parties are entitled to make in that regard. It is clear from ISME's own web-site, which is replete with such submissions, including to my own Department on specific areas of policy reform and legislation, that there is no impediment to your participation in the legislative process as your correspondence would seem to convey.
5. In relation to the Legal Services Regulation Act 2015, I do not accept that there was any form of privilege extended to the Law Society or the Bar of Ireland in its promulgation. I would remind you that the Act implements the independent recommendations made by the Competition Authority in its Report on the legal services sector published in 2006 and subsequently became deliverable by way of structural reform under the EU/IMF/ECB Troika Programme undertaken by the then Government in 2010. Moreover, a number of these reforms and their related amendments now to be found in the 2015 Act were not universally welcomed by the legal professions - particularly in terms of the introduction of more competitive legal services models and legal costs transparency provisions for the benefit of consumers including small and medium enterprise.
6. The sole engagement by my Department with the legal professional bodies was at a technical level and arose from the fact that they are the existing regulatory bodies for the legal professions and that this role is now being taken over by the Legal Services Regulatory Authority. This has, as reflected in Part 13 of the Legal Services Regulation Act, necessitated over 30 amendments to the existing provisions of Solicitors' Acts under which the Law Society is the designated regulatory body for Solicitors in the State. Similarly, both the Bar of Ireland and the King's Inns have had to amend their historical Codes and Rules to meet their new obligations which are now set out, for the first time, in national legislation.

7. Consultation on these matters was not a matter of privilege but rather one of practical necessity and no more than would be afforded to a body such as that which you represent were it a direct party to the legislation concerned.
8. In response to the broader points you have made about a "stalling" of insurance reform, I wish to draw your attention to the following actions that are actually being taken on foot of the work of the Cost of Insurance Working Group and of which you will no doubt be aware from ISME's engagement with Minister of State Michael D'Arcy in his capacity as the Group's Chair.
9. New Guidelines for the Reporting of Allegations of Fraudulent Insurance Claims to An Garda Síochána were published on 1 October 2018. The most recent figures available to the Department show that, between 1 October 2018 and 28 February 2019, of the 22 incidents of insurance claim fraud reported to An Garda Síochána, 19 were reported by insurance entities under these new guidelines.
10. A new insurance claim fraud category on the Garda PULSE system went live on 2 November 2018, enabling the production of better statistics.
11. The Garda National Economic Crime Bureau and Insurance Ireland's Anti-Fraud Forum now meet on a regular basis.
12. An Insurance Fraud Database Working Group, chaired by the Department of Justice and Equality, is working to establish an integrated insurance fraud database.
13. The Garda Commissioner, having considered the matter in detail, is now driving forward a stronger focus by An Garda Síochána at Divisional level on insurance fraud. This approach, which is aligned with the divisional-focused Garda model will be aimed at tackling such fraud on the ground all over the country. It is the intention of the Commissioner that the Garda National Economic Crime Bureau (GNECB) will guide Divisions and provide training in support of their investigation of insurance fraud.
14. The Personal Injuries Commission was established in January 2017 and presented two reports of its own over an 18-month work programme.
15. The Personal Injuries Commission recommended that the future Judicial Council be assigned the function of compiling guidelines for general damages for personal injury. Along with my Department officials, I am in on-going discussion with the Chief Justice and the Attorney General on this matter and has secured Cabinet approval to fast-track the relevant amendments to the Judicial Council Bill with a view to its enactment before the Summer.
16. The Law Reform Commission is, under its Fifth Programme of Reform, conducting a detailed analysis of the possibility of developing constitutionally sound legislation to delimit or cap the amounts of damages which a court may award in respect of some or all categories of personal injuries.
17. The Central Bank (National Claims Information Database) Act 2018 was commenced by Minister Humphries in January 2019 to provide a better understanding of those factors influencing the cost of insurance.

18. The Personal Injuries Assessment (Amendment) Act 2019 was commenced by Minister Donohoe in April 2019 reinforcing the role of the Personal Injuries Assessment Board which enables claims to be settled in a less costly fashion.
19. Sections 8 and 14 of the Civil Liability and Courts Act 2004 were amended in January 2019 in conjunction with my Department to improve their effectiveness against fraudulent claims with costs implications for the offending parties.
20. While I can appreciate from ISME's perspective that it is taking an unwelcome amount of time for these measures to have the desired effect, there is now evidence that insurers are making greater efforts under existing law to crack down on suspected fraudulent claims and there have been a number of recent high-profile court judgements under which the legal consequences of insurance fraud and the legal sanctions that apply have been left in no doubt. There is a growing body of jurisprudence in relation to the mitigation of awards levels before the Court of Appeal. There is also evidence of the positive impact of the range of measures taken. In May, the Central Statistics Office revealed that the price of motor insurance fell again in April and is 6.6% lower than this time last year and 24.4% lower than its peak in July 2016. The challenge is to ensure that any reform dividend of this nature proves to be of benefit to all consumers in securing the insurance cover they require.
21. At the same time, we have a highly profitable insurance sector and I have repeatedly called on insurance companies to reduce the costs they impose of their customers. There is, therefore, much more that can be done within the insurance industry by taking a more determined approach to addressing the fact that certain areas of risk are being commercially avoided to the detriment of vulnerable businesses and consumers.
22. While I appreciate that there may be on-going differences of emphasis between us in terms of how best to address high insurance costs, these are matters on which I think it would be of greater benefit to cooperate with positive effect and to the benefit of our respective constituencies - while recognising that there are genuine efforts being made to address the issues concerned by the Government and other stakeholders. If you are amenable to such positive engagement on behalf of ISME in the current process of reform I will be very happy to meet with you on that basis.
23. In the meantime I will continue to make every possible effort, including at Cabinet level, to help ensure that the relevant legislative and other measures to address insurance costs will be taken with lasting effect. I look forward to hearing from you when you have had a chance to consider those matters I have outlined above and I will give positive consideration to any request you may wish to make for a meeting at which we can have a constructive exchange of views on the issues concerned. I will also be happy to consider any submissions you may wish to make as part of the legislative process on the specific items of legislation you have raised.

Yours sincerely,

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Charlie Flanagan, T.D.  
Minister for Justice & Equality

## Annex B

Date	Event	Length of amendments (Govt. + Opposition)
9/10/2011	<b>Dáil Éireann:</b> <b>Bill published – 1<sup>st</sup> stage</b>	---
16/12/2011 – 23/2/2012	<b>2<sup>nd</sup> stage</b> Referred to Select Committee	---
17/7/2013	<b>Committee Stage</b> - List of proposed Committee Stage Amendments	<b>121 pages in total</b> 26 pages
15/1/2014	Committee Stage (Resumed) - List of Proposed Committee Stage Amendments - 1 <sup>st</sup> Additional List of Proposed Committee Stage Amendments	45 pages 3 pages
12/2/2014	Dáil Éireann: Committee Stage (Resumed)	47 pages
11/7/2014	Dáil Éireann: Report and Final Stages	<b>44 pages in total</b>
21/4/2015	Dáil Éireann: Report and Final Stages (Resumed) - List of proposed Report Stage Amendments - 1 <sup>st</sup> Addit. List of Report Stage Amendments - 2 <sup>nd</sup> Addit. List of Report Stage Amendments - 3 <sup>rd</sup> Addit. List of Report Stage Amendments - 4 <sup>th</sup> Addit. List of Report Stage Amendments  <b>Bill Passed by Dáil Éireann (3 ½ years after publication) and referred to Seanad Éireann</b>	26 pages 1 page 10 pages 6 pages 1 page
13/5/2015	<b>Seanad Éireann:</b> <b>Second stage</b>	---
19/11/2015	<b>Committee Stage</b> - List of Proposed Committee Stage Amendments	<b>75 pages in total</b>
26/11/2015	<b>Report and Final Stages</b>	<b>62 pages in total</b>
1/12/2015	Report and Final Stages (resumed) - List of Proposed Report Stage Amendments - 1 <sup>st</sup> Addit. List of Proposed Report Stage Amends - 2 <sup>nd</sup> Addit. List of Proposed Report Stage Amends - 3 <sup>rd</sup> Addit. List of Proposed Report Stage Amends - 4 <sup>th</sup> Addit. List of Proposed Report Stage Amends	58 pages 1 page 1 page 1 page 1 page

	<b>Bill Returned to Dáil Éireann to debate amendments made by Seanad</b>	
9/12/2015	<b>Dáil Éireann:</b>  - Amendments made by Seanad (280 amendments)  <b>Bill returned to Seanad Éireann to debate further amendments made by Dáil Éireann</b>	<b>92 pages in total</b>
15/12/15	<b>Seanad Éireann:</b>  - List of Proposed Amendments to Amendments made by Seanad Éireann - 2 <sup>nd</sup> List of Proposed Amendments to Amendments made by Seanad Éireann  <b>Bill completed passage through both Houses</b>	<b>12 pages in total</b>  1 page  11 pages
30/12/2015	<b>Signed into law by the President (Legal Services Regulation Act, No. 65 of 2015)</b>	

PIC RECOMMENDATIONS

1. Having regard to the significant discrepancy between Irish payments for whiplash type injuries and those in other jurisdictions, the PIC, in recognition of the impact of these payments on both consumers and the business community who require insurance cover recommends that the Government introduce in early course legislation to regulate the amounts or ranges of compensation for the categories of injuries identified in the first PIC Report and thereafter consider the introduction of further legislation to regulate general damages in all personal injury claims. This approach will achieve a greater level of consistency in the assessment of general damages generally.

2. In recognition of every citizen's right of access to the courts, the PIC recommends that any such legislation contain a provision whereby, in exceptional cases, a court may award an increased payment, subject to such maximum percentage as may be determined by the legislation

3. As an alternative to, or in conjunction with, the steps outlined in Recommendation No. 1, the PIC believes that a shared approach between the Executive and Judiciary in finding the best solution to fixing appropriate levels of compensation is desirable. This would permit guidelines for general damages in soft tissue injury cases - and indeed all other injuries - to be drawn up by the proposed Judicial Council - when it is established. This would enable the judiciary to take shared "ownership" of the process by advising on appropriate levels of compensation and in producing a revised Book of Quantum along with

## Annex D

MOGHURT UACHTARACH,  
COURT ÉIRIA CLIAITH 7.



THE SUPREME COURT, DUBLIN 7.  
Telephone: 01 838 6540

The Hon. Mr. Justice Frank Clarke  
Chief Justice

27<sup>th</sup> February 2019

Mr. Charlie Flanagan, T.D.,  
Minister for Justice and Equality  
Department of Justice  
St. Stephen's Green  
Dublin 2

### **Second Report of Personal Injuries Commission**

Dear Minister,

Thank you for your letter of the 13<sup>th</sup> inst. concerning the above. With a view to ensuring that your letter received the fullest consideration and response, I have consulted with the Presidents of the other jurisdictions through the Council of Presidents before replying. The views expressed are shared by them.

We are familiar with the two elements of Recommendation 1 of the Personal Injuries Commission's second report, being that

1. the future Judicial Council be assigned the function under its statute of compiling guidelines for appropriate general damages for various types of personal injury, and
2. pending introduction of such legislation, the judiciary participate with representatives of the Personal Injuries Assessment Board and your Department in the formulation of guidelines as to quantum in the case of claims for damages for soft tissue/whiplash injuries.

You very properly mention, in the context of the second element of the Commission's recommendation, the requirement that judicial independence and the separation of powers be respected and we need hardly add that those considerations must necessarily inform the Judiciary's response to any proposal for reforms in this area. Furthermore, the views expressed below cannot and do not purport to be a definitive – much less binding – interpretation of the law on any aspect of the matters under consideration, this being, of course, a matter for the courts in any particular case.

Can we first assure you of the willingness of the Judiciary to engage actively in considering appropriate measures in this area. However, we have real concerns about whether it is possible or appropriate to take steps without a clear legal basis.

While appreciating that the principal concern of your letter is the second element of the recommendation, we would very much wish to take this opportunity to confirm the Judiciary's openness to the incorporation within the Judicial Council's remit of a function of formulating and issuing appropriate guidelines on compensation in personal injuries cases. This could draw, where appropriate, on the experience of other Judiciaries in undertaking similar exercises, such as those of the Judicial College for England and Wales and the Judicial Studies Board for Northern Ireland, each of which bodies have been suitably resourced, and have had access to appropriate external expertise, in developing their respective Guidelines for the Assessment of General Damages in Personal Injury Cases. We look forward to engaging positively with you and your Department in finalising those proposals.

However, the second element of the Commission's recommendation would seem to raise a number of issues which, we suggest, merit very careful examination. The first possibility is that the existing PIAB legislation might be used.

It is worth recalling that the guidelines contained in the Book of Quantum under section 54 of the Personal Injuries Assessment Board Act 2003 do not - indeed, very likely could not, having regard to the duty of the courts to administer justice independently - be prescriptive for individual cases. This is, of course, in no way unique to the Irish legal environment.

The guidelines concerned are stated to be "general" guidelines as to "the amounts that may be awarded or assessed in respect of specified types of injury"; the court is required, in assessing damages, to "have regard to" the Book of Quantum; and that obligation "shall not operate to prohibit a court from having regard to matters other than the Book of Quantum when assessing damages in a personal injuries action."

It is also important to make mention of the fact that any legislation which confers a power, on either an office holder or a statutory body, to make regulations must comply with what has come to be known as the "principles and policies" test. Because the Constitution confers the sole law making power on the Oireachtas, it is not permissible for the Oireachtas to delegate that power to a third party except to the extent that the third party may provide detail where the principles and policies by reference to which that detail is to be provided can be found in primary legislation. The current PIAB legislation does not appear to contain any criteria by reference to which a recalibrated scale of damages in personal injuries actions could be formulated. On that basis there is a strong argument for the proposition that the Book of Quantum referred to in that legislation can only reflect the "going rate" rather than any "recalibration". On the basis of that argument it would undoubtedly require a legislative change before the Book of Quantum could do other than reflect the "going rate".

We note your proposal that members of the Judiciary with expertise in the area would join with representatives of your Department and the Personal Injuries Assessment Board with a view to identifying, as appropriate, revised guideline award levels for publication by the Board, taking into account the Quebec Task Force Whiplash Associated Disorder scale.

While fully appreciating that this is suggested with a view to giving practical effect to the second element of the Commission's recommendation, we do see it potentially exposing the guidelines process to challenge. Judicial participation might - however unwittingly - convey an impression publicly that judges had become involved in the discharge of the statutory function of an executive agency, and one whose rationale in setting the guidelines may be subject to scrutiny by the courts. Additionally, any expectation that such an exercise might lead to revision - perhaps significantly downwards - of guideline amounts may assume wrongly that the Book of Quantum on its present statutory footing is a norm-setting as distinct from a norm-following exercise.

We are, therefore, of the view that there are very considerable legal difficulties with using the existing PIAB legislation, and the Book of Quantum referred to in it, as a legal basis for any involvement of the Judiciary in formulating guidelines for the award of general damages in personal injury cases. The legal issues which we have identified would almost certainly lead to a succession of challenges which would inevitably be followed through to the higher courts. We would be reluctant to support a measure which would involve the participation of judges in a process which was so likely to be open to challenges in the courts. In addition, either such challenges would be successful, in which case nothing would be gained by the process, or if unsuccessful would be likely to delay by a very considerable period the time before which there would be any clarity as to the legal position. This might, indeed, negate the very purpose of the alternative suggestion which is to have these matters dealt with in a shorter timeframe than that which is anticipated to be likely to occur before a Judicial Council is up and running.

A second possibility might be a model outside the PIAB structure. Having set out the reasons why we are concerned that it would not be appropriate to seek to achieve the end indicated in the alternative proposal of the Commission through the use of the PIAB legislation, we would have equal concerns about any other model which did not have a clear legal basis. The law at present leaves it up to individual judges to determine damages while having regard to case law (in particular that of appellate courts) and the Book of Quantum. The requirement to have regard to the Book of Quantum is clearly provided for in law. The status of any other set of recommendations which did not have a clear legal basis would be very much open to challenge with all of the difficulties which we have already identified.

In summary, the Judiciary's preference would be that any new guidelines regime in this area should have a clear legal basis and should ideally

- be assigned within the Judiciary
- be appropriately resourced, and
- be fully articulated in statute as to
  - the powers of the guidelines setting body, including in relation to the potentially contentious issue of review of existing award levels
  - the sources of information from which it may draw and
  - the standing in law of the guidelines issued.

Obviously, we are not privy to whether it would be feasible to legislate for such a solution in the short term as opposed to awaiting its incorporation in the Judicial Council Bill. Clearly, if such a statutory structure were to be established in the near future, same could be incorporated into the Judicial Council in due course.

Whatever be the position, we would wish to assure you of the Judiciary's willingness, within the bounds necessitated by the separation of powers, to engage actively with you and your Department on the design of the appropriate solution.

Yours sincerely,

A handwritten signature in dark ink, appearing to read 'F. Clarke', written in a cursive style.

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Frank Clarke  
Chief Justice