17 Kildare St.,
Dublin 2.
13th July 2020

Ms Helen McEntee TD,
Minister for Justice and Equality,
Dept of Justice and Equality,
51 St. Stephen's Green,
Dublin 2.

Dear Ms McEntee,

My letter of 29th June refers.

I have summarised below the areas of greatest concern to ISME in our pursuit of lower insurance costs. As you can see, most issues require initiation or amendment of primary legislation under your Department's remit.

Despite the ravages of Covid-19, the catalogue of dubious, exaggerated and plainly fraudulent claims has continued unabated in our courts over the last four months. At the same time, we witness the closure of play facilities such as Fort Lucan and Blueway Waterpark because they can no longer afford insurance. This will continue, not merely because the State applies no sanction, but because the legal system is unashamedly pro-plaintiff. This is unsustainable.

In view of the urgency of the issue for almost all Irish businesses as well as private citizens, we would appreciate the facilitation of a meeting with you and your senior officials at your earliest convenience.

Yours sincerely,

Neil McDonnell
Chief Executive

Executive Summary

SMEs are highly dependent on the functioning of the legal system in the enforcement of contracts, and in managing insurance costs. In neither of these areas does our legal system perform well. This is not merely an opinion of small business owners; it has been observed and commented upon by our own Competition and Consumer Protection Commission (CCPC), EU Commission, the OECD, and the European Court of Human Rights (ECHR).

Our system has been exceptionally slow to move with the times; efforts to modernise are treated as threats by incumbents of the legal system, internal resistance is high, and change is slow; it is externally driven or forced by circumstance. Our legal system appears optimised for the betterment of its incumbents rather than the delivery of fair and affordable justice to the citizenry. In order to redress this, we seek the following measures:

- The benchmarking of Ireland's progress with the structural legal reforms sought by the Troika.
- Enactment and enforcement of the Perjury and Related Offences Bill.
- Immediate investigation and enforcement of insurance fraud by Gardaí.
- Amendment of the Defamation Act 2009.
- Reduction of quantum via primary legislation.
- A duty of candour on law officers before the courts.
- PIAB claims must form the basis for actions brought before the courts.
- Moral and financial hazard must attach to plaintiffs who refuse PIAB assessments in favour of litigation. They must materially exceed PIAB assessments in order to recover their costs.
- Parties to civil litigation must agree their respective hearing costs before being admitted to court.
- Successful defendants must be able to recover their costs quickly either through a bond, or from the plaintiff's lawyers.
- Comprehensive fee scales must be introduced for the Circuit and High Courts, as exist in the District Court.
- The Occupier's Liability Act must be amended to provide for a 'common duty of care' that is practical and proportionate as well as reasonable.
- Occupiers found responsible for causing a claimant injury must be determined responsible 'beyond reasonable doubt.'
- The right of appeal in civil litigation must be regulated (as it is in criminal law) to prevent impecunious or vexatious plaintiffs from coercing defendants into settlement.
- Defendants must not be penalised for raising fraud as a defence where there is objective reason for doing so.

The reasoning behind these measures is set out below.

The Troika and Legal Reform

The presentation by the Chairperson of the CCPC, Isolde Goggin on legal services reform to the Burren Law School[1] in 2016 is a useful summary of how Irish undertakings regarding legal reform were progressively neutered. Within this paper, she conducts an analysis of the reaction of 'vested interests' to the passage of the Legal Services Regulation Act (LSRA), enactment of which was part of the Memorandum of Understanding under which Ireland entered the IMF/ECB/EU bailout in November 2010.

The LSRA had the dubious honour of becoming the most amended piece of primary legislation in Irish history. The legislative history of the passage of this act is extraordinary.[2] Ms Goggin refers to the intense degree of communication between the Law Society, the Bar Council, and the Honourable Society of Kings Inns with Ministers and with the Department of Justice. She also points to significant, material amendments made late in the legislative process, which ensured independent regulation was to apply only to complaints about general professional misconduct. And in the financial misconduct area the Law Society would retain its role. Similarly, the Bar Council was allowed to bar from membership of the Law Library those barristers who wished to participate in new business models such as multi-disciplinary practices, marginalising them from the mainstream profession.

Ms Goggin noted that the Medical Protection Society (MPS), which indemnifies doctors, published a paper which attributed rising indemnity cover costs to inefficient, non-transparent and overpriced legal services in Ireland. It claimed that legal costs in Ireland are higher than in any of the 40 countries the MPS operates in.

The paper effectively poses the question as to whether the LSRA was amended to protect the interests of the consumers of legal services, or the incumbents providing those services. ISME is in no doubt whatsoever that it was the latter.

Required Reforms:

- *Bench-mark Ireland's progress with structural legal reforms set out in the Economic Adjustment Programme for Ireland[3] and in Ireland's Memorandum of Economic and Financial Policies with the Troika.[4]*

White Collar Crime and Perjury

While Ireland has made efforts to tackle white collar crime with the enactment of the Criminal Justice (Corruption Offences) Act 2018,[5] we have yet to see it make an impact. Furthermore, this Act lists the offence of perjury, which remains a common-law offence in Ireland, and thus has no statutory definition; prosecution of the offence under the 2018 Act would thus be problematic.

[1] Does the Law Protect Incumbents: The Case of Legal Services Reform in Ireland
[2] https://www.oireachtas.ie/en/bills/bill/2011/58/?tab=amendments
[3] https://ec.europa.eu/economy_finance/publications/occasional_paper/2011/pdf/ocp76_en.pdf
[4] https://www.imf.org/external/np/loi/2011/irl/112811.pdf
[5] http://www.irishstatutebook.ie/eli/2018/act/9/enacted/en/html

ISME has campaigned for three years for the enactment of a statutory offence of perjury.[6] We were pleased when independent Senator Pádraig Ó'Ceidigh initiated the Perjury and Related Offences Bill[7] as a private member's bill in 2018. Despite this subsequently gaining the support of the Minister for Justice, and a promise of Government time on the floor in parliament, this bill lapsed with the termination of the 32nd Dáil. We are hopeful of political commitments in the recently agreed program for government that it will be enacted by the 33rd Dáil. However, this cannot be taken for granted. One of the notable features of the passage of the Perjury and Related Offences Bill through the Senate was a last-minute attempted amendment[8] to the bill at the behest of the Law Society. There is nothing unusual in a professional legal body attempting to amend criminal legislation of course, but in this case, the Law Society had not interacted at all with either the sponsors of the bill or the Department of Justice, despite requests to do so. Given their proclivity for legislative amendment demonstrated by Isolde Goggin above, this is most uncharacteristic.

What we do know about the Law Society's attitude to affidavits generally and perjury in particular, is that they do not wish to have their clients held to account for falsity. In 2018, the High Court published practice direction HC81[9], pertaining to court proceedings on the asylum, immigration, and citizenship list. This required that solicitors provide details in affidavits of "every statement/representation made by the applicant or by any other member of his/her family . . . to any immigration body in Ireland or other jurisdiction".

The High Court had to issue a number of clarifications to this practice direction after solicitors and barristers raised a number of concerns with it,[10] specifically that requiring these affidavits would have "a chilling effect", giving rise to "significant access-to-justice barriers for migrants and their families". It is a matter of deep concern for ISME that law officers are comfortable and willing to publicly voice opposition to a requirement for candour in court.

Finally, believe the absence of a perjury statute in Ireland constitutes a signal to the judiciary, the DPP and to An Garda Síochána that lying on oath is not a 'real' crime. The passing of a perjury statute will achieve nothing if it is ignored, as Section 14[11] of the Civil Liability and Courts Act 2004 currently is.

While the Garda National Economic Crime Bureau is nominally tasked with enforcement activity in this area, ISME is advised both by policyholders and by insurance company investigators that Gardaí simply do not investigate insurance fraud. Unless plaintiffs are engaged in some ancillary criminal activity, the chances of enforcement action against them are effectively zero.

This is an area that must be immediately addressed by An Garda Síochána through the establishment of a dedicated Garda Insurance Fraud Unit. Insurance exaggeration and fraud is a very serious crime and is imposing a cost burden on Irish business at least as onerous as that of 'normal' crime. If An Garda Síochána does not show an urgent determination to investigate and prosecute this type of

[6] https://www.isme.ie/wp-content/uploads/2017/06/The-Case-for-a-Perjury-Act.pdf
[7] https://www.oireachtas.ie/en/bills/bill/2018/112/
[8] https://www.oireachtas.ie/en/debates/debate/seanad/2019-06-26/10/
[9] Practice Direction HC81
[10] https://www.irishtimes.com/news/crime-and-law/high-court-clarifies-practice-direction-for-immigration-and-asylum-cases-1.3764472
[11] http://www.irishstatutebook.ie/eli/2004/act/31/section/14/enacted/en/html

white collar crime, we will seek the formation of an independent, dedicated police force analogous to Italy's Guardia di Finanza.

Required Reforms:

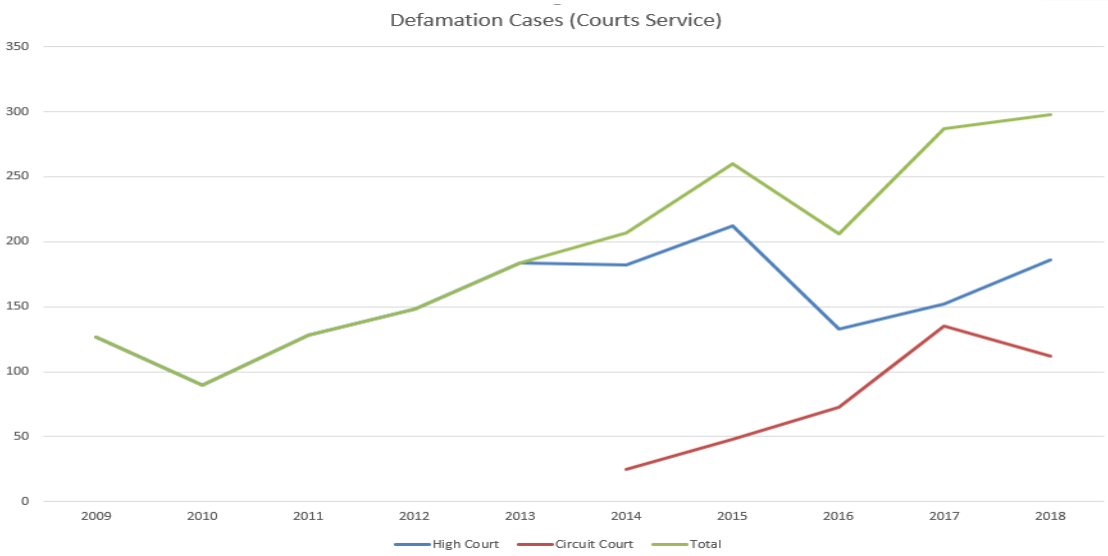
- *Enact the Perjury and Related Offences Bill as early as possible in the tenure of the 33rd Dáil and require its widespread enforcement.*
- *Immediate investigation and enforcement of insurance fraud by An Garda Síochána, or in default, removal of this class of crime from its remit.*

Defamation

According to the annual report statistics[12] produced by the Irish Courts Service, defamation is the fastest rising tort in Ireland. Because the definition of the tort in the Defamation Act 2009[13] is so broad, and because there is no need for a plaintiff to prove special damage, it is routinely used not only against journalists, but against retailers who challenge shoplifters. ISME has one significant member which operates in the retail static guarding sector; its annual public liability insurance is €100,000, with a €10,000 excess, because of retail defamation claims. Since most defamation actions against retailers are settled out of court in the €5,000-€10,000 range, retail security consultants advise retailers not to challenge shoplifters, but to bar them from store entry, and to send CCTV evidence to the police. They also advise that there is no 'safe script' for retailers to use with shoppers in circumstances where shoplifting is suspected.

While defamation actions against the media are less frequent, they invariably involve far larger quantum. Indeed, the quantum awarded in Ireland in defamation cases is so large that the European Court of Human Rights concluded in a 2017 ruling[14] that a damages award made against an Irish newspaper for defamation violated the right to freedom of expression, under Article 10 of the European Convention. While the case in question pre-dated the passage of the Defamation Act 2009, that act does not remove the inherent uncertainty and capriciousness around liability (and quantum) from defamation litigation in Ireland.

[12] https://beta.courts.ie/annual-report
[13] Defamation Act 2009
[14] Strasbourg Observers: Independent Newspapers v Ireland



ISME has previously lobbied the Department of Justice for an amended defamation statute.[15] The Minister for Justice promised to review the Defamation Act in March 2020,[16] but the general election intervened. The recently negotiated Program for Government includes a commitment to 'review and reform defamation laws.'

Required Reforms:

- *Amend the Defamation Act 2009 in line with ISME and ECHR recommendations.*

Personal Injuries and the Cost of Insurance

ISME has campaigned on insurance costs issues for over five years. One of the central difficulties with the cost of insurance in Ireland is the prevalence of exaggerated and false claims. Despite ample evidence presented in court of routinely falsified or exaggerated claims, there has been virtually no enforcement action taken. We are aware of only one prosecution[17] under Section 26[18] of the Civil Liability and Courts Act 2004 (the fraudster got a suspended prison sentence), and none at all under Section 14.[19] The fact that enforcement under Section 14 would require desk-top police investigation only makes this failure quite remarkable. This form of white-collar crime attracts no attention at all from An Garda Síochána.

The Personal Injuries Commission (PIC) published its second and final report in July 2018,[20] calling for urgency in setting appropriate levels for personal injuries awards. Two years later, we await the deliberations of the Personal Injuries Guidance Committee of the Judicial Council to come up with its recommendations.

[15] The Case for Reform of the Defamation Act 2009
[16] https://www.gov.ie/en/press-release/47d38c-minister-flanagan-hosts-symposium-on-reform-of-defamation-law/
[17] https://www.independent.ie/irish-news/courts/cage-fighter-faces-10-years-for-false-7k-personal-injury-claim-29645327.html
[18] http://www.irishstatutebook.ie/eli/2004/act/31/section/26/enacted/en/html#sec26
[19] http://www.irishstatutebook.ie/eli/2004/act/31/section/14/enacted/en/html#sec14
[20] https://dbei.gov.ie/en/Publications/Publication-files/Second-and-Final-Report-of-the-Personal-Injuries-Commission.pdf

The amount of money being charged to the personal injuries ecosystem by the legal lobby is acting as a significant barrier to reform. We provide an estimate in Appendix I, using Central Bank insurance company data, of the amount of money charged by the legal profession to the insurance system in 2015.

However, this is continually contested by the legal lobby. ISME (and online paper the Journal.ie) were obliged to fact check[21] members of the Law Society about misleading public utterances made by them about the cost of insurance.

Central Bank data[22] produced last December totally debunk legal lobby protestations on the matter. The table below from 27 of the report shows how lucrative the litigation route is in motor insurance claims.

Average Settlement Cost	Compen-sation €	Legal €	Other €	Total €
Direct				
2015	11,114	1,083	431	12,628
2016	11,589	1,268	472	13,329
2017	12,057	1,453	614	14,124
2018	11,956	1,747	561	14,264
PIAB				
2015	21,694	476	1,109	23,279
2016	22,513	606	1,021	24,140
2017	23,406	888	903	25,197
2018	23,048	1,128	762	24,938
Litigated				
2015	40,970	21,835	1,921	64,726
2016	41,446	22,041	1,867	65,354
2017	49,387	24,223	1,601	75,211
2018	48,948	23,818	500	73,266

The value of personal injuries litigation to the legal sector is especially apparent in those litigated cases settled for less than €100,000 (which is most of these cases). The table below from page 28 of the same Central Bank report shows that these cases typically average €23,183 in damages but generate costs of €14,681 per case. The legal costs thus come to 63% of the value of damages paid.

[21] https://isme.ie/time-to-counter-the-spin-on-insurance-costs/
[22] First Motor Insurance Report of the National Claims Information Database

Average Settlement Cost	Compen-sation €	Legal €	Other €	Total €
Direct <€100k				
2015	10,256	896	445	11,597
2016	10,588	1,018	492	12,098
2017	11,131	1,200	610	12,942
2018	11,118	1,373	632	13,123
PIAB <€100k				
2015	21,498	362	1,213	23,073
2016	22,499	515	1,227	24,241
2017	22,694	690	1,136	24,521
2018	22,660	885	1,139	24,684
Litigated <€100k				
2015	21,241	14,264	1,109	36,614
2016	23,259	14,715	1,173	39,147
2017	24,023	14,604	1,205	39,832
2018	24,208	15,139	1,033	40,380

The key finding of the PIC was that damages in personal injuries cases in Ireland were a multiple of 4.4 times those in our nearest neighbours in England and Wales. General damages in England and Wales are already outliers in terms of their generosity and are under review in that jurisdiction.

Following the final report of the PIC, the Personal Injuries Guidance Committee of the Judicial Council is now considering the appropriate levels of general damages in personal injuries awards. It is not accepting submissions from outside bodies at this time.[23]

General damages for personal injuries are guided by the Book of Quantum[24] produced by the Personal Injuries Assessment Board (PIAB). It is important to note that PIAB does not set awards levels. It aggregates the decisions made in court for different types and levels of injury, consolidates them into a book, and assesses *the injury* according to the scale of damages typically awarded. These are tabulated into a book of 'range values.' For example, the Book of Quantum provides a range value for a soft tissue injury to the thumb as follows:

> *Thumb (Minor)* *up to €21,200*
> *Minor sprains are mild injuries where there is no tearing of the ligament, and often no function is lost although there may be tenderness and slight swelling which has substantially recovered.*

It is this extraordinary level of generosity for very minor levels of discomfort which attracts some many claimants, legitimate and otherwise, into personal injuries litigation in Ireland. Bear in mind the practicalities of coming to a judicial settlement for a sprained thumb in court, four or five years after the thumb was sprained.

[23] https://judicialcouncil.ie/personal-injuries-guidelines-committee/
[24] Book of Quantum 2016

ISME has therefore developed its own *Fair Book of Quantum.*[25] While this would remain extraordinarily generous by international standards in its awards, by reducing damages for minor injuries by 80% it would remove incentives to litigate.

The net issue at stake in the debate on personal injuries awards is whether it is possible to legislate for awards levels or not. The legal lobby does not want to see awards levels legislated for and argues that to do so is unconstitutional. ISME argues (and is supported in its view by academic constitutional lawyers) that damages are a matter of public policy and law-making alone. To suggest that judges should have the exclusive power to set damages is, in our view, a breach of the separation of powers, and therefore unconstitutional. This is further explored below.

ISME has set out its views to both members of Government and the Oireachtas. A good summary of our position on capping damages is set out in our July 2019 letter to the Minister for Justice.[26] It summarises the justification for a legislative cap on damages as follows:

1. The Civil Liability Act 1961,[27] which caps damages for fatalities, has survived 59 years without constitutional challenge.
2. The Chair of the PIC, Mr Justice Kearns, recommended the introduction of a legislative cap on damages in a recommendation redacted from his final report
3. The Irish Constitution grants right of access to the courts, not to given levels of quantum.
4. The award of general damages was only assigned to judges in 1989, it rested with juries before that.
5. The Chief Justice advised the Minister that any reduction in general damages below the going rate in the Book of Quantum would require legislative change.
6. The Chief Justice advised 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.
7. 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, despite being asked to do so in the case of a private member's bill capping damages.[28]

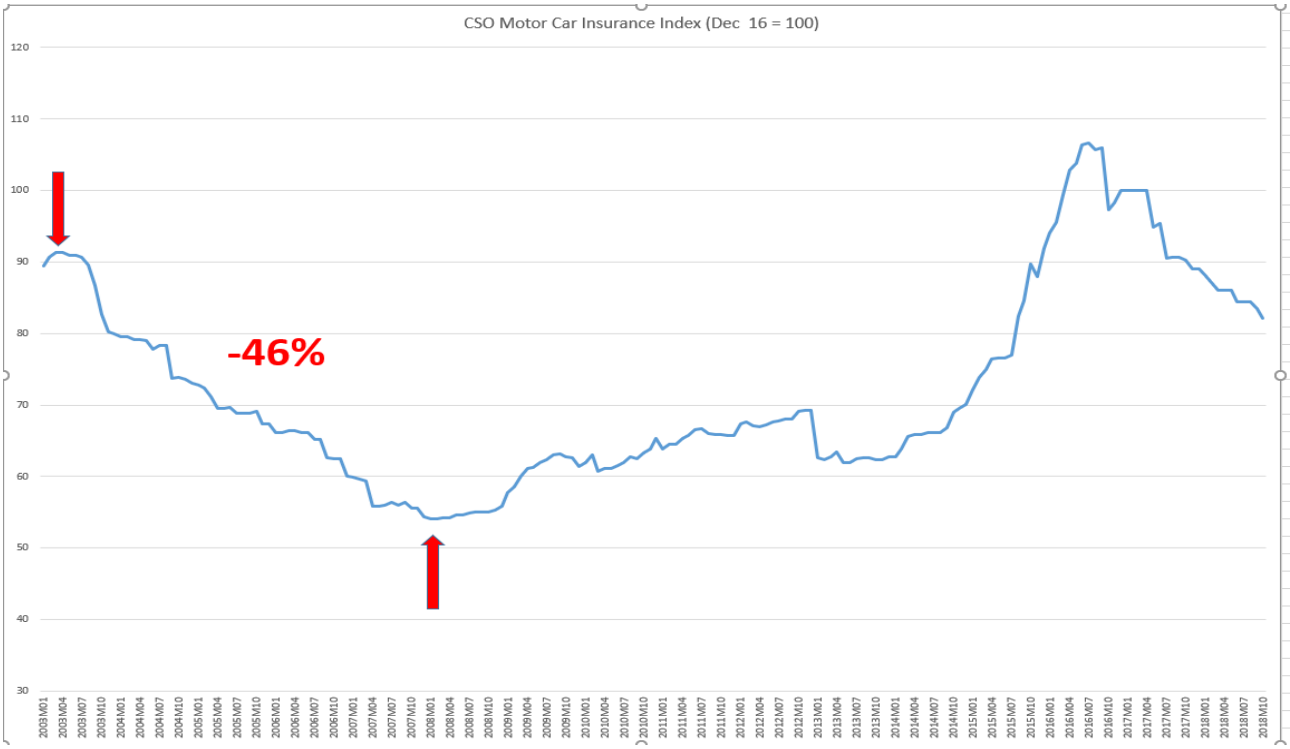
In contrast, the submission by the Bar Council to the Law Reform Commission[29] makes so broad an assertion of the concept of the administration of justice in the courts that it effectively precludes the making of legislation by the Oireachtas in this area. This is a completely wrong-headed and self-serving interpretation of the Irish Constitution which, like all modern states, provides for the separation of powers. The Irish Constitution states in Article 15.1.2[30], 'The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.'

[25] ISME Fair Book of Quantum
[26] https://www.isme.ie/wp-content/uploads/2019/10/Response-to-Minister-Flanagan-09.07.19.pdf
[27] Civil Liabilities Act 1961 Section 49
[28] https://www.oireachtas.ie/en/bills/bill/2019/20/
[29] Capping Damages in Personal Injuries Actions
[30] Bunreacht na hÉireann

If the 'administration of justice' precluded the setting of damages by the Oireachtas, it would follow that any legislation which prescribed damages in statute would therefore be unconstitutional. This is not the case, and indeed laws of long standing such as the Civil Liability Act 1961 and the Unfair Dismissals Act 1977[31] have for many decades prescribed awards levels without offence to the constitution.

The Law Society, in its Gazette,[32] also cites similarly hysterical claims about the constitutionality of capping damages. Amusingly, in light of the fees generated from the insurance companies (and therefore the policyholders), the Law Society says it '*would have serious concerns, due to profit maximisation incentives on the part of insurance companies, if damages capping were to be introduced without any consequential reduction in insurance premiums.*'

The data suggest otherwise. In the five years following the introduction of PIAB, which substantially removed lawyers from the motor claim settlement channel, motor insurance costs fell 46% (see chart below of CSO data). NB: this reduction took place without reducing quantum.



Regrettably, ISME believes the submissions from the Bar Council and the Law Society regarding legislation capping general damages must be viewed from an advocacy, representative and income protection perspective, rather than as sincere, trustworthy or reliable efforts to interpret the law.

PIAB must regain its position as the settlement agent for the substantial majority of claims. It can only do this if there is real moral hazard for refusing to accept a PIAB assessment and going to court. Currently, a plaintiff who refuses a PIAB assessment and goes to court will recover their costs even if they succeed in being awarded only a euro more than the PIAB assessment. This is patently absurd

[31] Unfair Dismissal Act 1977 Section 7
[32] https://www.lawsociety.ie/gazette/in-depth/lrc-capping-damages/

and unjust. In view of the fact that legal costs in cases settled below €100,000 typically equate to 63% of the award value, plaintiffs must materially improve upon PIAB assessments in court before they recover their costs.

In order to stop the exaggeration of symptoms and sequelae that routinely accompany claims, original PIAB claims must accompany affidavits of verification where cases precede to court.

Required Reforms:

- *Reduce quantum by primary legislation and place the Book of Quantum on a statutory footing.*
- *Impose a duty of candour on both plaintiffs' and defendants' lawyers before the courts, as already exists in asylum cases.*
- *Original PIAB claims must form the basis for actions brought before the courts.*
- *In litigated awards above €100,000, plaintiffs must be awarded 125% of the PIAB assessment before they recover their court costs.*
- *In litigated awards below €100,000, plaintiffs must be awarded 150% of the PIAB assessment before they recover their court costs.*

External Review of Performance and Reform

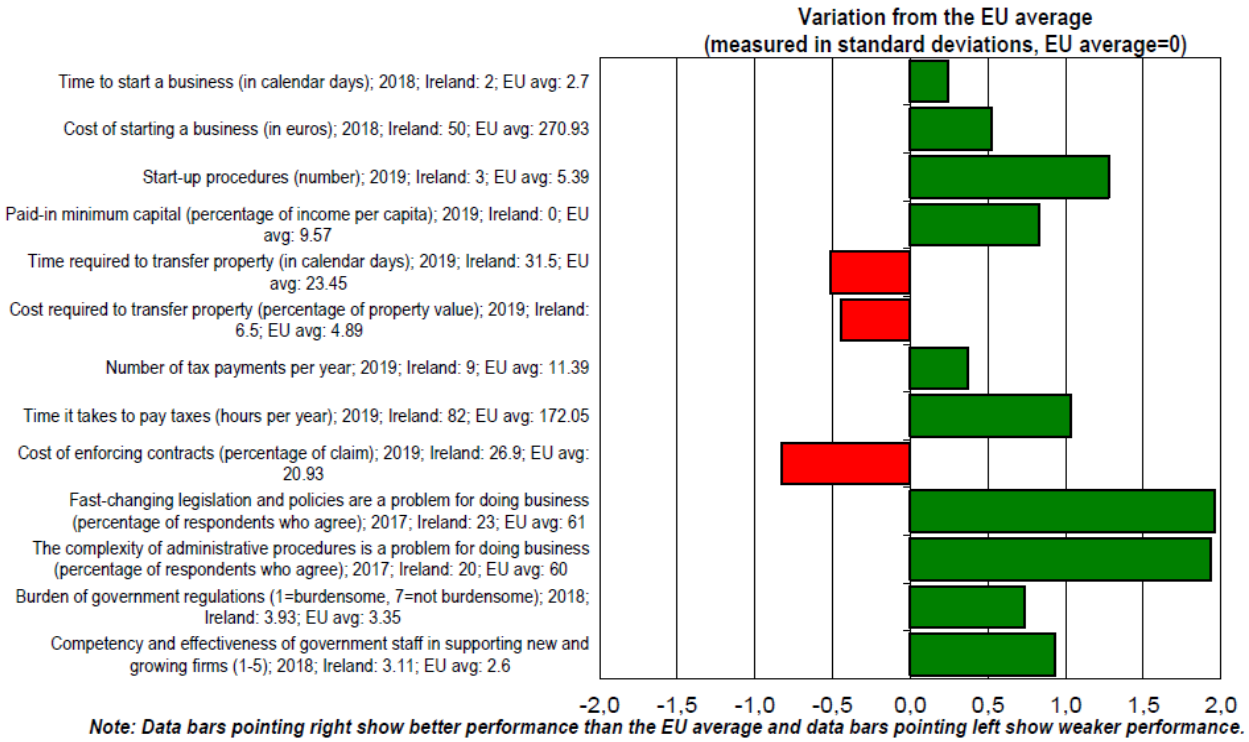
The OECD published its Economic Survey[33] of Ireland in February 2020. In it, the OECD made the striking finding that if Ireland improved its enforcement of new (white-collar) criminal laws, it would raise its per capita GDP by 1.6%. But white-collar law enforcement does not appear to be a priority in Ireland.

The OECD also notes that since its last survey, Ireland has failed to develop out-of-court debt resolution mechanisms. ISME lobbied on this issue during the Great Recession in 2012 and has made a formal proposal[34] to Government for an affordable access to Ireland's examinership (second chance) regime. Examinerships in Ireland cost €80,000 to €130,000 at a minimum. This means that insolvency resolution is not worth the cost for the creditors of most small businesses.

ISME recognises the urgency of introducing an affordable second-chance regime for SMEs, given the wave of insolvencies that will follow the Covid-19 pandemic. However, we detect resistance from those with a financial interest in the maintenance of the status quo, among certain large law and audit firms. It is notable that the EU Commission 2019 SBA Report[35] for Ireland notes some deterioration in this area.

Thankfully, the regular country reporting under the SBA Act tracks relevant areas of national performance over time. It is noteworthy from ISME's point of view that those areas we consistently underperform in involve legal services, such as second chance (mentioned above) and property transfer and contract enforcement (below).

[33] OECD Economic Survey Ireland 2020 Table 1.7
[34] https://isme.ie/wp-content/uploads/2020/04/Administrative-Examinership-Proposal.pdf
[35] 2019 SBA Factsheet



Note: Data bars pointing right show better performance than the EU average and data bars pointing left show weaker performance.

Similarly, the annual semester reporting by the EU Commission analyses issues on national rather than just small business basis. It is a matter of great concern to ISME that many of the observations made by the Commission in the 2020 Semester Report,[36] particularly regarding legal and insurance costs, remain essentially the same as those in previous years: there is disfunction in the market for legal services; increasing legal costs; legal costs are an impediment to challenging poor public procurement practices; this is simply not good enough.

It is also a matter of concern to us that the anti-trust investigation into Insurance Ireland was initiated by DG COMP[37] rather than being undertaken by domestic authorities. This is a failure of domestic white-collar investigation and enforcement.

Legal System and Administration of Justice

Last year, a judge of the High Court issued a remarkably blunt and pithy ruling in a personal injuries case. Ali-v-Martin; O'Connell-v-Martin[38] concerned an appeal to the High Court of a claim by a Ms Rosaleen O'Connell which was previously dismissed as fraudulent by the Circuit Court.

What is noteworthy about this case is not the vehemence with which the judge denounced the appeal by an impecunious and fraudulent plaintiff to the High Court; it is not the highly critical observations he made about direct referrals of this fraudster by a lawyer to medical consultants; it is not the fact that the fraudster demanded aggravated damages from the (innocent) defendant in the appeal; and it is not the fact that the Law Society, the Bar Council, nor the Medical Council had no

[36] https://ec.europa.eu/info/sites/info/files/2020-european_semester_country-report-ireland_en.pdf
[37] https://ec.europa.eu/ireland/news/antitrust-commission-opens-investigation-into-Insurance-ireland-data-pooling-system_en
[38] Ali-v-Martin; O'Connell-v-Martin; [2019] IEHC 571

interest in pursuing complaints of professional misconduct made by ISME made against the professionals involved.

What is fascinating about this case is the fact that the lawyers in the case complained volubly about Mr Justice Twomey's temerity in questioning the way the fraudster's case was prepared and presented. So vehement were these complaints that some weeks later, in an entirely unrelated case (Minister for Public Expenditure & Reform [2019] IEHC 862), Mr Justice Twomey stated the following:

> "*…the solicitor and counsel involved in the O'Connell-v-Martin case were not criticised by this court in any way for how they represented their clients. This is because they have a duty to act on the instructions of their clients. The truth or otherwise of those claims is a matter for the Court and not the lawyers*."

It appears that this resilement by Mr Justice Twomey followed publication in the Bar Review (Appendix II- highlighting by ISME) of an opinion piece co-authored by the Chair of the Professional Practices Committee, and the Chairman, of the Council of The Bar of Ireland, which rejected any suggestion that counsel must ensure the veracity of a client's representations, unless there was clear knowledge that a client had made false representations. It described as 'A flawed narrative' 'If counsel were permitted to withdraw from cases because the credibility of their clients' evidence were put in doubt.' That was not what was at issue in the O'Connell case. The opinion stated that there should be no impediment to the presentation of a case by counsel 'provided it is a stateable case in law and not demonstrably dishonest.'

This was widely seen within the legal fraternity as a resounding rebuke to Mr Justice Twomey and his judgement in the O'Connell case, and it likely provided the impetus for his reported comments above which followed in December. As outsiders to the legal system, the victims of fraudulent litigation and their representatives must rely on the glimpses into the system provided by this example from the Bar Review. We cannot know what is said behind closed doors. However, so vehement an implied critique of a High Court judge in good standing is strongly indicative of an evident sense of entitlement, superiority and impunity among at least a minority of our inner bar.

What the authors of this Bar Review opinion piece neglected to consider was where a client had been found as a matter of fact to have made false representations. This of course is exactly what happened in the O'Connell case, where the Circuit Court had dismissed the plaintiff as fraudulent. It should be noted that the Chair of the Professional Practices Committee who co-authored this piece in the Bar Review has since been appointed as a judge of the High Court.

The message this sends out to the officers of the court is, however, that 'all's fair in love, war and litigation.' It is not merely the entitlement of counsel to say anything in pursuit of their client's interests in court, it is their duty. There is in fact evidence of a case three years ago where a lawyer perjured herself[39] in court on behalf of a client but escaped subsequent sanction.

[39] https://www.thetimes.co.uk/article/solicitor-swore-false-affidavit-for-high-court-rlcdvdvnd

We consider this to be a flawed and immoral position, which suggests that there is no objective truth, that the end justifies the means, and that litigation without end is an acceptable and satisfactory steady state for our common-law legal system.

The treatment of Mr Justice Twomey also suggests that, while the independence of the judiciary is firmly established in its relationship with the Legislature and the Executive, it is easily and improperly influenced by the legal lobby, most particularly the Bar Council, from where most judges are drawn. This is not a healthy situation for the fair and equitable administration of justice.

Modern jurisprudence is moving away from this 'wild-west' attitude to litigation. If the Irish courts do not have the maturity, common sense and decency to adopt a reasoned position that is fair to both sides (rather than just plaintiffs) it is inevitable that Ireland will have to adopt statute law similar to the Lawsuit Abuse Reduction Act 2017[40] enacted in the US.

Required Reforms:

- *Where plaintiffs and defendant cannot agree to a pre-trial settlement of a personal injury case, both sides must agree their respective hearing costs before being admitted before the trial judge.*
- *Plaintiffs must undertake to cover these agreed defendant's costs pre-trial.*
- *Where plaintiffs are unable to guarantee these costs pre-trial, they must provide a bond to do so. Failing production of a bond, the plaintiff's legal counsel must undertake to discharge defendant's costs.*
- *Introduce comprehensive fee scales for the Circuit and High Courts, as exist in the District Court.*

Occupier's Liability

The Occupiers' Liability Act 1995[41] as it stands today substantially enacted the requirements and findings of the Law Reform Commission in their 1994 Report on Occupiers Liability.[42] The Act nominally clarifies the "the common duty of care" as follows:

> '*a duty to take such care as is reasonable in all the circumstances (having regard to the care which a visitor may reasonably be expected to take for his or her own safety and, if the visitor is on the premises in the company of another person, the extent of the supervision and control the latter person may reasonably be expected to exercise over the visitor's activities) to ensure that a visitor to the premises does not suffer injury or damage by reason of any danger existing thereon*.'

In practice however, a number of High Court cases have defined liability at either end of the spectrum such that it is impossible for an occupier notified of an accident on their premises to be able to quantify their degree of liability.

[40] https://www.congress.gov/bill/115th-congress/senate-bill/237
[41] http://www.irishstatutebook.ie/eli/1995/act/10/enacted/en/print.html
[42] https://www.lawreform.ie/_fileupload/Reports/rOccupiersLiability.pdf

By way of example of these extremes, ISME first cites O'Grady -v- Abbott Ireland[43] where the High Court ruled in a case where a plaintiff sued over being struck by a lift door that '*the incident was caused by inadvertence on the part of the plaintiff for which she must bear responsibility…*'

This would seem to ISME to be a logical conclusion based upon the principle of 'reasonable care. Contrast this decision with that in Keegan v Sligo County Council[44]** where a plaintiff who slipped in the doorway of his own home after consuming five pints of beer was awarded €105,650 in damages after suing the County Council from which he rented his home. This decision was based on the assertion that the tiles used on the front porch were inappropriate for exterior use, and that the Council was liable pursuant to the Occupier's Liability Act 1995.

Similarly, in McCarthy v Tekken Security & anor[45]**, the defendants were found liable for catastrophic injuries caused to the plaintiff by a third party on the street outside the occupier's premises, despite the fact that the third party was apprehended and imprisoned for assault afterwards.

(** cases currently under appeal)

Even with access to the finest legal minds in the country, it is impossible for any business owner to conclude anything other than that the Courts will assume occupiers are strictly liable for injuries on their premises, irrespective of the circumstances of the case, and the conduct of the plaintiff. Therefore, the Occupiers' Liability Act requires urgent amendment.

Required Reforms:

- *The 'common duty of care' must not only be 'reasonable,' it must be practical and proportionate in all the circumstances*
- *The evidential standard on claimants to demonstrate that an occupier was responsible for causing the claimant injury must be amended to 'beyond reasonable doubt.'*

Hearing De Nov, 'Equality in Arms' and Equity before the Court

The excessive cost of Circuit Court and High Court proceedings, and the fact that defendants who successfully defend their cases in court have little or no chances of ever recovering them, represent a serious threat to the administration of civil justice. ISME acknowledges the complaints of many of our own members who contest the settling of defensible claims by the insurers in questionable circumstances. However, we also note that in cases where a successful defence is mounted, the defence still loses: 'costs follow the event' is an entirely meaningless phrase in the majority of cases; and defendants rarely recover their costs as plaintiffs are not insured for them.

This the threat from a losing plaintiff to appeal a case to the High Court must always be taken very seriously by a defendant, irrespective of how strong their defence is, or high groundless an appeal is.

[43] O'Grady v Abbott Ireland [2019] IEHC 79
[44] Keegan v Sligo County Council [2017] IEHC 722
[45] McCarthy v Tekken Security & anor [2018] IEHC 101

The vast majority of SMEs faced with such an appeal will be forced to settle by their insurer or fight their case alone.

Section 38 of the Courts of Justice Act 1936 provides that appeals from the Circuit Court to the High Court are to be heard 'by way of rehearing.' This has always been understood to be a de novo hearing and was so described by the Law Reform Commission.

In Fitzgibbon v Law Society of Ireland[46] Clarke J., citing the specific example of an appeal from the Circuit Court to the High Court, set out the critical characteristics of a de novo appeal as follows:

> a. The decision taken by the first instance body against whose decision an appeal is brought is wholly irrelevant.
> b. The appeal body is required to come to its own conclusions on the evidence and materials properly available to it.

Thus, it is for the High Court judge to consider the case afresh on the basis of the evidence presented on the appeal and without attaching any weight to the decision made by the Circuit Court judge.

In our view, this is effectively a licence to litigate interminably and without regard to the merits of the plaintiff's case to coerce a blameless defendant into settlement. Furthermore, we understand that this exact line of legal argument is being used to defend themselves by lawyers against whom professional conduct defences have been made in the Ali-v-Martin; O'Connell-v-Martin case. If this proves to be the case, it suggests that both the rules of our superior courts, and the LSRA, need to be strengthened.

Several judges and lawyers have voiced the opinion that Section 26 of the Civil Liability and Courts Act 2004, which provides for aggravated damages where the defendant has suggested the plaintiff is making a fraudulent claim, is an unfairly pro-defendant provision.

In the judgment of Lackey v Kavanagh in 2013[47], Cross J stated:

> *'I am of the view that since the introduction of the 2004 Act which clearly impacts upon a Plaintiff disproportionately more than on a Defendant, the issue of aggravated/exemplary damages must always be in the mind of a court where it is alleged that the Plaintiff is deliberately exaggerating his or her claim and/or being guilty of fraud or otherwise invokes the provisions of s.26 of the 2004 Act. I think the issue of aggravated/exemplary damages is the only real deterrent to an irresponsible or indeed an overenthusiastic invocation of such a plea.'*

However, ISME members have made very clear to us that even where they suspect a plaintiff is making a fraudulent case against them, they are advised not to suggest fraudulence in their defence. The Report on the Cost of Employer and Public Liability Insurance[48] noted a number of dicta from cases where there was the possibility that they would have the effect of deterring defendants from

[46] Fitzgibbon v Law Society [2015] IR 516
[47] Lackey v Kavanagh [2013] IEHC 341
[48] Cost of Insurance Working Group January 2018

raising section 26 in proceedings for fear of attracting an award of aggravated damages, even where they may have a genuine belief that false or misleading evidence has been used.

It should be noted in the O'Connell-v-Martin case in the preceding pages that, even though the Circuit Court had dismissed a case on the grounds of fraud, the dismissed plaintiff sought aggravated damages from the defendant in her High Court appeal. We consider this manifestly unjust.

There cannot be 'Equality in Arms' where only one party before the court is going to pay costs, whatever the outcome. Impecunious and fraudulent claimants always enjoy a tactical advantage over defendants in civil litigation because they are rarely, if ever, denied audience in the courts, and rarely, if ever, discharge their costs. Indeed, an investigative reporter recorded a solicitor boasting that even the fraudulent claimants he represented had not been pursued for costs.[49]

This 'heads I win, tails you lose' environment was expressed most pithily by the former President of the High Court, Mr Justice Peter Kelly, when he said 'the only people who can litigate in the High Court are paupers or millionaires.'[50] This is the antithesis of equity, yet it is invariably justified on the grounds of 'access to justice' i.e. the concept that those of lesser means must not be denied access to due process. They never are, but when they lose, they never pay. This system is demonstrably unjust, and arguably unconstitutional, as it places one party at an unbreachable advantage before the courts.

This asymmetry in law encourages plaintiffs to refuse PIAB assessments and take cases to court which should properly be settled outside or should not be taken at all.

Required Reforms:

- *The right of appeal in civil litigation must be regulated (as it is in criminal law) to prevent impecunious or vexatious plaintiffs from coercing defendants into settlement.*
- *Defendants must not be penalised for raising fraud as a defence where they have good reason to do so, or where a lower court has so found in respect of a plaintiff.*

[49] https://www.independent.ie/irish-news/interview-found-solicitor-bragging-about-how-he-had-rarely-lost-cases-36276281.html
[50] https://www.independent.ie/irish-news/courts/legal-costs-to-face-cap-under-justice-review-36609852.html

Appendix I

ISME ESTIMATE OF LEGAL FEES GENERATED FROM THE INSURANCE SYSTEM (2015)

			€000's
Accident & Health Claims Paid 2015*:			1,000,798
Exclude: VHI (health)	880,763		
Exclude: Irish Life Health	81,761		
Claims Paid net of 'Health'			38,274
Motor Vehicle Claims Paid 2015*:			1,006,091
Total 'Accident' Claims Paid 2015*:			**1,044,365**
Percentage of claims handled outside PIAB system (1):		80%	835,492
Average legal costs per claim (2):		42%	**350,907**
Number of practicing certificates (Solicitors) 2017 (3):			10,122
Number of practicing Barristers 2018 (4):			2,300
Average accident/injuries income per practising lawyer:			**28,249**

*Excludes claims outstanding at year end.

Note:
(a) the figures quoted are three years old;
(b) the average personal injuries award rose 10% between 2015 and 2017
(c) approximately 20% of solicitors practice solely in-house;
(d) approximately 24% of solicitors practice in the Top-20 firms, and are generally not involved in personal injuries litigation;
(e) many barristers operate exclusively in specialist areas other than personal injuries.

Therefore, the amount earned by those lawyers who normally practice in personal injuries will therefore be multiples of the (approximately) €28,000 per annum calculated above.

(1). Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach Report on the Rising Costs of Motor Insurance, November 2016
(2). Cost of Insurance Working Group First Motor Insurance Key Information Report, July 2017
(3). https://annualreport.lawsociety.ie/
(4). https://www.lawlibrary.ie/About-Us.aspx

Appendix II The Bar Review, Volume 24; Number 5- November 2019

The suggestion that counsel must ensure the veracity of a client's representations has enormous implications for the administration of justice.

Mary Rose Gearty SC
Chair of the Professional Practices Committee

Micheál P. O'Higgins SC
Chairman, Council of The Bar of Ireland

The core job of a barrister is to present one side of an argument in order that the fact finder might reach a decision, based on the law and on that tribunal's findings of fact. It is not the role of counsel, unless she has clear knowledge that a client has made false representations in respect of a claim or defence, to reach a conclusion on the truth, as distinct from the credibility, of her instructions.

Where the truth lies

On issues of law, counsel may refuse to make an argument that has no reasonable chance of success. On issues of fact, which are peculiarly a matter for witnesses and for the decision maker, there is rarely a situation which will justify counsel in forming a concluded view as to where the truth lies so as to justify refusing to act for that client. The reason for the distinction is that counsel usually knows better than her client what the law is and how it applies to a given set of facts, whereas clients and witnesses usually know whether their evidence is true, but counsel will seldom know this. It is not the function of counsel to determine whether instructions are true, but to present one side of the case to the decision maker, in order to assist the decision-making process. This is our important contribution to the administration of justice.

Courts and other tribunals must sometimes determine truth, or probable truth, without being certain because, having heard all sides, that is necessary to the resolution of disputes. Counsel should refrain from making any such determination. It is not in her power to do so because counsel has not heard all sides when advising a client or presenting a case. Nor is it necessary that she should do so, because that is the function of the court.

The importance of fair representation

Most importantly, one of counsel's primary duties is to ensure that even apparently weak cases can be presented as well as possible. The ability of the system carefully to examine even a weak case, provided it is a stateable case in law and not demonstrably dishonest, is a key safeguard of a rational, evidence-based approach to justice.

Weak, even apparently implausible, cases sometimes turn out to be legitimate and those cases can prove very important. If, for instance, the reason for doubting the instructing party is based on a general assumption which itself may be the result of unconscious bias, where is the genuine party to find representation? It may be that the generally held bias comes against the client at every turn and she is presumed to be unreliable when in truth, she is not. This is to perpetuate the wrong by not allowing the client to make her case.

Our courts, historically, took the view that women and children were not reliable witnesses in certain types of cases and sought corroboration of their evidence. Such attitudes have long been discredited but the danger of inherent bias is that it is often unconscious. One of the most valuable attributes of the independent barrister is that she puts forward the argument on behalf of every client whose rights are in issue, be he good, bad or even morally ugly, so that a tribunal of fact can consider that argument and rule upon it.

A flawed narrative

If counsel were permitted to withdraw from cases because the credibility of their clients' evidence were put in doubt, it might be difficult to avoid counsel being made responsible to assess the truth of their clients' cases and, thus, for matters not under their control and outside their knowledge. This would usurp the functions of judges and other fact finders, put counsel's judgment in issue in every contested case, expose counsel to criticism whenever a case failed on the facts, and potentially create a conflict between clients and counsel. Ultimately, clients would have to find counsel who believed them.

In the case of suspicion, as distinct from knowledge, of dishonesty, this should not affect a client's legal team. If it did, who would defend those who are the subject of allegations of dishonesty? If it did, the allegation alone would ensure that the suspected thief or fraudster, whether in criminal or civil proceedings, would never find counsel willing to act, for fear counsel would be identified with his dishonesty, were such a determination made by the tribunal of fact.

The narrative that if an action fails, counsel should be criticised for presenting the case is flawed and seriously inimical to the interests of justice. Would counsel then be entitled to refuse to represent a litigant if not assured of success, or at least of the probity of her client? A chilling thought for decision makers, not just for members of the Bar.