ISME
17 Kildare Street,
Dublin 2
9th February 2018

Michael D'Arcy TD,
Minister of State at the Department of Finance and the
Department of Public Expenditure and Reform with special responsibility for
Financial Services and Insurance,
Department of Finance,
Upper Merrion Street,
Dublin 2.

Dear Mr D'Arcy,

ISME wishes to submit to you the following observations and responses to the Cost of Insurance Working Group (CIWG) Report of the Cost of Employer and Public Liability Insurance, published in January 2018.

SUMMARY:

The tone of the CIWG report implies an unwillingness to tackle general damages awards by way of legislation. ISME believes this prejudges the deliberations of the LRC and the Personal Injuries Commission (PIC). The report is also contradicted by case law and statute law. There is no barrier whatsoever against legislating for general damages.

RECOMMENDATIONS:

1. The CIWG should consider afresh, from a legally neutral standpoint, its views on the constitutionality of legislating controls in the assessment of general damages.
2. Separate to (1) above, the CIWG should consider whether a constitutional amendment would be required to replace the general damages remedy altogether with a 'care not cash' model.
3. The Department of Finance should appoint to the PIC a representative to reflect the interest of policyholders, prior to that body's conclusion of consideration of the Book of Quantum.

We submit the following observations on the report.

Page 29
Commission-based remuneration models incentivise increasing premia. It is therefore necessary to consider a move to fee-charging structures for insurance brokers, per the consultation at present under way by the Central

Bank for financial intermediaries. We invite therefore invite the CIWG to consider the Central Bank's Consultation Paper CP 116[1] in this regard.

ISME is also of the view that insurers should be required by law to provide to policyholders (private and commercial), at notification of renewal, a simple statement detailing:

1. Premium and sums insured (wages, sales, reinstatement value etc.), for each risk category insured (El, PL, motor, property etc.) and the relevant percentage rate of premium to risk insured.
2. Five year's claims history for each risk category insured; actual claim and loss reserve with all paid claims; broken down by their constituent parts (legal fees, plaintiff award, witness fees etc.)

This data is compiled by insurers in any case. Its provision to policy holders would greatly increase market transparency at little or no marginal cost to insurers.

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In view of the gravity of the issue, the failure of Insurance Ireland to provide the data set requested by the CIWG is of great concern. Should Insurance Ireland persist in this failure, the CIWG should seek detailed data sets directly from the underwriters. We feel that the CIWG is entitled to draw a negative inference if the underwriters and or Insurance Ireland fail to comply with this request by the end of the calendar year.

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While we acknowledge and understand the views of the CSO that the production of an index for business insurance inflation would be difficult, it would be far from impossible to structure such an index in a manageable fashion. By comparison with the UK in particular, the paucity of insurance data in this jurisdiction is remarkable, especially in view of the fact that many of the underwriters are the same. Regarding the persistently cited data deficit around settlement data, we draw the CIWG's attention to Sec 10.(1) of the Statistics Act 1993, which states:

> *The functions of the Office shall be the collection, compilation, extraction and dissemination for statistical purposes of information relating to economic, social and general activities and conditions in the State.*

We further draw the CIWG's attention to Sec 25 of that Act, which states:

> *25.-(1) The Taoiseach may prescribe by order a requirement on persons and undertakings to provide information under this Act, specifying, in particular—*
>
> *(a) the general nature of the information required;*
>
> *(b) the frequency with which it is to be provided;*
>
> *(c) the persons or undertakings, or classes of persons or undertakings, required to provide it*

Our impatience with the closure of the data deficit is informed by the fact that the powers to do so have been on the statute books for 25 years.

[1] Intermediary Inducements Enhanced Consumer Protection Measures, Central Bank of Ireland November 2017

Page 53
The data deficit on legal fees is a serious issue. We agree that the onus should not fall on the Law Society to collate cost data. We consider the collation of cost data for a defined set of claims-related activities (including assistance with PIAB claim form completions) to be a matter for the CSO and the Courts Service. ISME does not believe there would be any difficulty in publishing anonymised cost data on the National Claims Information Database.

Page 63
The fact that trespassers are owed the same duty of care by an occupier as other forms of entrant to property is manifestly unfair, illogical, and not in the interests of public policy. It should not await the publication of other reports or studies and should be addressed forthwith by the Oireachtas.

Page 64
ISME also identifies the issue of strict liability for occupiers as one which acts as a disincentive to good management of health and safety. Insurers and the courts should have due regard to those occupiers/defendants who have put in place robust measures to mitigate damage occasioned to others.

Page 66
While the CIWG cites Judge Groarke's dismissal of the 'schoolyard chase' personal injuries claim, ISME wishes to point out that:

1. Judge Groarke has been one of a very small number of judges who have cast what could be considered an objective and disinterested eye on such cases, and,
2. We do not consider his judgment to be representative of the judiciary in general, and this case is unlikely to have struck a hard precedent, and,
3. It remains a matter of fact that many primary schools now enforce a 'no-running' policy in the school playground, something that would be nugatory if this case was representative of the prevailing attitude of the judiciary.

Page 71
We consider the CIWG's comments on the departure of Irish underwriters from the public liability market for hospitality business to be self-explanatory.

Page 74
The Law Society relates the opinions of its membership that '*costs have reduced over the past five years*,' yet it also advised the CIWG (see page 53) that '*it does not capture any information on the amount or range of legal fees which solicitors charge in relation to personal injuries cases*…' These apparently contradictory positions suggest further investigation by the CIWG, and perhaps the CCPC, is merited.

Page 78
The reference to 'external environmental factors' in the context of accounting for the size of our general damages awards compared to those of the UK is most troubling. Since general damages are made in respect of

'pain and suffering' and exclude special damages, it is difficult to imagine what the CIWG would consider to be justifiable 'external environmental factors.' We believe the CIWG should immediately clarify this, as it goes to the heart of what is commonly understood by general damages.

Page 80-82

Here the CIWG correctly identifies the needs for stability in the PIAB awards system, which will lead to transparency of awards, and a decreased volume of claims going through the courts process. It stops short of the next logical step, which is that the Book of Quantum must constitute more than a mere 'guidance document' for the judiciary and insurers. ISME cannot gainsay those solicitors who advise clients to refuse PIAB settlements and pursue court actions, because, anecdotally, they are advising their clients correctly. Judges frequently trump PIAB awards for a given injury classification. And when they do not, as the CIWG report acknowledges, there is very infrequent application of the 'Section 51A' directive on costs. There is, therefore, little or no fiscal incentive to settle for PIAB assessments, and no material moral hazard for advancing one's action through the courts. It is imperative that this situation is rectified.

There is a useful discussion of the reserving policies of the underwriters, which ISME understands is directly linked to Central Bank solvency requirements. However, the matter of how insurers calculate premium for policy holders on the basis of claims reserves is another matter. The fact that the notification of even the most tenuous of liability claims against a business results in a reserve against that claim, which directly impacts the future premium of that policy holder, causes great disquiet among small businesses. This is especially so in those cases where claims are disproven, thrown out, or FNC (Filed No Claim) several years later, but premium does not return to the *status quo ante*, nor is there credit for the related premium overcharge.

This is one of the reasons policy holders seek much more robust responses than the Civil Liability and Courts Act 2004. The 2004 Act allows claims of dubious integrity to proceed too far 'into the system' before challenge, by which time financial loss will have already resulted to the policy holder, irrespective of how that claim is finalised.

Page 83-85

Following on from the above, the logical conclusion is that Book of Quantum award levels must be put on a more structured footing, with far less scope for discretion in their application. It is at this point ISME identifies a very worrying turn in the CIWG report.

The tenor of the second paragraph of Section 8.4 *Legislative Limit on Damages* suggests that the CIWG considers any attempt to regulate or cap awards to be '*a sensitive one*,' of which they are unaware of '*any recent serious consideration*;' and most seriously '*that there are constitutional limitations to such an approach*.' Firstly, this indicates a marked ignorance of the many position papers by various industry bodies in recent years; Secondly, it apparently signals that the CIWG has already reached a conclusion on the matter; and thirdly, it is wrong.

In fact, not only is there no constitutional constraint on the Oireachtas legislating for the quantum of general damages; it is our informed opinion that were the judiciary (or legal profession) to argue that decisions on quantum were exclusively the domain of the judiciary, such position would encroach upon the separation of powers, and would itself be unconstitutional. It is our view that it is for the Oireachtas to decide upon matters of quantum for general damages, and legislate accordingly. The legislature routinely decides the sentencing tariffs to be applied in matters of criminal and road traffic law. The principle is no different here. Similarly, the notion

that a particular level of award for, say, a whiplash soft tissue injury constitutes some form of 'property right' is laughable. See case law references and PIC commentary below.

Pertinent to this discussion, we feel that the membership composition of the PIC mitigates against its arriving at conclusions on quantum which would recognise the views of policy holders. The policy holder has a single indirect representative in the form of a member from the Competition and Consumer Protection Commission (CCPC). ISME therefore requests representation on the PIC prior to its publication of its next report.

The CIWG report very helpfully explains the concept of tortious damages, and lists the three tests for the assessment of fair damages. ISME considers our current general damages regime falls short of the required standard because:

1. General damages (especially those for minor injuries) can no longer be objectively stated to be fair to the defendant, and,
2. They no longer take any regard for the common or societal good, or the health and welfare of the nation, and,
3. While they might be considered 'proportionate within the scheme for other personal injuries' in a purely Irish context, they provide a return on 'pain and suffering' (most egregiously for minor injuries) which is a gross outlier to that returned in other common and civil law jurisdictions, for no objective, material, or justifiable reason.

Section 8.6 rightly reflects the concern for the public interest perspective in considering appropriate general damages. We must recognise the balance between private gain and public loss when we attempt to weigh the public interest. The linkage between quantum and the cost of insurance is linear. In the first paragraph of this section, the CIWG states '*the often high cost of such insurance is almost certainly acting as an inhibiting factor to the betterment of broader society*.' In the next paragraph it states that '*an important aspect in any analysis of this issue is whether a legislative cap on damages, or a similar measure, is necessary for the common good*.' ISME considers this apparent contradiction to be a rhetorical flourish by the working group; it is self-evident that quantum must be reviewed and controlled from a public interest perspective. ISME quotes the GAA's Ard-Stiúrthóir's Report 2017[2]:

> *The current five-year cost of claims to the Association is €13.5 million. Personal injury claims to the Association are averaging near €3 million annually. This is simply unsustainable.*

The linking of quantum to property rights is another entirely bogus argument put forward in this section. ISME considers it important to quote at length from the first report of the PIC by Justice Nicholas Kearns:

> *The right to damages in compensation for personal injury is part of the right to litigate and is also associated with constitutional property rights and the right of access to the courts. Under Article 34 of the Constitution, justice is usually administered in public, in courts established by law by judges appointed in accordance with the Constitution. The District and Circuit Courts deal with PI cases up to a defined financial jurisdiction and have their jurisdiction defined by Statute. The High Court is a court of first instance with full original jurisdiction. Full original jurisdiction and power to determine imply clearly that, whatever limitations may be imposed by law as regards the jurisdiction of the Circuit or District Courts, the determination of compensation levels by the High Court is not regulated by legislation (High*

[2] http://www.gaa.ie/mm/Document/GaaIe/GAANews/13/54/73/2016ArdSti%C3%BArth%C3%B3irsReport_Neutral.pdf

Court compensation levels are not regulated by legislation at this time; it will be a matter for the LRC to recommend in due course whether it is feasible to have legislation which caps court awards) and determinations of the Court may only be changed, as appropriate, by a court to which an appeal lies from the High Court (i.e. the Court of Appeal or, in certain instances as provided for in the Constitution, where an appeal from the High Court is heard directly by the Supreme Court).

It is the right to damages and the right to litigate that are considered property rights. No one is suggesting that either right is expunged, merely that they will be regulated by law (as is explicitly provided for in the constitution). The right of the legislature to regulate far more contentious and serious personal rights has been litigated before and not found wanting (e.g. Lynch v Minister for Justice, Equality and Law Reform, Ireland and the Attorney General[3]). To presuppose, as the CIWG does, that the level of quantum itself for a given injury constitutes an enumerated (or indeed unenumerated) constitutional right is to pre-judge the outcome of deliberations by the PIC and the LRC. We consider this a highly inappropriate, premature, and misguided diversion by the CIWG.

The CIWG references the Sinnott V Quinnsworth[4] case here, stating that '*damages must reflect pain and suffering and should not be punitive*.' Of far more interest in this case was that the principle that general damages could be capped was conclusively established in Irish case law. The omission of this precedent from the CIWG report is deeply troubling. In the case, the Supreme Court heard a defendant's appeal against an award of general damages of IR£800,000. The Supreme Court varied that award to IR£150,000. This case was cited again by the Supreme Court in Nolan V Murphy[5] where an order for general damages of €600,000 was set aside in favour of an order for €350,000. The right to cap general damages is therefore conclusively established in Irish case law.

Furthermore, this is an area in which Dáil Éireann has also conclusively established domain. Section 49 of the Civil Liability Act 1961[6] explicitly capped the damages in cases involving fatalities at one thousand pounds. This amount of quantum is regularly updated by means of Statutory Instrument, and currently stands at €35,000 (SI 6/2014[7]). The fact that secondary legislation only is required to adjust this cap on general damages is a serious omission from the CIWG report.

The fact that Section 8.4 of the CIWG report is so at variance with established case law and statute law leads ISME to suggest to the Minister that he might review the legal advices imported into this report.

Notwithstanding the right to damages in litigation is considered to be a property right per the PIC commentary above, ISME does not consider it appropriate to abandon the concept of a 'care not cash' model. If this requires an amendment to the Constitution, then the societal merits of such an amendment should at least be discussed and considered at this point.

[3] 2010 IESC 34/10
[4] Sinnott .v. Quinnsworth Limited [1984] ILRN 523
[5] Nolan -v- Murphy [2005] IESC 17 (18 March 2005)
[6] http://www.irishstatutebook.ie/eli/1961/act/41/section/49/enacted/en/html#sec49
[7] http://www.irishstatutebook.ie/eli/2014/si/6/made/en/print#

Page 86
Nothing stated by the AGO is, in our view, materially contrary to our position on the constitutional status of general damages as stated above, with the proviso that we would not consider legislating to control quantum to represent something which '*restricts the rights of citizens.*' We cite the case and statute law above in support of our view.

Page 88
ISME endorses the CIWG's observation that there is a complete disconnect between general and special damages, particularly regarding minor injuries.

Page 89
The overwhelming logic of the CIWG's deliberations on quantum is that quantum must be subject to some objective control, yet the working group 'pulls its punches' in its conclusion, stating it is a matter for the PIC initially, and ultimately for the 'recommendations' of the LRC. Consistent application of awards of quantum logically requires regulation by the Oireachtas.

Page 91
It follows from what we have said above that we consider Action points 8 and 9 to be far too weak and equivocal, and to lack any sense of urgency. The notion that anyone in the Department of Finance would question whether it is '*constitutionally permissible for the Oireachtas to enact legislation*' on quantum we find to be repugnant to established constitutional case law and statute. It must fall to the Government to assert the rights of the Oireachtas in this regard.

Pages 93-95
ISME does not seek to deny access to the courts process. However, conscious of the need to ensure fairness to the parties in law, defendants should not be wantonly deprived of the chance to offer fair settlement in the low-cost PIAB environment. There appears to be a strong bias towards the plaintiff in all the CIWG considerations here. We consider this to be unfair. In view of the fact that legal costs have consistently amounted to some 60% of the cost of awards, ISME has proposed that claimants who wish to refuse a PIAB assessment (a decision ISME would never seek to delimit) must succeed in getting a court award of 150% of the PIAB assessment before they can recover costs. In the event that the CIWG does not agree to this proposal, we call upon them to suggest another methodology by which moral hazard should be applied to those who refuse PIAB assessments. It is manifestly unfair that a plaintiff who succeeds in trumping a PIAB assessment by a nominal amount in court should also enjoy full recovery of potentially thousands of euro of costs in addition. A mere strengthening of the Section 51A provisions is totally inadequate in this respect.

It is also necessary for the CIWG to ensure that a claim which moves from PIAB to the courts for decision must in all material respects, be the same claim. (See our observations on perjury below).

Pages 99-109
ISME must observe that the entire thrust of Chapter 10 *Notification of a Claim* is structured from a plaintiff's point of view; is framed around the most traumatic type of injury possible; and effectively precludes defendants

from mounting an adequate defence in many cases. While one can debate the merits of the period allowable under the statute of limitations for the initiation of a claim, the failure to notify a defendant of a claim in a very short period after the occurrence of an alleged accident must be viewed in the most critical way. ISME's view is that there must be a *strict obligation* on plaintiffs to notify defendants/insurers of the occurrence of an accident within a very restricted period of time; and there must be a *strict obligation* on insurers to notify policyholders within a very restricted timeframe. We consider that the default period for notifications must be short; measured in days rather than weeks; and deviations from this notification protocol must be few and tightly regulated. Where notification protocols are deviated from, the court must be required to draw an appropriate inference, and act accordingly in a prescribed manner.

Pages 115-119

ISME acknowledges your comprehensive inclusion of our request for a Perjury Act, which the CIWG frames in the context of white collar crime reform by the Department of Justice. As pointed out at our meeting with you and your officials; the specific reason ISME seeks a Perjury Act in the context of insurance reform is the fact that it is currently possible to present what is effectively a *de novo* claim for personal injuries to a court having refused a PIAB assessment. And the first time that a plaintiff swears an affidavit of verification is at the initiation of court proceedings, i.e. *after* they have refused a PIAB assessment of their claim. This represents a very serious undermining of the PIAB process, and is one of the reasons (a) why so few claims are settled through PIAB, and (b) why litigants succeed so frequently in attaining higher awards in court. For this specific reason, ISME's proposed Perjury Bill includes Section 4 as follows:

> *4.—(1) Section 11 of the Personal Injuries Assessment Board Act 2003 is amended by inserting the following subsections after subsection (5):*
>
> > *"(6) A claimant who makes an application under section 1 containing assertions or allegations, or provides further information concerning a claim, shall swear an affidavit verifying those assertions or allegations, or that further information.*

While some might take the view that it would be inappropriate to ask a claimant to swear an oath or affirmation before submitting a claim to PIAB, we take the opposite view for the following reasons:

1. PIAB is a quasi-judicial expert body which makes recommendations on assessments of general damages. Similar bodies such as the Labour Court deem it appropriate to take evidence on oath, in cases where quantum is usually far lower. There is no good policy reason why PIAB should be different.
2. It is grossly unfair to defendants that the claimant's first statement of claim should be free to be varied so much at the point of entry to the courts system.
3. It is illogical that PIAB should entertain a claim for a five (or six) figure sum of compensation without an affidavit of verification.
4. In view of the proposed strengthening of several sections of the Civil Liability and Courts Act 2004, it is appropriate that a claimant should have the advices of a solicitor (or commissioner of oaths) before committing their claim to PIAB.

The effect of this provision would be to make it difficult to materially vary the statement of claim at the point where a PIAB assessment is refused, and a court action initiated. No genuine claimant will be discomfited by the enactment of our Perjury Bill; therefore we would view very critically any suggestion that this is not an appropriate response to the claim-inflation problem that is widely accepted to exist.

Pages 120-130

It is most revealing of the Irish legal system in general that the only mention of the legal principle 'equality in (sic) arms' is in consideration of the use of Section 26 of the 2004 Act. While quoting (now Senator) Michael McDowell at length, it is clear that, 14 years later, there is still no equality of arms where defendants are concerned. The system, and the judiciary, take an overwhelmingly paternalistic and protective view of defendants, even where their claims are plainly dubious. We ask only that this be righted.

Pages 138-139

A consistent refrain from those SMEs which have been through the claims process up to and including settlement, is that they feel that the 'costs follow the event' principle is very rarely pushed to a conclusive decision. Plaintiff, insurer, and indeed their own defence counsel appear content to 'settle on the steps' because 'everybody gets paid.' In other words, they feel their own counsel has little incentive to press a winning case to a decisive conclusion against a colleague on the plaintiff's side, when their respective roles might be reversed the following week. This is because, almost invariably, the SME defendant is a better mark for costs (for all parties) than is the plaintiff. While the insurer might chase a losing plaintiff for costs, their chances of recovery are far lower than from a policy holder to whom they can fix a higher premium. The SME community suffers a well-informed cynicism of the motivations of the legal community in this regard.

General

We have received numerous member reports regarding solicitors who have made data access requests to business owners, most particularly for CCTV footage, which precede the issue of statements of claim. We ask the CIWG to recommend a change to the Data Protection Acts to explicitly exclude a right to access in contemplation of a personal injuries action, *and* prior to the subject forming (and swearing) their statement of claim.

We draw the CIWG's attention to the fact that external, objective commentators continue to reference Ireland's unjustifiably high legal costs regime. See the EU Commission 2017 Semester Report[8] for Ireland:

> *Implementation of the 2015 Legal Services Regulation Act started in late 2016…. Therefore, it is paramount that the implementation of the act introduces competition-enhancing and cost-reducing provisions following public consultation processes, or incorporates these provisions in regulations to be issued by the Legal Services Regulatory Authority so as to boost competition and reduce costs.*
>
> *Legal services, commercial insurance, and credit are also expensive. As a small open economy, the performance of business services and regulated professions is important. However, barriers to entry and exit remain significant.*
>
> *As evidenced by the low ratio of newly founded and closed companies in these professions. The 2016 restrictiveness indicators (European Commission, 2016) are relatively high in several professions such as the legal profession…*

[8] https://ec.europa.eu/info/files/2017-european-semester-country-report-ireland_en

Furthermore, despite the recently adopted Legal Services Regulation Act, imperfections in the market for legal services still drive the costs of enforcing contracts upwards, to the detriment of small businesses in particular.

The rising cost of commercial insurance and the high interest rates for business loans (Section 4.2.4) are also relevant.

The overwhelming corpus of informed objective, external opinion is that Ireland has significant problems with certain costs. It is no longer acceptable to point to imaginary or invented 'constitutional' or 'property rights' concerns to justify maintenance of the status quo.

With many small solicitors' firms in membership, ISME is not blind to the fact that personal injuries claims management represents the majority or all of the turnover for many legal firms. However, this does not justify the excessive rent that insurance costs now impose on private citizens, small business, meat producers and agribusiness, sporting organisations, charities, childcare facilities, and civil society.

We therefore ask that you ignore the intense lobbying, the pseudo-legal posturing, and the entreaties to maintain the status quo that you are no doubt under, and to do what is in the interests of Irish society as a whole.

Yours sincerely,

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Neil McDonnell
Chief Executive
ISME, the *independent* business organisation