



ISME,
17 Kildare Street,
Dublin 2.
5th June 2019

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,

Yours of 30th May refers. Thank you for your response to my note of 20th February.

The Personal Injuries Commission published its second and final report in July 2018. Mr Justice Kearns, with a brevity not noteworthy among his former High Court colleagues, set two imperatives:

- reduce quantum in the case of whiplash injuries, as it is self-evidently too high; and
- ensure that there is hazard for exaggerated and false claims.

While we acknowledge the amount of analytical work conducted to date, the degree of real progress on these essential issues is negligible. Premia are still rising. Dubious and blatantly fraudulent cases continue to proliferate. This continues on your watch, and with what we can only assume is the acquiescence of Cabinet. Bluntly, and as we stated in our [submission](#) to the Joint Oireachtas Finance Committee, the CIWG is confusing performance (i.e. doing lots of things) with effectiveness (i.e. doing the right things).

While you state in the second paragraph of your letter that *'there are many people who hold the contrary view to that of ISME'* regarding the constitutionality of capping damages, the issue is not a matter for popular opinion. A legislative cap is either constitutional, or it is not. We are well aware that 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. Specifically:

- 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.
- Mr Justice Nicholas Kearns's first recommendation of the Personal Injuries Commission (PIC) was to introduce a legislative cap on damages. This recommendation was redacted from the published version, presumably on the direction of your Department, or the Department of Justice and Equality.
- Mr Justice Nicholas Kearns further set out the broad parameters within which he suggested that a bill to cap damages would survive constitutional challenge, which ISME has made publicly available on its website [here](#).

- The Constitution guarantees rights of access to the courts, not to given levels of quantum. The CIWG has consistently ignored this distinction.
- The award of general damages was only assigned to the judges in 1989, it rested with juries before that.
- We understand that the Chief Justice, in his letter of 27th February to the Minister for Justice and Equality, made clear that any reduction in general damages below the 'going rate' reflected in the Book of Quantum would require legislative change.
- In the same letter we understand the Chief Justice said that any 'new guidelines regime' establishing revised levels of quantum must be 'fully articulated in statute...'
- We understand the Chief Justice also suggested 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 the Department of Justice and Equality to the risk that asking 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's their job to adjudicate, it's your job to legislate. The Chief Justice seems to be politely asking you why you aren't.

It appears, on balance, that the more constitutionally risky route is that of assigning to the judiciary exclusive responsibility on the matter of setting damages.

This makes the Government's decision to refer Senator Lawlor's private member's bill to the Law Reform Commission more confusing. Considering the Chief Justice's letter, if the Judicial Council Bill does not contain wording highly analogous to the Lawlor bill, then departure from the 'going rate' for general damages will not be possible. If you are serious about having a Judicial Council Bill which can reduce damages within the strictures set by the Chief Justice, it makes no sense to push Senator Lawlor's bill out of the Houses of the Oireachtas for long-term consideration by the LRC. Furthermore, it is a complete abdication of the Government's responsibility to urgently tackle this issue.

What is more intriguing about the 'constitutionality' issue is that, despite it being raised in the compilation of the Report on the Cost of Employer and Public Liability in January 2018, and commented upon by the Attorney General in that report, the Government has not sought the Attorney General's opinion on the matter. Asking the LRC to balance constitutional rights with the common good is a distraction if a legislative cap is unconstitutional. Your predecessor in the Cost of Insurance Working Group, (then) Minister of State Eoghan Murphy, raised the constitutionality canard with us as long ago as January 2017, yet it does not appear to have occurred to anyone in your Department or the Department of Justice and Equality to ask the Attorney General for his opinion on the matter.

That is why I explicitly asked you to address the matter of an Attorney General's opinion in my February letter. While you attempt to explain away the issue by referral to the LRC, it is the AG who is charged by the constitution to advise Government, not the LRC.

Your note says the CIWG concluded that an 'in-depth analysis' was required to ascertain how 'the correct balance of constitutional rights and principles could be struck in the common good.' We are entirely perplexed as to how much more analysis the CIWG requires on this point. The CIWG has produced three voluminous reports itself, as well as commissioning the PIC, which has produced two. Coupled with these there are daily reports in the print and broadcast media of ridiculous awards, of fraudulent claims, and of closing businesses,

festivals and events. If you and your colleagues think we can afford to wait for several years while the LRC ponders the impacts on the common good, I can only suggest you suffer a serious disengagement with the current reality.

Regarding the issue of tackling fraudulent and exaggerated claims, there have been no material achievements whatsoever by the CIWG. Statistically, Ireland is becoming a safer place, with workplace accidents per thousand employees falling, road fatalities per million population falling, and actual road fatalities falling. Yet the Courts Service annual report (to 2017) shows incoming personal injuries actions in both the Circuit and High Courts increasing year on year, as well as an 85% increase in Circuit Court defamation cases. This statistical disconnect is inexplicable without a significant element of exaggerated, fraudulent or manufactured litigation.

Your public utterances suggest that the government cannot direct the setting up of a dedicated fraud detection unit by An Garda Síochána. This appears to us to be at odds with Sections 20 and 25 of the Garda Síochána Act. While we note the Commissioner's intention that the Garda National Economic Crime Bureau (GNECB) will guide Garda divisions in the investigation of insurance fraud, this is a highly specialised area which will require the maintenance of a dedicated specialist resource.

Insurance fraud is not specifically categorised under the current Irish Crime Classification System. However, in view of the absolute amounts of money changing hands annually in our insurance system, we suspect that insurance fraud is larger than most of the other categories listed under Fraud, Deception and Related Offences. Therefore, if the Commissioner is not in a position to commit dedicated resources to insurance fraud detection in the short term, the establishment of an independent, dedicated, specialist white-collar crime agency with full powers of search, arrest and detention, as is the case in most other European countries, is warranted.

If it is the settled opinion of the Government that the capping of general damages is a matter for consideration by the LRC, you realise this will push consideration of the matter well outside the term of the 32nd Dáil. The LRC published its fifth program of law reform today, 5th June. Consideration of a legislative cap on damages is one of 15 projects it will look at. I draw your attention to the comments of Ms Justice Mary Laffoy today:

'The Commission has started working on some of the projects in the Fifth Programme and it is hoped that it will publish Issues Papers and Reports in relation to most, if not all, of those projects over the next three years, over which period the collaborative and consultative processes will continue.'

I mean no criticism of the fine members of the LRC when I say that this is a prescription for doing nothing. Referral of a legislative cap to the LRC is a Pontius Pilate act, condemning to their fate thousands of businesses, festivals and charities who expected imminent relief from extortionate insurance. It is entirely inconsistent with the urgency required by the current situation, and contradicts the conclusions Government signed up to in the PIC process.

If the status quo prevails, and our members continue to suffer without legislative relief, this will inevitably become a policy matter for the next general election. This is a matter of your choosing, not ours.

I should point out that among the most forceful representations being made to ISME on this issue are those we are receiving from members who publicly support, or are currently members of, Fine Gael. The Alliance for Insurance Reform, of which ISME is a member, comprises tens of thousands of SMEs, charities, community and sporting groups in every parish in Ireland. Collectively, we represent businesses employing more than three times that employed by the Irish State. These jobs and livelihoods matter. Your insistence on prioritising the sectoral interests of a minority of disreputable members of the legal lobby, who milk the current Wild West litigation system, speaks volumes.

We have attempted to engage with you and your offices in a wide variety of manners and ways. No material changes to the outcomes for ordinary SME businesses have been effected. Businesses are struggling to survive

as you prioritise one administrative distraction after the next. Our members are not fools, and resent being treated as though they were.

We do not wish to personalise this issue on you, since insurance reform requires a Cabinet-level response. However, if your note of 30th May elaborates the considered opinion of the CIWG, and bearing in mind that the bulk of required reforms are a matter for the Department of Justice and Equality, that Department is at this stage a better mark for our efforts.

Since our correspondence is discoverable by FOI, and to avoid the administrative inconvenience this applies for both sides, I have caused this correspondence to be displayed on the ISME website.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Neil McDonnell', followed by a long horizontal line that ends in a circular flourish.

Neil McDonnell
Chief Executive

Copy: An Taoiseach, Leo Varadkar TD
Minister for Justice and Equality, Charles Flanagan TD
Minister for Minister for Business, Enterprise and Innovation, Heather Humphreys TD