17 Kildare Street,
Dublin 2.
9th December 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,

Firstly, may I thank you again for the meeting with you and your staff on 30th September. We found it productive. However, we are concerned at the absence of progress in many areas affecting the cost of insurance, referred to in my letter of 13th July.

General Damages/Quantum

The slippage in timelines on this issue is most concerning. As the Department is aware, ISME considers the issue of general damages to be one of public policy and therefore for legislation, not for decision by the judiciary. Reluctantly acknowledging that the matter is with the PIGC, we are of the view that no delay whatsoever should be tolerated in the production of guidelines beyond 31st July 2021. If there is any suggestion of slippage beyond this date, or if indeed guidelines are published which do not produce a substantial reduction in quantum, ISME asks the Department to be ready to immediately place the Book of Quantum on a statutory footing, with reductions in general damages at least as material as those set out in our *Fair Book of Quantum*.[1]

Legal Reform

We do not make the above suggestion lightly. The pace of legal reform is unacceptably slow. We previously referred you to Isolde Goggin's analysis[2] of the passage of the Legal Services Regulation Act 2015, which was widely seen as prioritising the desires of the legal profession over the needs of society. We have seen a similar tardiness in the failure to commence the Judicial Conduct Committee under the Judicial Council Act 2019. The absence of this Committee has already caused considerable but self-inflicted discomfort to the current members of the Supreme Court. We consider the political fall-out from this episode to be completely unacceptable, given the obvious lack of judicial buy-in to reform. Our failure to enact reasonable conduct procedures is inexplicable given the availability of simple codes in common law jurisdictions such as New Zealand.[3]

Since our meeting, the Central Bank's latest report[4] confirms the 2019 data showing legal fees in minor injuries cases average 63% of the value of damages, even though litigated actions

[1] https://isme.ie/isme-fair-book-of-quantum/
[2] Does the Law Protect Incumbents: The Case of Legal Services Reform in Ireland
[3] https://www.courtsofnz.govt.nz/about-the-judiciary/judicialconduct/
[4] Second Motor Insurance Report of the National Claims Information Database

take almost twice as long as negotiated ones, and get only €400 more in damages. It is abundantly clear to us who benefits from the glacial pace of reform; it is also clear who are the paying victims.

We note the recent High Court ruling[5] denying access by a plaintiff to CCTV footage of an accident on a defendant's premises. ISME had cause to write to the Data Protection Commission on the topic recently before this ruling was made. We have yet to enjoy the courtesy of a response. Two issues are apparent to ISME regarding subject access requests in personal injuries cases:

- Neither the General Data Protection Regulation nor the Data Protection Act 2018 were written in contemplation of the adversarial position of parties in personal injuries litigation.
- An absolutist position by the DPC on the release of CCTV to a plaintiff in a personal injuries action is no longer tenable, especially in cases where the defendant may be in breach of obligations under the Civil Liability and Courts Act 2004. Mr Justice Barr's ruling cites several points that counter a blanket requirement to disclose. We therefore consider the Data Protection Act to require urgent amendment to reflect this, and the fact that defendants are entitled to defend themselves before the courts.

We await with some apprehension the decision in the Zalewski case.[6] No one harbours any illusion that this is an unfair dismissal case that has wound its way up to the Supreme Court. It constitutes a serious assault on the State's machinery to affordably resolve employment disputes, and to force them into the courts. We consider the grounds ("administration of justice," Articles 34.1, 37.1 and 40.3) upon which the case is based to be so absurdly broad as to undermine the State's dispute resolution mechanisms in other areas. We also consider it to be a pre-emptive strike against any attempt to expand the role of PIAB. The legal profession's zeal in taking this case to the Supreme Court is in marked contrast to its refusal to countenance even the most minor of legal reforms. You would do well to note this when next the members of the legal profession lobby you.

Whether intended to or not, the recent remarks[7] by Ms Justice Mary Irvine about the "difficult year" and impact on legal incomes in the courts greatly angered many citizens and business owners. "The permitted footfall for the Four Courts was almost entirely given over to personal injury cases," yet the judge urged insurance companies to settle. Since 97% of cases do in fact settle out of court, and those that are fought are invariably those which the defendant feels highly motivated to contest, it was infuriating to see such remarks from the most respected member of the bench. It is already the case that far too many cases settle out of court, and insurers should contest far more.

The "settlement mentality" bedevils the insurance problem. It allows serial claimants[8] to sue with impunity, without ever paying their costs when they lose. It also allows lawyers on both sides to recover their costs. This is unsustainable. If it is not addressed soon, we will seek the

[5] Dudgeon v Supermacs IEHC 600
[6] Zalewski v Adjudication Officer and Ors
[7] https://www.lawsociety.ie/gazette/top-stories/2020-ferociously-difficult-year-in-courts--justice-mary-irvine/
[8] https://www.breakingnews.ie/ireland/serial-compensation-claimants-lose-first-case-to-come-before-a-court-1046022.html

introduction by your Department of a requirement for plaintiffs to bond their costs, or alternatively, an Irish equivalent to the LARA[9] in the United States.

No doubt you will continue to be pressed by the Courts Service for an increase in resources. Looking at the case data in the 2019 Annual Report,[10] incoming civil cases increased by 2.7% from 2018 to 2019, while cases resolved declined by 1%. Yet the legislature has provided for an increasing number of judges. In the private sector, this would provoke a search for efficiency, which would encompass issues such as:

- Whether our sitting days are sufficient?
- Whether our operational hours are sufficient?
- Whether our pre-trial procedures are adequate and appropriate?
- Whether we are maximising the use of technology to minimise administrative burdens within the system?

No demand for extra resources should be met until questions like this are appropriately addressed by our Courts Service and Judiciary.

Neither the Minister for Health nor any member of his Department has responded to us on a letter sent last July identifying failure by the Medical Council to investigate the generation of medical reports by a medical practitioner at the request of a solicitor for a fraudulent claimant. Despite scathing remarks by the trial judge, the Medical Council responded to an ISME complaint about the medical practitioner involved by stating "*when preparing reports, a registered medical practitioner is entitled to their professional opinion in respect of diagnosis and prognosis*" and "*there was not sufficient cause to warrant further action being taken in relation to the complaint as there was no prima facie evidence of professional misconduct or poor professional performance*..." This is a matter treated far more seriously[11] in the UK. While I appreciate this is not a matter for your Department, it bears heavily on the cost of insurance, and Government must tackle it through amendment of the Medical Practitioners Act.

Plan to Reform the Insurance Sector

While naturally we welcomed this announcement on 8th December, the fact remains that material reform is long overdue. The PIGC has been given until July 2021 to introduce guidelines on general damages, despite this reform being declared "urgent" by Mr Justice Kearns of the Personal Injuries Commission in July 2018.

The PFG commitment to ensure that fraudulent claims are forwarded to the DPP by December 2021 is incomprehensible. The Civil Liability and Courts Act 2004 already provides for three offences in this regard which are simply not being actioned by the enforcement authorities. It is therefore illogical to conclude that new legislation will be enforced. What we require in the area is for the DPP and An Garda Síochána to do their job using legislation of long standing.

[9] Lawsuit Abuse Reduction Act 2017
[10] Courts Service Annual Report 2019
[11] https://www.lawgazette.co.uk/law/lying-gp-expert-should-have-been-jailed-like-solicitor-says-appeal-court/5069683.article

We are concerned at the absence of defamation reform in the Action Plan. This is the fastest rising tort in the Circuit Court, and is being used to muzzle journalists and trade associations such as ISME. It represents a very significant insurance cost for retail and hospitality businesses, which are the most frequent recipients of writs.

We welcome the commitment to enact the Perjury and Related Offences Bill 2018 by next March but remain perplexed why it is taking so long. The fact that the Hamilton review has commented on Ireland's failure to tackle white collar crime, and the fact that the Criminal Justice (Corruption Offences) Act 2018 lists the as yet undefined offence of perjury as an offence against the administration of justice, means this bill should be expedited to enactment. In any case, there appears to be a positive consensus towards it in the Dáil.

While personal injuries reform advances at glacial pace, personal injuries litigation is innovating swiftly. There is a worrying trend in personal injuries litigation involving minors[12][13][14][15] where post-traumatic stress disorder is listed as the cause of action. As you know, this is beyond the remit of PIAB, and is unlikely to be included in the deliberations of the PIGC. This must be addressed, and if necessary legislated for.

In addition to the issues above previously raised, we wish to outline to you why we believe our current laws deny access to civil justice for SMEs and individuals:

Equality of Arms in Civil Litigation; Champerty and Maintenance

> *"If you are a pauper, yes. If you are a millionaire, yes. But if you are a middle-class person on a middle-class salary, litigation in the High Court is ruinous."*

These were the words of Mr Justice Kelly as he assumed the chairmanship of the Review of the Administration of Civil Justice in 2018. He neglected to point out that even for millionaires, litigation in the High Court could prove ruinous.

The provision of "equality of arms" before a court in criminal, and to a lesser extent civil trial in Ireland is well established.[16] The extent to which this is in fact vindicated in practice is another matter. The cost of contract enforcement in Ireland is the fourth highest in the EU[17]. The high cost of litigation in Ireland prevents access by SMEs to the courts to challenge public procurement decisions.[18] This semester report also notes the average time to enforce contracts in Ireland at 650 days (p81). The commentary from the Commission is unusually explicit: "*Concerning enforcement of contracts, Ireland scores poorly on all three indicators (time required to enforce a contract through the courts, cost required and quality of judicial*

[12] https://www.independent.ie/regionals/sligochampion/news/boy-trapped-in-tesco-toilet-is-awarded-10k-39754333.html
[13] https://www.irishtimes.com/news/crime-and-law/courts/circuit-court/boys-settle-damages-for-trauma-over-tapir-attack-at-dublin-zoo-1.4412738
[14] https://www.irishtimes.com/news/crime-and-law/courts/circuit-court/child-awarded-20-000-for-psychiatric-injuries-linked-to-seeing-mother-bleeding-1.3799181
[15] https://www.independent.ie/news/40000-for-boy-4-left-stranded-on-platform-after-luas-door-closed-before-mother-could-get-off-39799349.html
[16] The Right to a Fair Trial in Civil Cases, Rozakis
[17] Ireland SBE Factsheet 2019
[18] EU Commission Semester Report Ireland 2020, p59

process). In particular, the cost, which corresponds to 26.9% of the claim value, is particularly affected by attorney fees (18.8% of the value)." It is noteworthy in the EU Commission semester reports that criticism of our legal system and its costs has been a consistent and recurrent theme since the last recession.

The net result of this situation is that the relative means of the litigants in a civil case in Ireland are far more important and material than are the merits of the opposing cases in deciding an eventual outcome. The ability of one party to absorb significantly more cost in the prosecution of litigation against another thus presents a fundamental asymmetry in the ability of the parties to secure a fair trial. It defeats any concept of equality of arms. We consider this to be fundamentally unfair. We are not alone in this view.

In his written judgment in the *Persona*[19] case, the current Chief Justice considered at length the "access to justice" merits of permitting third-party funding of litigation. In considering whether the current state of the law denied Persona access to justice, Mr Justice Clarke had to weigh up whether that would have implications for the law of champerty.[20] He stated:

> *"there are many ways in which such difficulties might be alleviated. Legal aid is one. Adjustments to "no foal no fee" or conditional fee type arrangements might be another. Changes in the balance between the obligations of the parties and the resources provided by the Court might be a third. Clearly some form of legitimate third-party funding could be a fourth."*

The material factor for the Supreme Court in finding against Persona was that the pre-independence Maintenance and Embracery Act 1634 remained on the Irish Statute book. Persona discontinued their case in 2016 following this decision, citing the €10m cost[21] of litigation as prohibiting them from proceeding.

Maintenance is the intermeddling of a disinterested party to encourage a lawsuit. Champerty is the "maintenance" of a person in a lawsuit where the maintainer agrees to take a share of the proceeds of litigation. This is also known as litigation finance. Given its status as a British statute, it is significant that the United Kingdom abolished the offence of champerty in 1967.

While deciding for the defendant in dismissing the Persona case, Mr Justice Clarke expressed a significant caveat:

> *"…the courts must act to find a remedy in any case where there is a breach of constitutional rights. While the choice, as a matter of policy, between a range of possible ways in which a potential breach of constitutional rights might be removed is fundamentally a matter for either the Oireachtas or the Executive, it may be that circumstances could arise where, after a definitive finding that there had been a breach of constitutional rights but no action having been taken by either the legislature or the*

[19] Persona Digital Telephony Limited & anor -v- Minister for Public Enterprise & ors
[20] http://www.irishstatutebook.ie/eli/1634/act/15/enacted/en/html
[21] https://www.rte.ie/news/2016/0420/783117-court-persona-digital-telephony/

government to alleviate the situation, the courts, as guardians of the Constitution, might have no option but to take measures which would not otherwise be justified."

Given this injunction, it can only be a matter of time where Irish courts do decide that a genuine access-to-justice issue arises for a party to litigation which would amount to an infringement of their constitutional rights. Mr Justice Clarke concluded in this judgment:

> "*…if a breach were to be established and a court were to so hold, it would clearly be appropriate for the Court to afford the Oireachtas and/or the Executive an opportunity to decide what the best solution might be. If, however, in such circumstances no action whatsoever was taken (or action which clearly was insufficient to meet whatever requirement had been identified) then there might very well be a strong argument that the Court's jurisdiction would necessarily have to extend to taking whatever measures were necessary.*
> *Where there is a constitutional problem and policy choices as to its solution, then it is clearly for the Oireachtas and/or the Executive to choose which possible answer should be adopted. But there are strong grounds for believing that there cannot, in those circumstances, just be no answer.*"

As of September 2020, there remains "no answer."

Short of a major pivot towards civil legislation in Ireland, accompanied by the recruitment of a large number of civil code judges, the simplest way in which to redress this issue is the repeal by the legislature of the Maintenance and Embracery Act 1634. The Oireachtas must act now.

Lastly, after a long and difficult year for everyone in Government, may I wish you a very Happy Christmas; and following your recent good news may I also wish your soon-to-expand family a healthy and prosperous New Year.

Yours sincerely,

Neil McDonnell
Chief Executive

CC Minister of State Robert Troy TD, DETE
Ms Oonagh McPhillips, Secretary General, Department of Justice
Ms Oonagh Buckley, Deputy Secretary General, Department of Justice