17 Kildare Street,
Dublin 2.
16th July 2021

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

Dear Ms Humphreys,

I am prompted to write to you following the recent reported controversy[1] over the appointment of additional judges to the High Court. While acknowledging Ms Justice Irvine's commentary on the number of judges in Ireland versus those on the continent, the majority of the jurisdictions she compares Ireland to adopt civil code rather than common law, and comparisons are therefore inconsistent. We recognise your Department's commitment to raise the number of High Court judges by up to six, and suggest that not all ills in our justice system are the result of a shortage of judges.

In addition to the administrative changes we suggested last December, we believe a range of administrative and legal changes could be introduced that would very significantly reduce the current burden on the courts and the judiciary:

1. Introduce the automatic striking out of court proceedings if there has been no activity in the case for 12 months, without the need for a court hearing.
2. Shorten the period within which proceedings must be served to three months and require an attempt at service by registered post or personal service within that period or the action is automatically struck out; this would stop plaintiffs delaying and would also avoid unnecessary court hearings.
3. Require plaintiffs in personal injuries matters to furnish a copy of all medical notes and records for three years before and one year after an accident, within three months of service of proceedings. This would avoid wasting court time with discovery applications that are always granted of this category.
4. Set the PIAB Form A to be the originating court document if an assessment is not accepted. This would save court and court office time.
5. Identify categories of discovery documents in straightforward cases; e.g. photographs of the scene of an accident, any non-privileged contemporaneous witness statements that will be presumed to be discoverable, and which must be discovered by plaintiff and defendant. This would streamline straightforward matters.
6. The maximum legal costs permitted should be set by law. There should be scales for the value of the claim, the type of issues and whether it is settled or run to trial. This is already done in the district court, and German Federal Courts provide an even more comprehensive scale.[2] This incentivises resolving matters efficiently.

[1] https://www.independent.ie/irish-news/courts/humphreys-cites-370k-cost-of-a-judge-as-she-rejects-court-presidents-criticism-40646950.html
[2] https://www.gesetze-im-internet.de/englisch_rvg/englisch_rvg.html#p0427

7. Charge parties for judges' time. There should be a maximum High Court judge time for particular types of case. Beyond this, the court fees should rise (and come out of the overall budget).
8. Use judges' time better. Improved informal (by appointment; not by court list) case management by court officials, Masters or deputy judges. Our system of case management is too formal and judges are too involved. We have one High Court Master whereas in Northern Ireland they have seven, who do a lot of this type of work. Equally, in England are more masters and deputy judges who do much of the organisational side pre-trial. This is done much more efficiently in an office (in chambers) rather than in an open court like the Master's court.
9. Use witness statements as the evidence of the witness so that the hearing involves cross-examination only, as is the norm in England and Wales.
10. Require that judgments are limited in length barring extreme exceptions. A lot of High Court judges' time is taken in the writing of decisions on cases that are of little or no precedent value. At the other extreme circuit court judges rarely give judgments at all. While jurists would no doubt be impressed by the 21 pages of judicial consideration devoted to the word "following" in Leopardstown Inn v FBD & Ors[3] this year, it added little to the legal reasoning or outcome.
11. Require that costs must follow the event. This is already set out in law and is a rule of the superior courts, but it is routinely ignored by judges. Plaintiffs dismissed as fraudulent by a lower court are free to appeal to the High Court or the Court of Appeal without a care as to their ability to pay their costs if they fail. The courts refuse to require security for costs from plaintiffs on "access to justice" grounds, yet defendants are being denied justice as the system allows impecunious fraudsters to extort settlements from them rather than risk appeal, where they will lose their costs even if they win. Even in those cases where judges conform with the law and award costs to successful defendants, we are unaware of *a single case* where a defendant has recovered legal costs from a (non-corporate) plaintiff. This is patently unjust. Tackling this issue will require a number of initiatives:
    a. Frivolous, vexatious and nuisance lawsuits must be stopped at source via an equivalent to the DPP.
    b. Plaintiffs can be required to provide a bond for their costs. This would not prove difficult for genuine claimants, and the administration of bonding would be managed in the private sector.
    c. Lawyers who are found to have abused process through knowingly representing a fraudulent plaintiff, (or failing to exercise a reasonable duty of enquiry) should be subject to an equivalent of the LARA statute[4] in the United States.
    d. The Courts Service regime[5] for the award of costs must be greatly simplified. It should be as close to an administrative and automatic process as is possible to achieve.

[3] https://www.courts.ie/acc/alfresco/8bfaa5dd-3ea3-4580-979f-0dfb2d8243be/2021_IEHC_78.pdf/pdf#view=fitH
[4] https://www.congress.gov/bill/115th-congress/senate-bill/237
[5] https://www.courts.ie/rules/costs-0

We cannot revert to a status quo ante as we exit the Covid-19 pandemic. Whatever its ill-effects elsewhere it has demonstrated the ability to work and conduct formal hearings remotely, and it has removed very significant volumes of paper from most business transaction. Electronic working is now a norm for a great many. The Courts Service must be a part of this new world.

The evergreen analysis by Isolde Goggin[6] of the passage of the Legal Services Regulation Act 2015 retains its currency today following the publication of Employers' Liability, Public Liability and Commercial Property Insurance Report 1[7] by the Central Bank. While we have stated for many years that our litigation system functions more for the remuneration of the lawyers than it does for the compensation of victims, this report proves this to be the case beyond contradiction. Only in EL cases worth more than €150,000 does litigated compensation exceed that recommended by PIAB. This is simply scandalous. If not actually illegal, it is as close to the technical definition of rent-seeking as possible. Given the significantly increased timescale to award in litigated cases, it is clear that lawyers are financially penalising their clients by taking the litigation route in lower value cases, which make up 87% of the total.

Table 24: Average injury settlement costs of EL claims by cumulative settlement band by settlement channel from 2015-2019.

Band	Direct - EL		PIAB - EL		Litigated - EL	
	Avg Comp	Avg Legal	Avg Comp	Avg Legal	Avg Comp	Avg Legal
<€15k	4,763	578	10,012	237	5,113	4,617
< €30k	9,151	972	17,214	441	9,579	7,921
< €45k	12,558	1,192	22,042	481	14,123	10,764
< €60k	14,872	1,339	25,007	541	17,805	12,900
< €100k	18,978	1,839	29,919	594	26,899	18,249
< €150k	20,836	2,076	31,250	685	35,642	22,792
< €500k	23,691	2,590	35,496	877	56,350	31,291
All	24,232	2,790	36,320	902	69,865	35,268

[6] Does the Law Protect Incumbents: The Case of Legal Services Reform in Ireland
[7] https://www.centralbank.ie/docs/default-source/statistics/data-and-analysis/national-claims-information-database/ncid-employers-liability-public-liability-and-commercial-property-insurance-report-1.pdf?sfvrsn=5

Table 26: Average injury settlement costs of PL claims by cumulative settlement band by settlement channel from 2015-2019.

Band	Direct - PL		PIAB -PL		Litigated - PL	
	Avg Comp	Avg Legal	Avg Comp	Avg Legal	Avg Comp	Avg Legal
<€15k	5,422	842	9,144	659	4,316	4,686
< €30k	9,303	1,453	16,306	1,125	8,064	8,308
< €45k	11,730	1,839	20,580	1,436	11,625	11,065
< €60k	13,401	2,097	23,082	1,598	14,512	12,931
< €100k	15,536	2,389	26,270	1,698	20,895	16,674
< €150k	16,139	2,579	26,760	1,705	25,088	18,680
< €500k	16,664	2,698	27,484	1,734	31,176	21,827
All	16,851	2,706	27,484	1,734	38,599	24,421

Given the facts as established by the Central Bank, it is now imperative that we move forward with the establishment of PIAB on a more robust footing. The Supreme Court ruling in the *Zalewski* case[8] clears the way for a comprehensive overhaul of the management of personal injuries claims management. Subject to the strictures set out in *Zalewski*, there is now no reason why PIAB cannot take on an adjudication function in the first instance for personal injuries awards. This would remove hundreds of millions of demonstrably redundant legal costs from personal injuries actions. And it would have the added benefit for plaintiffs in lower value cases (which make up 87% of the total) of securing them higher awards.

We emailed your Department on 17th February to express our concern at the "vote" taking place among the members of the judiciary about the recommendations of the Personal Injuries Guidance Committee. We asked that all members of the Judicial Council with a personal conflict should remove themselves from consideration of the proposed awards recommendations. To our knowledge, this did not occur. Five months later we have the entirely predictable situation where a plaintiff is rejecting the new guidelines,[9] and is taking the PIGC recommendations to the High Court, where these is only one judge available who was not part of the deliberative process. We very much hope that the outworking of this case does not declare the entire awards-setting process by the PIGC to be unconstitutional, though that is a risk which we raised in previous correspondence. In such an eventuality, your Department must be ready with a legislative alternative, and we have suggested the use of ISME's Fair Book of Quantum.[10]

Regrettably, since we last raised the matter with your Department in December 2020,[11] we note a continued failure by the Data Protection Commission to address issues with the gaming

[8] Zalewski v Adjudication Officer and Ors
[9] https://www.irishtimes.com/news/crime-and-law/courts/high-court/woman-who-fractured-foot-challenges-new-personal-injury-guidelines-1.4618242
[10] https://www.isme.ie/isme-fair-book-of-quantum/
[11] https://isme.ie/isme-submission-to-the-department-of-justice-december-2020/

of subject access requests by personal injuries and defamation litigants. We have had sight of several solicitors' letters making sweeping SARs in respect of CCTV without having submitted a claim under affidavit. Article 23.1.j of the GDPR and Sec 60(3)(v) are explicit in respect of restrictions of right of access to personal data where civil litigation is commenced or contemplated. We believe the DPC needs to issue a clarification on this issue as a matter of urgency, and must exercise a studied disinterest and neutrality in matters of civil litigation. This does not appear to us to be the case at the moment.

We are delighted and grateful that the Criminal Justice (Perjury and Related Offences) Act 2021 has been enacted, and look forward to its earliest possible commencement. A perjury statute will not be a silver bullet to the issues of insurance fraud and other white-collar crime. It will require a culture shift by the judiciary, Garda Síochána, and the DPP. Despite the fact that Sec 14 of the Civil Liability and Courts Act 2004 has been on the statute books for 17 years, we know of only one charge being brought to date, this year. This is not a difficult area to prosecute, and indeed the suspect (in the case of a fraudulent personal injuries claim) provides half the evidence themselves in the form of an affidavit. We want to see people lying for money prosecuted this year. If this does not happen, we are aware of a number of businesses willing to advance the matter by private prosecution under the Petty Sessions (Ireland) Act 1851.[12] We believe this would prove embarrassing for our legal authorities, and our preference would be for the Gardaí to investigate and prosecute these offences when reported to them by the courts or the insured.

Lastly, the Action Plan for Insurance Reform will require maintenance of an aggressive legislative schedule in the autumn. In the case of defamation reform, and reform of the Occupiers' Liability Act, it will require faster action than is set down in the Department's Action Plan 2021. Having lobbied so hard for many of the reforms already made, you can be assured of ISME's support in driving forward the rest of the reform agenda.

Yours sincerely,

Neil McDonnell
Chief Executive

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

[12] http://www.irishstatutebook.ie/eli/1851/act/93/enacted/en/print.html