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PUBLIC CONSULTATION ON ENHANCING AND REFORMING THE PERSONAL INJURIES ASSESSMENT BOARD (PIAB)

April 2021

INTRODUCTION

The Council of The Bar of Ireland ("the Council") is the accredited representative body of the independent referral Bar in Ireland, which consists of members of the Law Library and has a current membership of approximately 2,150 practising barristers. The Bar of Ireland is long established, and its members have acquired a reputation amongst solicitors, clients and members of the public at large as providing representation and advices of the highest professional standards. The principles that barristers are independent, owe an overriding duty to the proper administration of justice and that the interests of their clients are defended fearlessly in accordance with ethical duties are at the heart of the independent referral bar.

The Council has prepared the following submission to the Department of Enterprise, Trade and Employment in response to the public consultation on enhancing and reforming the Personal Injuries Assessment Board ("PIAB").

RESPONSES TO CONSULTATION

Question 1 (a) Do you think there is scope to amend section 17 of the PIAB Acts 2003-2019 to increase the number of claims assessed by PIAB?

Section 17, it is important to note, does not exclude certain types of claims from the remit of PIAB. The section provides that in some types of cases involving personal injuries, otherwise coming within its remit, the Board retains a discretion not to make an assessment and instead to allow the case proceed immediately to litigation by issuing an authorisation under Chapter 2 of the Act. The section is permissive and not mandatory; see *Clarke v. O'Gorman* [2014] 3 I.R. 340, at para. 29.

Sections 17(1) (b) specifies 5 types of cases where this discretion applies.

The point to note is that the Board may make an assessment in any such case if the facts warrant.

The Council urges that the Board should retain its discretion in relation to these specific categories of cases specified in section 17 for the reasons set out below:

Section 17(1)(b)(ii)(I): The Council is of the view that the Board should retain its discretion not to assess where it feels it is inappropriate to attempt to resolve complex issues or overlapping issues on a desk assessment. Here an oral adjudicative hearing is required where issues of fact and law may be resolved. Indeed, the contrary view may also raise some of the

questions which arose in ***Zawelski v The Workplace Relations Commission and Ors*** [2020] IEHC 178 in relation to the Workplace Relations Commission.

Section 17(1)(b)(ii)(II): Even where proven, not all cases of psychological injury give rise to a right to damages as a matter of law; even where causation is established. Where no physical injury has been suffered, compensation is recoverable only where a very specific legal criterion, established by the Supreme Court in ***Kelly v. Hennessy*** [1995] 3 I.R. 253, is met. The question is a complex one so that if the assessment is mandatory there is potential for delay in an assessment by PIAB or indeed an incorrect assessment.

Section 17(1)(b)(ii)(III): Aggravated or exemplary damages are awarded rarely by the Courts and again only where very specific legal criterion are met. Very often there will be a question of law to be resolved and very likely an assessment of caselaw, before such an award is made.

Section 17(1)(b)(ii)(IV): The decision of O'Donnell J. in *Clarke v. O'Gorman* considers the issue of torts which are actionable *per se* and notes that "*the vast bulk*" will also be claims for personal injuries. His statement at para. 29 apparently approves of the Board having this discretion in this type of case when assessing the scheme of the Act:

> "*Some claims for trespass to the person and assault may not involve personal injuries (although that is rare), and there are obviously many actions for personal injuries that do not involve assault (although they may all be, at some technical level, a trespass to the person). But the vast bulk of actions for trespass to the person and assault will also be, and be properly described as, actions for personal injuries. That this is so is reinforced by the provisions of s. 17 of the Act of 2003 which permits, but does not require, the Board to refuse to provide an assessment in certain cases containing elements out of the ordinary. In particular s. 17(1)(ii)(IV) of the Act of 2003 permits this course...*"

At pp. 359-360, he stated:

> "*The scheme of the Act of 2003 is to deal with large numbers of routine claims which can be reduced to reasonably predictable valuations. Where there is any difficulty or complexity, the Act of 2003 either excludes such claims in limine, or permits the Board to decline to make an assessment. By definition, any claim for breach of constitutional rights not itself capable of being pursued within one or other of the established causes of action must be a matter of some novelty, and consequently difficult to assess. Furthermore, it is very unlikely that such claims, if dependent on a novel legal analysis, could result in a consensual settlement on a valuation provided by the Board. Such claims are better left to courts from the outset. It is therefore understandable that such novel claims would be excluded.*"

Section 17(1)(b)(ii)(V): This section recognises the claimant's right of access to the courts and represents a human approach to tragic circumstances where a claimant has a limited period of time to pursue his or her claim.

Section 17(1)(b)(iii) permits the Board to issue an authorisation (without assessment) if in its opinion the period of time for which the making of an assessment would have to be deferred in order for a long term prognosis to be made; specifically if it would be likely to be in excess of the 9 months (with a potential 6 month extension as provided for in section 49). It is submitted that this is a practical measure which facilitates a correct assessment. A claimant should not be denied his or her right of access to the courts or unduly delayed in progressing litigation where they wish to attend further treatment or see if injuries settle or resolve. It is observed that it may also be to the benefit of the respondent if those injuries do settle or resolve.

It is here particularly worth noting the Supreme Court decision of ***O'Brien v. Personal Injuries Assessment Board*** [2008] IESC 71, [2009] 3 I.R. 243, where it was held that a refusal of the Board to correspond directly with a claimant's legal representative was a direct interference with the applicant's right to legal representation and an indirect interference with the applicant's right of property in his personal injuries action. The reduction of legal costs and the achievement of greater efficiency were held to be insufficient reasons for a policy which interfered with a fundamental right. But Denham J. noted the impact of section 51A(3) of the Personal Injuries Assessment Board Act 2003 which provides that if a claimant refuses an assessment and pursues a claim in the courts and fails to obtain an award greater than the assessment, the claimant will not be entitled to his costs and the court may order the claimant to pay all or part of the respondent's costs. Denham J. commented that as a consequence of section 51A(3) alone, a claim must be processed very carefully by the Board, and professional guidance may be very important.

Section 17(1)(b)(iv) provides for a sensible exception where a conflict of interest arises in respect of a next friend or guardian.

Section 17(1)(b)(v) provides for a class of relevant claims to be declared (with the consent of the relevant Minister) for there to be good and substantial reasons for the Board not to arrange for the making of an assessment.

Section 17(1)(b)(vi) provides for the circumstances where notice of the claim cannot be served. **Section 17(1)(b)(vii)** deals with the situation where a respondent refuses to accept the assessment. **Section 17(1)(b)(viii)** applies to claims to which Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) applies. **Section 17(1)(b)(ix)** permits the Board to

issue an authorisation where a settlement has been negotiated for the benefit of a minor or person of unsound mind to be approved by the court.

It is submitted that these are all sensible mechanisms for the Board to utilise in organising its business.

Finally, **section 17(3)** provides that the Board may in its discretion decide not to make an assessment if the respondent does not pay the relevant charge. Again, the Council sees no practical or reasonable objection to the Board having this scope to carry out its business efficiently.

The Council more generally concurs with the consultation document issued by the Department of Trade, Enterprise and Employment in noting that PIAB was established to "*fairly, promptly, and transparently compensate the victims of accidents involving personal injuries, in a cost-effective manner.*" The values of fairness balanced with promptness are cardinal values in the success of PIAB to date. Any increase in volumes or change in the type of cases coming within the remit of PIAB must be carefully scrutinised for risk of compromising these most successful aspects of the PIAB structure.

As an early neutral evaluator, the strength of PIAB lies in the simplicity in the manner in which it operates. By introducing more complex claims, PIAB would lose its agility, become slow and more costly for parties and risk having to deal with more regulatory and administrative issues.

This point is underlined by section 49 of the 2003 Act. Specifically, section 49(1) places a duty on the Board to ensure that assessments are made as expeditiously as possible. Section 49(2) places a duty on the Board to ensure that every assessment is made within a period of 9 months. Section 49(4) permits that period to be extended by 6 months where it appears to the Board that it is not possible or appropriate to make the assessment within 9 months. Section 49(6) provides that a claimant may consent to the Board continuing to deal with the matter after that date where an assessment has not been made.

It is submitted that this time limit should <u>not</u> be extended as part of the current proposals. Parties should not be disproportionately delayed in progressing legal proceedings; having regard not only to aims of efficiency and fairness but also having regard to broader principles contained in Article 6(1) of the European Convention on Human Rights.

It is also worth reiterating that delays would burden not only claimants but, in different but often equally serious ways, respondents.

In summary, it is submitted that the matters set out in section 17 should not be amended to deprive PIAB of flexibility and agility to make its own appropriate assessment in discrete

categories of cases as to whether an assessment is appropriate and that caselaw has established that this discretion to decline assessment in certain cases is part of the scheme of the 2003 Act.

Question 1 (b) Do you think there is scope to amend other sections of the PIAB Acts to increase the number of claims assessed by PIAB?

The first point the Council submits in this regard is that the impact of the Personal Injuries Guidelines on PIAB should first be assessed. Action 15 of the Action Plan for Insurance Reform (December 2020) is for the Department of Justice to: "*Report on the implementation and early impact of the Personal Injury Guidelines and examine relevant policy response.*" The timeline given for this report is December 2021.

The aim of the Personal Injuries Guidelines is to "…. *lead to more claims being settled through PIAB, and less cases going to litigation. The Guidelines should result in more predictable court awards. This will mean parties involved in claims should have increased confidence in accepting PIAB awards.*" (as per the Consultation Paper issued in advance of their publication).

This appraisal should include a quantification of claims being assessed, the number of authorisations under section 14 of the Personal Injuries Assessment Board Act, 2003 (where consent to a PIAB assessment being undertaken is refused) and the level of awards made. This assessment should take place before legislative steps are taken to expand the role of PIAB to encompass additional injuries or claims.

Such an approach would be more likely to ensure that PIAB has the capacity to meet any increase in claims before it takes on additional responsibilities.

The Council further underlines the central point that the strength of PIAB lies in its status as an early neutral evaluator. This status allows it to operate in a simple, timely and cost-efficient manner. The Law Reform Commission Report on Alternative Dispute Resolution: Mediation and Conciliation (LRC 98-2010) commented on these features of PIAB's role at para. 7.19:

> "*As the Commission noted, the Board plays the role of that of an early neutral evaluator of personal injury claims in Ireland. Indeed, one of the main purposes of early neutral evaluations is to reduce the costs of litigation by facilitating communications between the parties while at the same time providing them, early in the process with a realistic analysis of their case which fits in with the objective of the Board.*"

The Board assesses a claim on the basis of documentation only and makes an assessment which reduces the number of claims which are required to be processed through litigation.

The Personal Injuries Assessment Board Annual Report 2019 states:

> "*Our model is a positive one for society as a whole as it delivers compensation more quickly, with lower costs and with predictable outcomes. PIAB helps to ensure that claims which do not need to go to court are resolved, thus ensuring that the courts have capacity in the lists for other types of cases.*"

It is submitted that any consideration of enhancing or reforming PIAB must be cautious and recognise the risk of damaging the strongest attributes and basis for the establishment of the body. By increasing the powers and responsibilities of PIAB, the risk of delay and higher cost of maintaining PIAB arises.

Furthermore, any enhanced role or reform of PIAB must not infringe unduly on a claimant's constitutional right of access to the courts. It must be remembered that litigation is not merely a means for seeking compensation but is the manner in which an injured party's rights are vindicated, and the appropriate forum for this is within the courts. In the Supreme Court case of *Grant v. Roche Products Ireland Ltd* [2008] IESC 35, [2008] 4 I.R. 679, Hardiman J. stated at p. 701-702:

> "*This is an absolutely express statement of the role of the law of tort in implementing the State's duties under Article 40.3 and the personal rights Articles of the Constitution … There is thus authority, both judicial and academic, for the proposition that the law of tort is, at least in certain circumstances, an important tool for the vindication of constitutional rights, and no authority whatever for the proposition that it is concerned exclusively for the allocation of damages and with nothing else whatsoever.*"

It is further submitted that the claims excluded by sections 3A and 4 of the Personal Injuries Assessment Board Act 2003 should not be amended to increase the number of claims assessed by PIAB.

It is submitted that respondents should not be compelled to consent to the making of an assessment, nor to the assessment made.

Question 1 (c) Do you think there are non-legislative changes that could be made to increase the number of claims assessed by PIAB?

A reduction in the level of awards under the Personal Injuries Guidelines may lead to more

respondents agreeing to assessment (as well as accepting the assessment). This increased volume may reduce the level of the fees due by respondents who consent to an assessment and this in turn may make the model more attractive.

Question 2 (a) Would a mediation process provided by PIAB bring benefits for claimants and respondents and help increase the number of cases administered through the PIAB system?

Mediation can be an excellent alternative dispute resolution mechanism but best delivers benefits in multi-issue cases. It also can be an expensive process.

The usual benefits of a mediation process are:

1. creating a legally safe (without prejudice) occasion for inter-personal confrontation/venting/apology;
2. identifying creative ways of resolving complex disputes;
3. facilitating the negotiation of a complex settlement (for example in the sale/de merger of a business or company).

Personal injury claims, while possibly involving complex questions of fact or sometimes law, may nonetheless be described as straightforward insofar as they resolve with a payment by the insurer to the claimant and so the above benefits of mediation are not needed and do not arise.

Instead much, if not all, of the benefit of mediation can be delivered simply by formal settlement talks.

That said, the added formality introduced by the presence of a mediator holding the ring for the day may well add some impetus to settlement.

But a claimant will not likely be able to pay the usual one half of the cost of engaging the mediator. If PIAB were to bear that cost, that would facilitate mediation of such cases. The application of public money here is a necessity: without it, the claimant cannot make up the deficit. It is less clear that the public purse should fund a for-profit insurance undertaking's share of this cost. If PIAB is prepared to fund the mediator's cost, or provide the mediator, that would be a step towards making the process practical.

But even then there remains the cost of each side's legal team in preparing for and participating in the mediation. For the reasons noted above, the party's own team - especially

on the claimant side, where by contrast experienced insurance personnel will be less reliant on advice - is central to the effectiveness of the mediation process, in showing the client the good reason (risk/vulnerability) to settle, and giving the assurance to do so. Again, the insurer can fund its own cost, but generally not a claimant. The present consultation/evaluation process then must engage with this question of how the claimant's mediation costs are to be funded. It may be that a willing insurer will be prepared to bear that cost. But if not, the only obvious resort is to the public fund.

Mediations that conclude in settlement justify their own cost. Unsuccessful mediations leave behind a significant cost (mediator, two legal teams, client cost of attending etc.), without any necessary benefit. That is a well understood risk of mediation, and one that makes it reasonable of a party to decline mediation where the cost is not worth risking because of an absence of any indication of realism on the other side. It would be well to monitor that cost in assessing the efficiency of any new system established.

Other practical problems arise. For instance, in a case involving a road traffic accident where liability is contested, it is difficult to see the individual defendant motorist agreeing to be present at a mediation conference.

What is more, a value of the current system of a desk assessment lies in the fact that a neutral evaluation of the claim is provided before the parties meet and views become entrenched. A mediation conference could raise additional issues in relation to the claim or produce a stalemate at an early stage in the process. This could lead to delay in an assessment being made. It is thus submitted that a mediation service in advance of the assessment would be inappropriate.

Insofar as a mediation service after an assessment is made is concerned, it is submitted that the machinery for mediation already exists. The Mediation Act 2017 was introduced to facilitate the settlement of disputes by mediation by placing certain obligations on a statutory footing and does already cover personal injuries actions. Section 14(1) of this Act requires that prior to issuing proceedings a solicitor must advise their client to consider mediation as a means of attempting to resolve the dispute. The solicitor must also provide information about the advantages of resolving the dispute otherwise than by way of the proposed proceedings, the benefits of mediation, and provide the client with information in respect of mediation services.

Also, Section 15 of the Civil Liability and Court Acts 2004 specifically provides for mediation in relation to personal injuries actions. The Court may, upon the request of any party, or upon its own motion direct that the parties to the action meet to discuss and attempt to settle the proceedings by attending a mediation conference.

Therefore, the option of mediation is open to the parties at any stage of the dispute process. Formal proceedings are not required to be issued before parties may attend mediation.

More generally, the potential for a creeping socialisation of essentially private expenses should also be kept under review.

Question 2 (b) In what other ways do you think the services provided by PIAB could be enhanced or reformed to incentivise greater use of the PIAB model?

The Council submits that for reasons set out above it is premature to consider these issues in advance of a review of the impact of the new Personal Injuries Guidelines.

Question 3 (a) Would providing for greater levels of data to be collected and reported on by PIAB be useful in ensuring a fair and predictable insurance system and in areas such as accident prevention?

Such data set would not capture claims which are resolved without recourse to PIAB or accidents occurring where no claim is made and so would have little benefit we feel in accident prevention.

We note that the Central Bank National Claims Information Database receives a wide picture of all insurance claims and therefore represents a reliable data set. In line with the programme for government and action 45 of the Action Plan on Insurance Reform, the Central Bank (National Claims Information Database) Regulations 2020 were introduced to expand the scope of the database to include employer's liability insurance, public liability insurance and property insurance taken out by persons in connection with their business, trade or profession.

The Council submits it would be more appropriate to provide data to a central database such as the National Claims Information Database where it could be contextualised against the claims which are resolved at an early stage and so do not progress to PIAB. It is noted that PIAB has provided such information to the National Claims Information Database in the past. This is stated in the Personal Injuries Assessment Board Annual Report 2019 by reference to "making data available transparently":

> *"In fulfilling our remit to deliver compensation awards, PIAB gathers substantial data on injuries and the circumstances of accidents in a wide variety of settings. We provide information transparently to policymakers, which assists their work, and we provide factual information and explanatory material to users of our system. These equally include people who have experienced an accident and who have the option of using our model and those who have a personal injury made against them. PIAB's statistical*

information can be particularly useful to those responsible for risk management and accident prevention, including other State Agencies. The use of anonymised data provides an important insight into the types of injuries people sustain and the nature of the accidents in which they are involved. PIAB has extensive processes in place to protect the privacy of the data subjects. During 2019, PIAB continued to utilise and share appropriately data with reference to ICD-10 (an international medical classification system). Elements of this data were shared with the Central Bank and in December 2019 PIAB welcomed the publication of the first National Claims Information Database report by the Central Bank of Ireland."

It is further observed that Actions 50-52 of the Action Plan on Insurance Reform relate to the establishment of a databank within the Central Bank for new entrants to the insurance market.

Question 3 (b) Is there scope to use PIAB data for the purposes of fraud detection?

It is a matter for PIAB to take advice on the complex legal and ethical questions raised by proposals to maintain and use personal data of individuals.

There is little detail provided in the consultation paper as to how this data would be used for the purposes of fraud detection and it is not clear how it is envisaged PIAB would detect fraud through the use of this data – whether PIAB would release this data on request, or within a statutory framework; or whether a representative of PIAB would have to attend court to give evidence of the data.

It is respectfully submitted that the courts structure, with concomitant application of the rules of evidence, is the appropriate venue for dealing with highly contentious allegations of fraud.

It is also to be recalled that insurers have departments which have developed a strategy and system for the investigation of potentially fraudulent claims.

The Council also notes that the Programme for Government contains the following proposals which appear reasonable and appropriate steps to first take in relation to this issue:

- *Seeking to increase coordination and cooperation between An Garda Síochána and the insurance industry. We will seek to expand the Garda Economic Crime Bureau, which deals with fraud. Under new structures, it will train and support Gardaí in every division, to ensure that expertise and skill are diffused across the State.*
- *Reviewing and increasing the penalties for fraudulent claims.*

- *Placing perjury on a statutory footing, making the offence easier to prosecute. We will broaden the scope of the Perjury and Related Offences Bill, ensuring that the maximum penalty for indictment should be harmonised with the equivalent maximum penalties for largely similar offences in the Civil Liability and Courts Act 2004.*
- *Ensuring that fraudulent claims are forwarded to the Director of Public Prosecutions (DPP).*
- *Publishing insurance fraud data.*
- *Exploring the feasibility of obliging fraudulent claimants to pay the legal expenses for defendants.*

Question 3 (c) Would there be a benefit in PIAB being mandated to record details of all personal injury settlements agreed in the State?

Again, it is a matter for PIAB to take advice on the complex legal and ethical questions raised by proposals to maintain and use personal data of individuals.

However, it must be questioned whether a balance could be struck between protecting the identity and personal data of a claimant and providing sufficient detail to explain why a particular award was given.

The level of any award is usually based upon such questions as the extent of any psychological sequelae including depression; extent of scarring or other cosmetic sequelae; interference with family relations; impact on personal relationships; prognosis. Without such information it is hard to see how the level of award would be useful, but it is equally difficult to envisage such personal information of citizens being available on a public database.

Question 4 Please provide any additional comments you may wish to make to inform the development and direction of policy on enhancing and reforming the role of the Personal Injuries Assessment Board.

The above submissions encompass our observations on the direction of policy on enhancing and reforming the role of PIAB other than to add the observation that to date PIAB has worked effectively and well.