LAW SOCIETY
OF IRELAND

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Government Buildings
Merrion Street
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By email: paschal.donohoe@oireachtas.ie

Re: Section 16(10) of the Consumer Insurance Contracts Act 2019

Dear Minister,

The Law Society of Ireland (the "**Law Society**") wishes to make the following submissions relating to section 16 (10) of the Consumer Insurance Contracts Act 2019[1] (the "**Act**") prior to the commencement of the provision.

In the Law Society's view, clarification is urgently required in order to avoid the risk of serious and unintended consequences which could be disadvantageous from the perspective of both the consumer and the insurer.

Section 16(10) provides:

> *If, after a claim has been made under a contract of insurance, the consumer or the insurer becomes aware of information (including information that would otherwise be subject to privilege) that would either support or, as the case may be, would prejudice the validity of the claim made by the consumer, the consumer or, as the case may be, the insurer shall be under a duty to disclose such information to the other party.*

Section 16 imposes duties on both the consumer and the insurer in the claims handling process. Section 16(10) imposes a duty to disclose ***information*** which either supports or prejudices the validity of the claim made by a consumer.

The Law Society endorses the desirability of ensuring candour between insurers and consumers in the context of insurance claims but is concerned by the lack of clarity as to the scope of the measure. In particular, our members have expressed concern around the meaning of the reference to "*information that would otherwise be subject to privilege".*

We presume that the intention was to require insurers and consumers to disclose factual information which was relevant to the pending claim (an objective which we would support) however, we assume it is not intended to require parties to disclose privileged communications with their solicitors or Counsel (such as briefs to, or opinions from, Counsel). We would respectfully submit that the latter issue should be clarified to specifically avoid any such suggestion.

1 Consumer Insurance Contracts Act 2019

While we accept that it is appropriate that insurers and consumers should be required to disclose *facts* to each other which are relevant to pending claims (and it would be unfair to withhold such disclosure), we do not consider that their right to obtain legal advice or to take steps to prosecute or defend any such claims should be prejudiced thereby. We would ask that the position be clarified urgently.

The Law Society wishes to highlight the following points:

PRIVILEGE

1. The Irish Courts have long recognised litigants' entitlement to claim legal professional privilege (which encompasses legal advice privilege and litigation privilege) as a fundamental safeguard to allow parties to protect their legal position. As Mr Justice Finnegan observed[2]:

   > **"The importance of legal professional privilege in our system of litigation cannot be overemphasised".**

2. Likewise, Finlay C.J. quoted with approval[3] a leading English judgment[4]:-

   > **"… it is absolutely necessary that a man in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers … that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent … that he should be enabled properly to conduct his litigation. That is the meaning of the rule."**

3. In most instances where the legislature has imposed duties of disclosure of information (such as duties of disclosure to the authorities of suspected criminal activity or GDPR disclosure obligations), express or implied exceptions confirm that parties are not required to disclose privileged information, thereby reflecting the constitutional importance of the right to claim privilege in appropriate circumstances.

4. However, section 16 (10) appears to envisage a duty of disclosure in respect of "information" that would otherwise be subject to privilege but does not clearly define precisely what information requires to be disclosed.

5. In the Law Society's submission, any exception to the entitlement to claim privilege must be justified and clearly defined. The current provision fails to do so because of the breadth and vagueness of the language employed.

6. The obligations placed on both consumers and insurers are not clearly delineated at section 16(10).

7. It is in the interests of both consumers and insurers that this should be urgently addressed.

[2] Redfern Limited v O'Mahony [2009] IESC 18 (Finnegan J) 4; [2010] 3 I.C.M.D. 12 page 4
[3] Smurfit Paribas Bank Limited v A.A.B. Export Finance Limited [1990] 1 I.R. 469
[4] Jessel M.R. in Anderson v Bank of British Columbia [1876] 2 Ch.D. 644 at 649

A. DEFINITION OF "INFORMATION"

1. The Act does not adequately define the type of *"information"* which may require disclosure other than by reference to the test that such information "*would either support or, as the case may be, would prejudice the validity of the claim made by the consumer".*

2. In the absence of a statutory definition of "information" which is required in order clarify the precise scope of the provision, there is concern that section 16(10) could be interpreted excessively broadly, which would unnecessarily and disproportionately impact on the rights of all parties (consumers and insurers) to claim privilege.

3. Legal Advice and Related Documents

a. Many situations give rise to legal privilege and it is unclear whether legal privilege is removed in all of these situations by section 16(10). For example, it is unclear if any or all of the following are intended to be included in the definition of information (thus requiring disclosure);

   i. **Solicitor/Client communications** for the purpose of seeking/providing legal advice in respect of entitlements/liability under an insurance policy;

   ii. **Correspondence between Solicitors and Counsel** for the purpose of briefing the latter and enabling them to advise on the prosecution or defence of a claim under an insurance policy; and

   iii. **Solicitor's and Counsel's advice and opinions** as to liability or entitlements under a policy of insurance or as to recommended actions.

b. The Law Society considers the better view is that, amongst other matters, (i), (ii) & (iii) above would constitute advice or requests for advice and would not constitute "information" for the purposes of section 16(10).

c. This interpretation is reinforced by the fact that, as explained below, in suggesting changes to this area in its report on Consumer Insurance Contracts[5] ("the **Report**"), the Law Reform Commission did not intend to change the law in respect of the legal privilege attaching to advices issued by solicitors and counsel. The Report observes at paragraph 8.61 that *"the commission makes no proposal to disturb this important aspect of civil litigation".*

d. It would have been an extraordinary and highly unusual step for the Oireachtas to seek to require the disclosure of material such as (i), (ii) & (iii) above and clearer language would have been required if that had been the intention[6].

e. In addition, any measure impacting on either party's right to claim privilege would have to be shown to be necessary and proportionate.

[5] Law Reform Commission Report – Consumer Insurance Contracts

[6] *As Chief Justice Murray observed in the Supreme Court decision in* ***Bupa Ireland Limited & anor v Health Insurance Authority & ors*** *[2008] IESC 42 (Murray C.J.) "... where the Legislature is enacting provisions, however sound the reasons for them may be, which have potentially serious implications for legal rights, including constitutional rights, of persons or corporations, one must expect that the intended ambit or application of such provisions will be expressed in the legislation with reasonable clarity".*

f. If the provision was to be interpreted broadly (although in our submission it should not be), it would potentially raise issues around consistency with both the Constitution and the European Convention on Human Rights.

g. While the Law Society considers that (i), (ii) & (iii) above would generally constitute advice or requests for advice and would therefore not constitute "information" for the purposes of section 16(10), considerable uncertainty is created since, in the absence of a statutory definition, the issue can only be resolved by the courts.

h. Accordingly, although the object of the provision was to clarify and define the disclosure obligations of insurers and consumers in the context of a claim, the lack of a definition further obscures the issue, thereby defeating its primary objective.

4. Experts

a. A similar lack of clarity arises in respect of experts' opinions and reports and associated documents. In summary, the position in respect of such documents is that:

   i. they would generally be privileged depending on the circumstances in which, and purposes for which, they were brought into existence.

   ii. However, where a party wishes to rely on a particular expert in certain contexts (most notably personal injury proceedings), under SI 391/1998, the party must disclose all documents which constitute the expert's "report" – including any draft reports, amendments, handwritten notes and cover emails along with the final report.

b. The Law Society accepts that if an expert (whether instructed on behalf of an insurer or consumer) identifies factual information which "*would either support or, as the case may be, would prejudice the validity of the claim"* then such information should be disclosed to the other party. However, the party instructing the expert should not otherwise have to disclose the report or the correspondence with the expert which would be privileged.

c. To the extent that the party instructing the expert subsequently decides to rely on that expert, then the extent to which disclosure is required will be determined in the usual way by applicable Rules of Court. For example, in personal injury accidents, the matter is addressed by SI 391/1998.

d. While the Law Society considers that the interpretation outlined at (b) and (c) above would be consistent with established jurisprudence and would also give effect to the presumed intention of section 16(10) – by requiring the reciprocal disclosure of factual "information", unnecessary uncertainty is created since, in the absence of a statutory definition, the issue can only be definitively resolved by the courts.

e. Once again, although the object of the provision was to clarify and define the disclosure obligations of insurers and consumers in the context of a claim, the lack of a definition further obscures the issue.

5. It is undesirable and unfair to all parties that there should be a lack of clarity in the context of consumer legislation. The definition of "information" should be clarified to ensure that all parties are in a position to comply with the Act once commenced and to ensure that it

achieves its goal without impacting unnecessarily on parties' existing rights to obtain legal advice in confidence, and to claim privilege.

Other Clarifications Required

6. Consideration should be given to whether there should be exceptions from the duty of disclosure (as in other legislative contexts) where it may be inappropriate to make a disclosure to the other side (such as in cases of suspected fraud or arson) or where, a disclosure might prejudice criminal investigations/prosecutions or constitute "tipping off" under anti-money laundering or other legislation.

B. LAW REFORM COMMISSION 2015 REPORT - CONSUMER INSURANCE CONTRACTS

1. It appears that the Act is based on this Report which offers a helpful insight into the basis and rationale for section 16 (10), reinforcing our conclusions as outlined above.

2. The Report suggests that it would be undesirable if an insurer could discover information that would benefit a consumer and fail to reveal it on the grounds of privilege (and vice versa). It further suggests that the solution to this dilemma is to implement a provision imposing a duty to disclose information. We believe that section 16(10) goes beyond what the Report envisaged and is disproportionate.

3. It observes at paragraph 8.61 that *"legal privilege attaches to advices issued by solicitors and counsel, and the commission makes no proposal to disturb this important aspect of civil litigation".*

4. The Report discusses the merits of Order 39, Rule 46 of the Rules of the Superior Courts 1986, as inserted by the Rules of the Superior Courts (No.6) (Disclosure of Reports and Statements) 1998 and the desirability of introducing such a facility in the claims handling process.

5. While the Law Society recognises that there are arguments that can be made for such disclosure requirements (on a reciprocal basis), there are concerns that the current provision will lead to unforeseen and undesirable consequences. This is because the provision does not contain the underlying regulations and clarifications which are required in order to ensure that all parties understand the meaning and application of the new provision. For example, would the obligation apply just to factual information or would it require the disclosure of reports? The Law Society suggests that factual information should be disclosed (e.g. test results, photographs etc.) but that reports should not require to be disclosed except to the extent that parties intend to rely on same in subsequent litigation (and on the basis outlined in the applicable Rules of Court).

C. SECTION 45 OF THE COURTS AND COURT OFFICERS ACT 1995[7]

1. As noted above, the Report highlights the benefit to the courts of the mandatory disclosure procedure in personal injury matters.

2. The Report at paragraph 8.65 confirms that the system of disclosure in personal injury matters, as provided for in section 45 of the Courts and Court Officers Act 1995 if *"suitably adapted, would make sense in the insurance setting."* The Law Society agrees

[7] http://www.irishstatutebook.ie/eli/1995/act/31/section/45/enacted/en/html

that such a disclosure system, suitably adapted as envisaged by the Law Reform Commission, could be beneficial to both the consumer and the insurer and could also avoid costly and lengthy litigation.

3. The Law Society has concerns that the disclosure duty has not been adapted (suitably or otherwise) as envisaged by the Law Reform Commission. Instead, section 16 (10) bluntly imposes a disclosure obligation. This is all the more stark when compared to the detail contained in section 45 of the Courts and Court Officers Act 1995 which introduced disclosure in personal injury litigation and was further supported and clarified by the rules and procedures set out in SI 391/1998 : Rules of the Superior Courts (No. 6) (Disclosure of Reports and Statements), 1998.

4. The current rules and procedures for the disclosure of reports and statements in personal injury litigation is a lengthy document which seeks to provide some detail and clarity around the requirements imposed on both plaintiff and defendant regarding the disclosure of their expert reports and/or statements. The rules also provide for applications to the courts for any orders that may be necessary thus protecting parties throughout the disclosure process. Section 16(10) of the Act provides no such clarity or rules of any kind.

5. A key difference between section 16(10) and the rules for disclosure in personal injury matters is that only statements which a party intends to rely upon are required to be disclosed. A report which a party does not wish to rely upon need not be disclosed. The Law Society recommends that that should continue to be the case – a party should not be required to disclose an opinion with which it disagrees (although it may be required to disclose purely factual information, such as test results, measurements, photographs, scans etc.).

6. As it stands, section 16(10) could be interpreted as requiring both parties to disclose all information, including privileged information which could be damaging to their positions. This goes far beyond the rules of disclosure in personal injuries claims and requires clarification to ensure a common understanding and application of the duty to disclose in a manner which does not unnecessarily infringe on each party's entitlement to claim privilege in appropriate cases.

D. LAW SOCIETY RECOMENDATIONS:

1. The Law Society welcomes any provisions that encourage parties to be open and frank regarding the facts which impinge on the validity of a claim. However, greater consideration is needed in respect of the uncertainty around the wording of section 16(10) which could seriously impinge on long-established rights to claim privilege in appropriate circumstances, rights which the Law Reform Commission did not intend to disturb. Consideration is needed before departing from important and long-established principles of legal privilege with such a broad disclosure requirement.

2. Legal privilege is fundamental to the administration of justice. In order to take due account of Constitutional rights and rights pursuant to the European Convention on Human Rights, any statutory obligation to disclose which seeks to circumvent legal privilege must be well-founded, clear and proportionate. In its current form, section 16(10) does not meet those standards. The Law Society is concerned that this provision will endanger the essential protections that privilege currently provides and will cause any number of unintended consequences.

3. The Law Society, therefore, urges that:

    a. The commencement of section 16(10) be deferred;

    b. Section 16(10) be amended to provide the necessary clarity; and

    c. The intended disclosure between the insurer and the consumer should be supported by regulations, codes of practice and/or rules governing such disclosure.

We appreciate your time in considering this correspondence and will be available to discuss the matters raised if that would be helpful.

Yours sincerely,

Michele O'Boyle
President