Consultation on the Scheme of the Consumer Rights Bill - Submission by the Irish Dental Association

[redacted]

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IRISH DENTAL ASSOCIATION RESPONSE TO SCHEME OF CONSUMER RIGHTS BILL 2021

June 22nd 2021.

Views are sought in relation to the Scheme of Consumer Rights Bill 2021.

The Irish Dental Association is a professional membership body and a licensed trade union which serves as the representative body for the dental profession in Ireland.

The Irish Dental Association ("IDA") was established in 1922 and offers a wide range of educational and scientific services including publication of the Journal of the IDA as well as organising two major educational conferences nationally each year. There are over 1,800 Members of the IDA which advocates for better oral health for the Irish population and for the promotion of the interests of the dental profession.

The Association has been invited by the Department of Enterprise, Trade and Employment (email from [redacted] dated May 20th 2021 refers) to set out its views on the Scheme of Consumer Rights Bill 2021. We are advised that the Department of Enterprise, Trade and Employment has published a Consultation Paper on the Scheme of the Consumer Rights Bill. We understand that the Scheme seeks to consolidate and update the legislative provisions that regulate the main types of consumer contract. The legislation, when enacted, will represent the most substantial reform of consumer contract law in forty years.

I am pleased to set out below the views of the Irish Dental Association, [redacted]

I would be obliged if you could confirm receipt of this submission in the first instance.

Introduction

This Bill seeks to update Consumer Rights Legislation and to implement a number of maximum harmonisation directives in Parts II, III, V and VI of the Scheme. Of particular importance is the proposal in the Consumer Rights Bill to extend the scope of the number of the EU Consumer provisions, which have been specifically excluded from the healthcare sector to that sector.

The reason healthcare was omitted from the EU Directives is set out in Directive 2011/83 (being one of the Directives implemented by the Bill) which provides at paragraph 30 of the recitals as follows:

"Healthcare requires special regulations because of its technical complexity, its importance as a service of general interest as well as its extensive public funding. Healthcare is defined in Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights and cross-border healthcare as "health services" provided by health professionals to

patients to assess maintain or restore their state of health including the prescription, dispensation and provision of medicinal products and medical devices… ***The provisions of this Directive are not appropriate to healthcare which should be therefore excluded from its scope."*** (emphasis added)

Health practitioners including Dental practitioners are regulated professions and are relevant health professionals for the purposes of the Directive. The important issue to note is that such health professionals including Dentists are already the subject of significant specialist healthcare Regulation. For the reason set out below the IDA is firmly of the view that it is inappropriate and incorrect to seek to extend the scope of EU Consumer legislation to healthcare professionals (and in particular the dental profession) in circumstances where they are, and have been, specifically excluded by EU Legislation itself. It is entirely erroneous to suggest that there are simply no reasons why certain aspects cannot be applied to healthcare. By way of illustrative example the IDA would offer the case of a patient receiving treatment. If the cost of such treatment needs to change, the Bill provides the patient must consent to such changes. While on its face this appears sensible nevertheless if a patient were under general or local anaesthetic such a provision would be entirely inappropriate and unworkable requiring a simple procedure to be broken down into several visits (increasing cost) to enable compliance with the Bill and obtaining the patients consent to the changes. This is precisely the type of Specialist Sectoral consideration referred to in paragraph 30 cited above which is not taken account of in the Scheme for the Bill. Similarly the attempt to extend the scope of such rights to healthcare is likely to have significant and unforeseen implications for the State arising from Directive 2011/24/EU on the application of patients' rights and cross-border healthcare.

Part II – Contracts For the sale of goods

Chapters 1 to 3 and 5 of Part II transpose Directive (EU) 2019/771 while Chapter IV gives effect to the provisions and delivery of passing of risk set out at Articles 18 and 20 of Directive 2011/83/EU (the Consumer Rights Directive). Neither of these Directives are intended to apply to the provision of healthcare and the failure to specifically exclude healthcare from the application of Part II may have far reaching unintended consequences (including driving up the cost of the provision of dental care). The Sales Law Review Group on its report on the legislation governing the sale of goods and supply of services quoted Lord Denning in Greeves & Co (Contractors) Limited v Baynham Meikle and Partners [1975] 1WLR 1095 in which he stated that:-

"The surgeon does not warrant that he will cure the patient. Nor does the solicitor warrant that he will win the case. But when a dentist agrees to make a set of false teeth for a patient, there is an implied warranty that they will fit his gums…"

This is illustrative of the fact that the provision of dental care may require items, which if not specifically excluded, could otherwise fall within the scope of Part II of the Scheme for the Bill.

The inclusion or potential inclusion of healthcare in Part II would be clearly inappropriate and could require the trader to replace certain goods or materials "free of charge" as envisaged by Chapter 3 or to require the trader to bear the cost of removal of the goods and re-installation. It will be noted that in dental treatments certain materials may be very expensive (for instance gold used for fillings) and products supplied are inserted into the patients mouth and unlike other traders may not then be utilised for other patients.

It will be noted that the IDA has established the Dental Complaints Resolution Service (www.dentalcomplaints.ie) which is a specialist complaints resolution service which has operated successfully since 2012 and has helped patients and participating dentists to resolve complaints in the Republic of Ireland, in accordance with Dental Council Guidelines. This resolution service provides an experienced and skilled facilitator who assists, with the assistance of a clinical adviser where appropriate, dentists and patients to resolve complaints relating to the provision of dental care. Evidence of the very significant role played by the Service can be seen below with statistics derived from the annual reports published by the Service.

It will be noted that the specialist nature of such issues which may arise require the input of suitably qualified dental professionals such as the Dental Complaints Resolution Service.

Dental Complaints Resolution Service Statistics

Year	Calls	Emails/letters	Accepted complaints	Numbers resolved
2013	262	1,230	130	28
2014	384	1,250	158	36
2015	287	970	134	44
2016	287	948	102	58
2017	520	1,120	128	71
2018	N/A	N/A	123	76
2019	N/A	Total emails and call 2080	109	69

Typically, settlements can involve some or any of the following elements agreed between the parties:

- Refund of fees
- Apology
- Re-treatment
- Payment of fees for re-treatment elsewhere
- Payment of fees for remedial work

The IDA would recommend that Part II should be brought into line with EU legislation and healthcare, and in particular dentistry, should be specifically excluded from the scope of Part II.

Part III – Contracts for the supply of digital content and digital services

Healthcare is specifically excluded from Part III to Head 42. Accordingly the IDA has no further comments on this part.

Part IV – Contract for the Supply of a Service

The IDA wishes to make clear that it has no difficulty with the existing Statutory Framework under the Sale of Goods and Supply of Services Act 1980 as it applies to the healthcare sector. Notwithstanding this, the proposals to extend the statutory provisions envisaged by Sections 39 to 42 of the Sale of Goods and Supply of Services Act 1980, to provide for statutory remedies in the healthcare sector is entirely inappropriate and belies a failure to understand the relationship between the dentist or doctor and patient (which is already the subject of extensive sectoral regulation) and the nature of the service being provided. Indeed Chapter 2 deals with consumer rights and contracts for the supply of service and Head 65 sets out requirements for conformity of the service with the contract. 65(1)(d) provides that in order to conform with the contract the service should be of a nature and quality that:-

"can reasonably be expected to achieve any result that the consumer made known to the trader at the time of the conclusion of the contract as a result of the consumer wishes the service to achieve…"

To again refer to the quote from Lord Denning above, "the Surgeon does not warrant that he will cure the patient" and the effort to apply remedies such as these to the healthcare sector is to seek that the healthcare professional is in fact warranting a particular outcome. The terms of Head 65(b) which require that the service "comply with any oral or written statement to the consumer by or on behalf of the trader" about the service when deciding to enter into the contract or making any decision about the service after entering into the contract is likely to require dental and medical practitioners to provide extensive warnings in connection with the risks associated with procedures and treatments such that it will undoubtedly reduce the number of necessary treatments being availed of by patients and if this were the outcome this could not be in the public interest. Similarly Part IV takes no account of additional treatments which may be required in the context of emergency treatment whereby a patient undergoing a procedure encounters a medical emergency. While it would be hoped that such circumstances may be avoided, nevertheless such outcomes are a statistical reality for dental and medical treatment.

Currently, as previously indicated the IDA operates the Dental Complaints Resolution Service which is a non-statutory alternative dispute resolution forum which has worked extremely successfully in resolving many complaints by members of the public against dentists since its inception. This resolution service provides an experienced and skilled facilitator who assists, with the assistance of a clinical adviser where appropriate, dentists and patients to resolve complaints relating to the provision of dental care. It has provided an alternative source of remedy for patients which is in compliance with Dental Council Guidelines and sectoral specific regulation. The concern that the IDA has is that the inclusion of healthcare into the remedies provisions dealt with in Part IV will damage the capacity of such alternative dispute resolution systems which are currently in being and working and are uniquely suited for the sectoral specific issues which arise in healthcare. The effect of the remedies proposed will be to replace a specialist Dispute Resolution System that is working with one that is unlikely to achieve its intended outcome and will increase costs for consumers significantly.

Part V – Consumer Information and Cancellation Rights

Part V of the Scheme for the Bill give effect to chapters (i) to (iv) in Directive 2011/83 (The Consumer Rights Directive) and S.I. 484/2013 and Directive 2019/2161. Healthcare is excluded from the scope of the Consumer Rights Directive pursuant to Article 3(3)(a) and 3(3)(b) and Section 2(b) of S.I. 484/2013 also excludes healthcare from its scope. Healthcare is excluded from the scope of Chapter 3 and Chapter 4 of Part V pursuant to Heads 78 and 86 of the Scheme for the Bill. Notwithstanding this, Part V proposes to extend the Directives pre-contractual information requirement for on-premises contracts in Chapter 2, Part V to Contracts for Healthcare. The reasoning for this is set out in paragraph 5.16 of the consultation document (page 64) which refers specifically to a 2010 survey by the National Consumer Agency. This is now out of date and indeed predates both the Dental Council Code of Practice relating to the display of fees in Dental Practices (2011) and the Medical Council Guide to Professional Conduct and Ethics for Registered Medical Practitioners (8th Edition 2019). Paragraph 5.16 states that:-

"As healthcare services in Ireland are widely provided for payment and in some cases on a poor profit basis, the requirement to provide on-premises information on the price of the services before the conclusion of the contract would be of benefit to users of the services."

In fact this is already provided for in the Dental Council Guidelines and the information sought in Schedule 1 of the Bill is already required to be provided pursuant to the Medical Council to professional conduct and ethics. Paragraph 5.16 of the consultation document quotes an extract from paragraph 44 of the Medical Council Guidelines (and implies this is the only reference to fees) but this is misleading. In fact information required for medical practitioners to obtain consent to treatment (set out in the Appendix to the Guide) includes a requirement to provide details of costs or charges which the patient may have to meet. To obtain patient consent without providing relevant required information may result in the consent not being "*informed consent*". Failure to obtain informed consent could result in the treatment being deemed to be an assault (which is not the case for non-healthcare professionals) and is illustrative of the fact that the current rules provided by the Statutory Healthcare Regulators achieve the objective of providing information to patients and does so in a manner that is consistent with sectoral specific issues (which do not arise for other non-healthcare sectors.

It must also now be acknowledged that arising from the extension of free GP care to patients and the extension of the GMS Scheme in recent years and Government Policy in the area of Slaintecare prevalence of private healthcare treatment has reduced significantly since the Bill was first mooted in 2015 and this is a further demonstration that the Bill is seeking to remedy matters which are assumed to be issues without any up to date factual evidence.

Finally, the de minimis provision set out in Head 75(8) for is provided (off-premises) should be increased from €50 to €250.

Part VI – Other Consumer Rights

The consultation paper provides at page 69 to the application of Part VI of the Scheme to contracts excluded from the scope of the Consumer Rights Directive.

Paragraph 6.4 provides:-

"The sectoral exclusions in Article 3(3) of the Directive were framed with the Directives provisions on pre-contractual information and the cancellation of distance and off-premises contracts in mind and there is no policy or practical reason why the provisions of Articles 19, 21 and 22 should not, with the exception of financial services, apply to consumer contracts generally."

The IDA refers to paragraph 30 of the recitals of Directive 2011/83 (The Consumer Rights Directive) and to S.I. 484/2013 (Section 3.2(b)). Both of these specifically exclude healthcare. What is provided for/proposed in the consultation document in relation to the inclusion of healthcare will lead to significant difficulties in the treatment of patients necessitating repeat visits for what otherwise to be straightforward procedures increasing both cost and patient discomfort. Head 100 provides in relation to additional payments that:-

"Before a consumer is bound by a contract or an offer the trader shall seek the consumer's express consent to any payment additional to the payment agreed for the trader's main obligation under the contract."

In the event that a patient is receiving medical treatment and it becomes apparent that further, more extensive work may be required, the application of this provision to dentistry will require the dentist to discontinue the treatment and obtain the patients consent to any additional cost. This may be required particularly if the patient is under either local or general anaesthetic. Under sub-section 4 any provision of a contract which requires the consumer to make a payment contravening sub-head 1 is unenforceable. Under sub-head 6 breach by a trader of the obligation to reimburse a consumer shall be actionable by the consumer. Clearly the application of this provision to the healthcare sector is entirely inappropriate and the inclusion of healthcare (and Dentistry) in Part VI will significantly increase the cost of treatment and result in treatments being provided over a number of visits to meet any changes to a treatment plan.

Similar issues arise in relation to Head 102 dealing with inertia selling. Definition of unsolicited product is broad enough to encompass additional products provided to a patient in the course of treatment. Again the application of this section to the healthcare sector is inappropriate and should be excluded.

We would be happy to elaborate or clarify any queries arising relating to our submission.

Yours sincerely,

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IDA irish dental association

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