Submission to Department – Review of Personal Injuries Assessment Board Acts 2003 & 2007

Background

The Minister for Jobs, Enterprise and Innovation has announced a public consultation on the operation and implementation of the Personal Injuries Assessment Board Acts, 2003 and 2007. In a letter to the Board dated the 19th June 2014, the Department of Jobs, Enterprise and Innovation has advised of the consultation process. In this letter, they welcome a submission from the Board on the operation of the Acts and an indication of any areas which might be presenting difficulties in terms of implementation, or which might hinder the Board in the performance of its functions under the Act. Below is the Board's submission.

Introduction

The Board's underpinning primary legislation, the Personal Injuries Assessment Board Act 2003, and subsequent amendments, have served the organisation well in achieving its objectives and delivering the underlying policy objectives. In 2013, the Board made 10,656 assessments to the value of €243m in an average timeframe of 7.4 months and at a delivery cost of 7.3%, while at the same time maintaining the same level of compensation for claimants. This is against a background of a timeframe of 3 years and a delivery cost of 46% under the litigation system, 2/3rds of personal injury claims removed from unnecessary litigation and the Board making close on 12,000 assessments in 2014.

Reputational/governance issues

The Injuries Board functions as a quasi-judicial body. Core to its success has been the reputation it enjoys as fair, independent, and credible, as is the case with the Courts. We believe that key to this are a number of issues, such as the very nature of the organisation, being an independent statutory body. Whilst the Minister enjoys certain powers, the ability of the organisation to independently assess cases, exercise discretion and make independent decisions is core. We believe that these functions are vital to underpinning the credibility and impartiality of the organisation and ensuring no perception or charge of bias. The balanced, broad societal representation on the Board and the general governance structure has also been central to the success of the Board. There are a multitude of specific reporting measures in place in terms of both the primary legislation and day-to-day operational arrangements to ensure that the organisation, as a public body, is, and is seen to be, accountable to the Minister, the Oireachtas and Citizen.

Operational issues

From an operational point of view, the key point is the Board's capacity and capability to assess cases within the statutory requirements. Central to that is the ability to recruit suitably qualified staff to carry out these core functions. In accordance with Government policy, we are currently restricted due to the existence of the moratorium on recruitment. A change in legislation is not likely to offer an appropriate remedy in this regard although it is a key issue for the Board.

A small number of technical improvements to the legislation could improve our ability to handle/assess certain categories of injury claims as set out below. Additionally a number of other proposed changes would help the Board more generally in the carrying out of its functions as quite specifically determined under the legislation.

List of proposed changes

1. Introduce a **new provision** where a Claimant is prohibited from introducing new information/details of claim into Court proceedings that were available but not submitted to the Board prior to assessment.

2. Introduce a **new provision** that the 9-month timeframe is put on hold where the claimant refuses to attend for a medical examination or return details of Special Damages (i.e. Medical bills, loss of earnings, personal belongings etc.)

   Comment: Under Section 25 of the Act the Board is obliged to proceed with an assessment in the absence of the claimant submitting any/or outstanding details of Special Damages or attending an independent medical examination – see Sections 25 (1) (a) and 25 (1) (d).

   When the legislation was drafted it was envisaged that the treating doctor/consultant's medical report, which is submitted by the claimant with their application, would contain sufficient information to permit assessment. These reports include information detailing injuries suffered, treatment received, extent of disability, and future prognosis. This was envisaged as supporting documentation which would enable the Board to assess the claim, without the need for further medical examination/s. The very same scenario was envisaged in relation to Special Damages.

   It has transpired from our very early operational days in 2004, however, that in almost all cases the treating physician's report is not adequate at the time of application for the purposes of assessing the claim and the initial Special Damages submitted with the application frequently do not represent the full extent of the claim. This is due to a timing matter, the reports available at the time of notification reflecting early rehabilitation, but to accurately assess claims, further examination by the Board appointed medical examiner has been found necessary in almost all cases to permit a more accurate prognosis. This needs to be commissioned at a later stage during our process. The medical reports accompanying application papers, in most cases, do not provide us with adequate information to assess and we commission independent medical reports later in our process when rehabilitation is more advanced. However going to the point at issue, where there is no compulsion for a claimant to attend such an examination, issues have arisen where we are under statutory obligation to proceed with an assessment. In addition the Special Damages details are often not available from the various service providers/institutions at the application stage and again issues arise when we encounter same not being presented on request for a variety of reasons. Providing the Board with the facility/option to put the statute "on hold" supports the claimant as they seek out the required documentation and fosters engagement with the Board where any reluctance is encountered.

   Currently Section 25 obliges the Board to assess a claim even where the claimant does not attend an independent medical examination nor submit full details of their Special

Damages. In circumstances where the claimant information is deliberately withheld, the assessment of Damages by the Board cannot reflect the full value of the individual's claim, leaving the award open to appeal in the Courts system, where legal fees are allowed. While the number of such cases could be perceived to be small there are serious incidents of circumvention of the legislation and are spread throughout the Country. In any subsequent proceedings the settlement is likely to exceed the amount of the Board assessment when outstanding medical/other details are then provided. These proposed amendments will prevent circumvention of the legislation, which leads to unnecessary costs and delays. As it has not been possible for the Board to assess claims based on the initial/incomplete information provided by the claimant and as envisaged when the legislation was drafted, this section of the Act needs to be reviewed. This review of the legislation provides an opportunity to close off this loophole which has come to light through the implementation of the Act

3. Amend **Section 22** to provide for:

(a) A right of recovery of fees/charges against the respondent's insurer, acting on behalf of the respondent, and

(b) The ability to charge different fees, in specified circumstances

Comment: The current right of recovery is only against the respondent, which is impractical on a case-by-case basis whereas the insurer is invariably acting on behalf of numerous respondents (circa 75% of all claims received). In effect the insurer, where on record, consents to the process, pays all the fees, decides whether to accept or reject the assessment, and pays the final settlement to the claimant. However when a debt arises, the Board's right of recovery is against the respondent and not the insurer, who is handling the claim. While such cases only represent a very small proportion of the Board's fee income the difficulty in recovering fees from individual respondents has led to €126,290 being unrecoverable in 2013 with €169,531 outstanding for a period of over 6 months at the end of 2013. The administration costs in relation to these fees and non-recovery are borne by other fee paying respondents and the proposed amendment would remove the inequity involved.

In relation to the facility to introduce different fees for different elements of service, at present, there is only one standard fee for the respondent and one for the claimant. The Board at some future date may consider a range of fees for different levels of service to ensure a more equitable distribution of the fees charged to respondents. How such fees would be implemented will require detailed consideration and consultation with respondents/ the insurance industry and any such amendment would be subject to an enabling provision by the Minister.

An amended provision could also allow for lower fees for on-line applications. The Board website has been recently upgraded and includes an on-line application form. The ability to apply on-line is not just convenient for customers but allows the Board to operate a more cost effective and efficient workflow system. The Board intends to favour on line functionality where appropriate and the charging of a lower fee which will act as an inducement for some customer cohorts to apply on-line. The lower fee will also reflect the reduced administration costs involved in handling such cases.

4. Introduce a **new section** to provide for the return of any surpluses that may arise over and above operational requirements/adequate reserve levels. The Board has accumulated reserves in excess of operational requirements due to reserves set aside for the purposes of defending legal actions, which were ultimately not required, having succeeded in our defence. Legislative change is required as there is no facility for the Board to transfer this money to the State. It is worth highlighting that current surpluses relate to what is most likely to be a "once off" event.

5. Amend **Section 79** to provide for service of papers other than by registered post (including electronically) in view of the administrative and cost burden involved. We are seeking to modernise this section to bring it in line with up to date efficient/economic means of legal service. From an economic and efficiency point of view there are other methods of service of documents than that currently provided for in the legislation (for example: electronic correspondence). In addition to reducing the Board's operating costs, such methods will benefit customers both in terms of service options, convenience and cost.

6. Amend **Section 54(1) as follows:**

(a) To provide the power required to collect and analyse data to fulfil the Board's functions under Section 54 (1) (b), (c) and (d) together with an amendment to the Central Bank Act to list the Board as a body with which the Bank can share data.

(b) To provide clarification as to which body is required to review the Book of Quantum and the frequency of such reviews.

Comment: While section 54 (2) does provide that the Board shall have all such powers as are necessary or expedient for, or incidental to, the performance of its functions under the Act explicit powers may be required to collect data. The section does not provide sufficient powers for the Board to collect certain information i.e. other personal injury settlement data; and relevant data in the possession of other state agencies. Section 265 of the Social Welfare Consolidation Act 2005 is an example of a Government body having powers to share data with other specified bodies. A similar provision might enable other bodies to share relevant data with the Board. Without the power to collect this data, the Board cannot fulfil its functions to the extent that it needs. In the current form, without permission to access certain data cohorts, the legislation restricts the Board's ability to carry out a more comprehensive Cost Benefit Analysis

While Section 54 specifies that the Board should produce a Book of Quantum, which it has done, it does not specify any responsibility to update/review this Book and the figures contained therein. Clarity is required as to who should review the Book of Quantum.

7. Amend **Section 3(d)** to provide for the assessment of medical negligence claims

Comment: Medical negligence cases are currently outside the Board's remit and the only option a claimant has in such cases is to pursue litigation if an agreed settlement is not achieved. Removing the ban on assessing medical negligence will allow claimants in certain cases to pursue their claims through the Board. Latest information

suggests that the State has set aside more than €1 billion for medical negligence claims in public hospitals and HSE facilities, which includes a considerable amount for litigation costs. It is recognised that the nature of some of these cases may not be appropriate for the Board's model. However if a small percentage of these cases, by volume/value, were assessed by the Board, there could be a potential saving of up to €50 million to the State (this is an estimated figure as the Board is not privy to the full details available in relation to the medical negligence claims portfolio but an independent Cost Benefit analysis would illustrate); as a service to the citizen, claimants/their families/society would benefit enormously from a non-adversarial claims process in many of these cases.

It is important to highlight that removing the ban on assessing medical negligence claims does not require the state nor private sector medical respondents /insurers to use the model but offers these respondents/their insurers a lower cost processing model which they can use when appropriate for some cases and still engage litigation if more appropriate for other cases. It is not an "either/or" situation but offering another resolution tool, making it available, a choice such respondents already have in the case of their Motor, Public and Work place claims book. For example in cases where the state or a private sector respondent/insurer find they have committed a "wrong" then an adversarial costly and lengthy litigation resolution system is not economically nor socially viable in our view when the Board model can focus on assessing the value of the award due. In other cases where a defence is warranted, a liability matter remains at issue, litigation may then be the best model to adopt but not in all cases. Any relevant amendment would require provision for a commencement order from the Minister to allow for the research of and production of guideline levels of Damages and the allocation of the required resources to the Board.

8. Amend **Section 35** to provide for the ruling of all fatal claims not just those involving minors as dependants.

Comment: It is the almost universal practice for the settlements of fatal injury claims under section 48 of the Civil Liability Act 1961 to be ruled in Court, irrespective of whether there are minor dependents or not. This provides protection to both the claimant and respondent. The PIAB Act only provides for a ruling where there are minor dependants. While the numbers are relatively small (55 assessments in 2013), cases, not involving minors, do not enjoy the protection of the Courts and the parties may be subject to challenge at a later stage. The amendment will provide the same protection to all parties involved in the settlement of fatal injury claims whether they involve minor dependants or not.

9. Introduce **a new Section** to provide similar protection for infant claimants in relation to assessments as is provided under Section 63 of the Civil Liability Act for offers of settlement:

Comment: Prior to the establishment of the Board, when a settlement offer/lodgement was made in a claim from a Minor, the claimant's next friend could make a Section 63 application to the Court to consider the offer/lodgement and provide protection in relation to legal costs. There is no such facility under the PIAB Act nor protection in relation to costs if the assessment is not bettered on final settlement. In 2013 the

Board assessed 948 infant cases of which 367 awards were rejected. As it currently stands these infant claimants do not have the same protection as afforded under Section 63 with the result that they will be liable to costs if the eventual settlement does not exceed the amount of the assessment. Minors are in a unique position in that claims are brought on their behalf. Decisions which are made in good faith on their behalf in relation to assessments/settlements can have implications for them if the eventual outcome is not as anticipated. This provision will provide the added protection to minors which was available under section 63.