



PRIVATE & CONFIDENTIAL

Mr Paschal Donohoe TD
Minister for Finance
Department of Finance
Government Buildings
Upper Merrion Street
Dublin 2
By email: minister@finance.gov.ie

26 January 2021

Dear Minister,

I refer to your exchange of letters with my predecessor in relation to Section 16(10) of the Consumer Insurance Contracts Act 2019 (the "Act"), resting with your attached letter of 4 September 2020.

My predecessor's letter expressed the Law Society's concerns in respect of the intended commencement of Section 16(10) of the Act. Those concerns relate to a lack of clarity around the intended effect on legal professional privilege of the disclosure obligation provided for in the Section.

You replied that the provisions of Section 16(10) reflect the policy recommendations of the Law Reform Commission (the "Commission") and the policy to increase transparency in the handling of insurance claims, which is supported by the Law Society. You also confirmed your intention to proceed to commence the Section.

The Commission's recommendation at paragraph 8.66 of its Report on Consumer Insurance Contracts (LRC 113 – 2015) (the "Report") is in the following terms:

"8.66 The Commission recommends that an insurer must disclose to its consumer policyholders any information discovered during the course of the investigation of claims, and consumer policyholders must disclose to insurers any information of which they become aware after making a claim, where that information goes to the validity of the claim; and that this mutual obligation to disclose applies even where any such information would otherwise be subject to litigation privilege."

Significantly however, the Commission 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"*.

While Section 16(10) of the Act replicates Clause 15(6) of the draft Bill contained at Annex B to the Report, it should be noted that, apparently inadvertently, the provisions of Section 16(10) go further than the Commission's stated objective of the recommendation in paragraph 8.66. We believe that it also contradicts the Commission's intention not to disturb the legal privilege attaching to advices issued by solicitors and counsel and are seeking clarification from the Commission on this point.

We consider it important that the policy of increased transparency (which again, we support) is implemented in such manner as to preserve the essential elements of legal professional privilege, both litigation privilege and legal advice privilege, which is an important constitutional protection for all litigants, including insureds and insurers alike.

The implementation of recommendations contained in the recent Report of the Review of the Administration of Civil Justice may provide an opportunity to clarify Section 16(10) in order to reflect a better balance and to achieve the stated objectives of the Report while respecting legal professional privilege.

Yours sincerely,

A handwritten signature in black ink that reads "James Cahill". The signature is written in a cursive style with a long horizontal stroke at the end.

James Cahill
President

Cc: Mr Paul Gallagher SC, Attorney General info@ag.irlgov.ie
Mr Brendan O'Leary, Principal Officer Brendan.O'Leary@finance.gov.ie