



PRIVATE & CONFIDENTIAL

The Hon Ms Justice Mary Laffoy
President
The Law Reform Commission
Styne House
Upper Hatch Street
Dublin 2
By email: info@lawreform.ie

26 January 2021

Dear President,

I am writing in relation to Section 16(10) of the Consumer Insurance Contracts Act 2019 (the "Act").

As you will be aware, the Act sought to implement the Law Reform Commission's Report on Consumer Insurance Contracts (LRC 113 – 2015) (the "Report"). Section 16(10) of the Act provides the following (emphasis added):

*"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."*

My predecessor wrote to the Minister for Finance prior to the commencement of Section 16(10) to express the Law Society's concern that the reference to privilege may lead to an unintended dilution of legal professional privilege. In his reply, the Minister stated that the provisions of Section 16(10) reflect the Law Reform Commission's policy recommendations.

While Section 16(10) replicates Clause 15(6) of the draft Bill (at Annex B to the Report), it appears to go beyond the stated objectives of the Report. You may recall that the explanation provided by the Commission for the Clause was that:

"Section 15(6) implements the recommendation in paragraph 8.66 that 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 is under a duty to disclose such information to the other party. This requirement is based on the comparable duty to exchange

information that applies to High Court personal injuries claims under section 45 of the Court and Court Officers Act 1995.”

The Commission’s recommendation in paragraph 8.66 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.”

However, the Commission made clear at paragraph 8.61 of the Report 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”*.

It would appear, therefore, that Section 16(10) goes beyond the stated objective of the recommendation in paragraph 8.66 and does not reflect the Commission’s intention not to disturb the legal privilege attaching to advices issued by solicitors and counsel. There is a clear risk that a literal construction of Section 16(10) would require disclosure of all privileged material which would support or prejudice the validity of a claim.

We consider it important that the policy of increased transparency (which the Law Society supports) is implemented in such manner as to preserve the essential elements of legal professional privilege, both litigation privilege and legal advice privilege, and we are concerned at the lack of clarity around the extent to which privileged material will be required to be disclosed in accordance with the new statutory provision.

We regard legal professional privilege as an important constitutional protection for all clients (including both insureds and insurers alike) and something which has been repeatedly recognised by the Courts of Ireland (and those of the European Union).

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) and to bring some balance to the issue.

We would very much appreciate the opportunity to engage with the Commission in respect of this important matter of principle and look forward to hearing from you in that regard.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'James Cahill', with a long horizontal flourish extending to the right.

James Cahill
President