



Bill Digest

Personal Injuries Assessment Board (Amendment) (No.2) Bill 2018 Bill No. 97 of 2018

Finn Keyes, Parliamentary Researcher (Law)



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Abstract

The *Personal Injuries Assessment Board (Amendment) (No.2) Bill 2018* seeks to reform the process used by the Personal Injuries Assessment Board in receiving and assessing personal injury claims. It makes various amendments to the *Personal Injuries Assessment Board Act 2003* to effect these reforms.

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Bill Digest- Personal Injuries Assessment Board (Amendment) (No. 2) Bill 2018

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Executive Summary

The Bill proposes reforms intended to improve the PIAB process and to encourage cooperation with the Board. Some of the reforms proposed in the Bill were born out of the recommendations of the Cost of Insurance Working Group in a report published in January 2017.¹ The Report noted issues in the PIAB process that were contributing to the rising cost of insurance and recommended reforms accordingly. This summary sets out some of the key reforms proposed by the Bill. They are each discussed in more detail in the Principal Provisions section of this Digest.

Consequences for non-compliance with requests of assessors

One issue identified by the Cost of Insurance Working Group is the failure of claimants to comply with PIAB requests for further documentation and independent medical assessments. The Bill proposes in section 8 to incentivise full cooperation with the Board by directing courts in any subsequent proceedings to have regard to a failure to cooperate in the determination of costs. That is, where a case proceeds to a court following a PIAB process in which either party fails to respond to PIAB's requests for independent medical assessment or further documentation, a court is to be empowered to make an adverse costs order in respect of the offending party.

Preliminary notification

Section 2 of the Bill proposes an amendment to the 2003 Act such that PIAB will not issue a formal notification to the respondent (the person against whom liability is alleged) until the prescribed fee and full medical report are received by the Board. Where an application has been received, but without the full fee and medical report, the Board may issue a preliminary notification to the respondent. This amendment will allow a respondent to consider the full facts before making a decision on whether to contest liability or consent to assessment by PIAB.

¹ Cost of Insurance Working Group, [Report on the Cost of Motor Insurance](#). (2017)

Clarification of issues relating to the Statute of Limitations

Difficulties have arisen in case law² with respect to the disapplication of the Statute of Limitations³ during the course of a PIAB assessment. Particular issues have arisen where respondents are added at a later date to a claim. This gave rise to a lack of clarity as to whether the limitation should be paused from the date of the original application or from the time at which the further respondent was added.

The proposed amendment in section 7 of the Bill will clarify that the Statute of Limitations will be disapplied as against any individual respondent from the time they are added to the claim and for six months following the issuing of an authorisation. That is, the Statute will be disapplied as against:

- a. The original respondent, from the time of the original application;
- b. The additional respondent, from the time they are added to the claim.

This amendment will clarify the operation of the Statute of Limitations in cases where additional respondents are added to the claim at a later date.

Other important provisions

The Bill also proposes, in section 11, to amend the section of the 2003 Act dealing with the composition of the Board. It proposes to remove the power of IBEC and ICTU to nominate members to the Board. This is intended free up places on the Board for appointments via public competition and the Public Appointments Service. Section 9 of the Bill also proposes to place a new statutory requirement on PIAB to publish a revised Book of Quantum at least once every three years.

² See [Renehan v T&S Taverns Ltd \[2015\] IESC 8](#).

³ The operation of the Statute of Limitations is discussed at p. 14 of this Digest.

Introduction

The [*Personal Injuries Assessment Board \(Amendment\) \(No.2\) Bill 2018*](#) proposes a number of amendments to the [*Personal Injuries Assessment Board Act 2003*](#) necessary to give effect to certain reforms of the Board's process. The Personal Injuries Assessment Board (PIAB) provides an efficient and low-cost alternative to dispute resolution for personal injuries claims. PIAB has assessed more than 120,000 cases since its inception in 2004⁴ and is a significant feature of the country's legal landscape. While PIAB can broadly be regarded as a law reform success story, there are issues that have arisen that require amendments to PIAB's governing legislation, the 2003 Act. This Bill Digest will set out the general background to the establishment of PIAB and outline its process before setting out the areas that have been identified as in need of reform. The Digest will then examine the reforms proposed in the Bill.

The Joint Committee on Business, Enterprise and Innovation was briefed by officials from the Department on the General Scheme of the Bill. The Committee decided on November 7th 2017 that pre-legislative scrutiny was not required. The Bill was published on August 13th 2018.⁵ Announcing the Bill, Minister Heather Humphreys said:⁶

“The PIAB model is a positive one as it delivers compensation faster, with lower costs and predictable outcomes. The strengthening of the PIAB model, along with the work of the Personal Injuries Commission, and the complementary work of the Cost of Insurance Working Group will lead to the delivery of benefits for both businesses and consumers.”

⁴ PIAB, [*Annual Report 2017*](#).

⁵ Department of Business, Enterprise and Innovation, “*Minister Humphreys announces the publication of the Personal Injuries Assessment Board (Amendment) (No. 2) Bill 2018*” available at <https://dbei.gov.ie/en/News-And-Events/Department-News/2018/August/13082018a.html>.

⁶ *Ibid.*

Background to the Personal Injuries Assessment Board

The Personal Injuries Assessment Board (PIAB) is an independent statutory body that was established under the *Personal Injuries Assessment Board Act 2003* (the 2003 Act).⁷ It commenced operations in the following year. The reforms implemented by the 2003 Act were a response to concerns that a “compo culture” akin to that prevalent in the United States had taken hold in the early 2000s.⁸ It was perceived that high awards in the courts were incentivising dubious claims and undermining the integrity of the system. This in turn, it was argued, drove up the cost of insurance premiums, as insurance companies had to contest an increasing number of claims through the expensive court process. This cost was, it was argued, being passed on to consumers in their insurance premiums. The reforms therefore sought to have the majority of personal injury claims dealt with outside the courts via a less expensive and less adversarial process.

Under the process established by the 2003 Act, claimants must first submit a personal injuries claim to the Personal Injuries Assessment Board. If liability is not disputed by the person against whom the claim is being made, PIAB makes an assessment of compensation, which either party can then accept or reject. If one of the parties rejects the assessment, or liability is disputed at the outset, PIAB issues an “authorisation” allowing the case to proceed to court. No personal injuries claim can be taken in the courts without such an authorisation from PIAB.⁹

The PIAB process constitutes a significant intervention by the State into the settlement of personal injuries disputes between private parties, disputes which would otherwise simply be fought out in the courts. It does not, however, go as far as some international comparisons, such as the New Zealand Accident Compensation Scheme, which abolished entirely the notion of fault-based liability for accidental injury. The New Zealand scheme instead simply provides lump-sum payments to those who have been injured in accidents, paid for by a national levy.¹⁰

⁷ Text of the *Personal Injuries Assessment Board Act 2003* (as amended) available [here](#).

⁸ McMahon & Binchy, *Law of Torts* (4th ed. Bloomsbury, 2013) p. 61.

⁹ This is subject to certain exceptions, most importantly in the case of medical negligence claims. These exceptions are discussed below.

¹⁰ See New Zealand Accident Compensation Corporation. <https://www.acc.co.nz/>.

The PIAB process

The objective of PIAB is to provide a quick and inexpensive means of resolving claims for personal injuries in cases where liability is not disputed. PIAB also awards compensation to persons affected by certain fatal accidents.¹¹ PIAB was introduced to accelerate the delivery of compensation in these cases; to provide greater predictability to the quantum of damages awarded; and to reduce the cost – particularly in relation to litigation and legal services – of processing claims. In his speech introducing the 2003 Act, the then Minister of State at the Department of Enterprise, Trade and Employment, Frank Fahey TD said that PIAB would help to reduce the cost of insurance premiums and so assist both businesses and consumers.¹²

“It is widely accepted that litigation costs add on average in excess of 40% to the cost of compensation, which has contributed to the high cost of insurance and the cost of claims against the growing self-insured sector, including the State. These costs are a threat to the health of the economy, job security and competitiveness in an enlarged European market. By eliminating the need for litigation costs, where legal issues are not in dispute, the PIAB will significantly reduce the cost of delivering compensation to the benefit of all consumers. The PIAB will offer a lower cost and speedier means of finalising genuine personal injury claims than the current litigation system.”

The types of claim that come within PIAB’s remit are defined by the 2003 Act.¹³ A claimant may lodge a claim with PIAB for personal injuries under three main classes of liability:

- employer’s liability;
- motor liability; and
- public liability.¹⁴

The 2003 Act excludes certain types of personal injury claims that are subject to international regulation or conventions, such as those arising from air and maritime

¹¹ Section 48 of the *Civil Liability Act 1961* vests the power to take an action in respect of fatal injury in a dependant of the deceased person. This person can make an application to PIAB.

¹² Dáil Éireann, Debate on Second Stage of *Personal Injuries Assessment Board Bill 2003*, (27 November 2003), available [here](#).

¹³ 2003 Act, sections 3, 3A and 4.

¹⁴ Public liability refers to the liability of a party to claims by members of the public. It often involves slips, trips or falls in public places such as roads and pathways, but also supermarkets and restaurants etc. An organisation dealing with the public usually takes out public liability insurance to protect itself against such claims from members of the public.

accidents.¹⁵ A significant exclusion relates to claims for personal injury arising from the provision of health services, such as medical negligence.¹⁶

A basic premise of the PIAB process is that it operates as a filtering mechanism for personal injuries claims; a claimant may not institute court proceedings for personal injuries of the types that come within PIAB's remit unless PIAB issues an 'authorisation' permitting him or her to do so.¹⁷ After a claimant notifies PIAB of his or her claim, PIAB sends details of it to the respondent (the person against whom liability is alleged).

If the respondent does not wish PIAB to deal with a claim – because, for example, he or she disputes liability – PIAB will issue an authorisation allowing to the claimant to bring the case to court.¹⁸ The average time taken to process a claim through PIAB is a little over 7 months, as opposed to several years through the court process.¹⁹

If the respondent agrees to proceed under the PIAB scheme, the claim proceeds to assessment. However, the 2003 Act allows PIAB to decline to hear a claim if, for example; it is of a type that has too few precedents to allow PIAB to produce an assessment; the case is too complex, or for other similar reasons. In such cases, PIAB directly issues an authorisation so that the case can proceed to court.²⁰

PIAB assesses personal injury claims by reviewing documentary evidence such as medical reports, and by reference to the [Book of Quantum](#), a set of guidelines on amounts of compensation for various types of personal injury. The assessors may request further information and independent medical examinations.²¹ Based on these, PIAB produces an assessment. A PIAB assessment includes an assessment of damages of two types. These are "General Damages" and "Special Damages".

¹⁵ Section 3A of the 2003 Act.

¹⁶ 2003 Act, section 3(d).

¹⁷ 2003 Act, section 12.

¹⁸ 2003 Act, section 14.

¹⁹ PIAB [Annual Report 2017](#). PIAB is obliged under the 2003 Act to process claims within a 9 month timeframe. See section 49(2) of the 2003 Act.

²⁰ 2003 Act, section 17.

²¹ Sections 23 and 24.

Box: Explainer – General Damages and Special Damages

General Damages: General damages compensate for the pain, suffering, distress and inconvenience that the plaintiff has endured, and is likely to endure into the future.

Special Damages: Special damages compensate for specific, quantifiable items of loss incurred by the plaintiff, such as medical expenses.

PIAB's assessment is then submitted to the claimant and respondent(s) for them to consider. If either party chooses not to accept the assessed award, PIAB issues an authorisation so that the matter can be resolved by the courts.²² However, if the parties accept PIAB's assessment, it becomes binding on them.²³

In general, the limitation period for instituting court proceedings for personal injuries is only two years. The 2003 Act suspends the limitation period while a claim is being processed. The suspension runs from the date when a claimant lodges an application with PIAB until six months after the date when PIAB issues an authorisation.²⁴

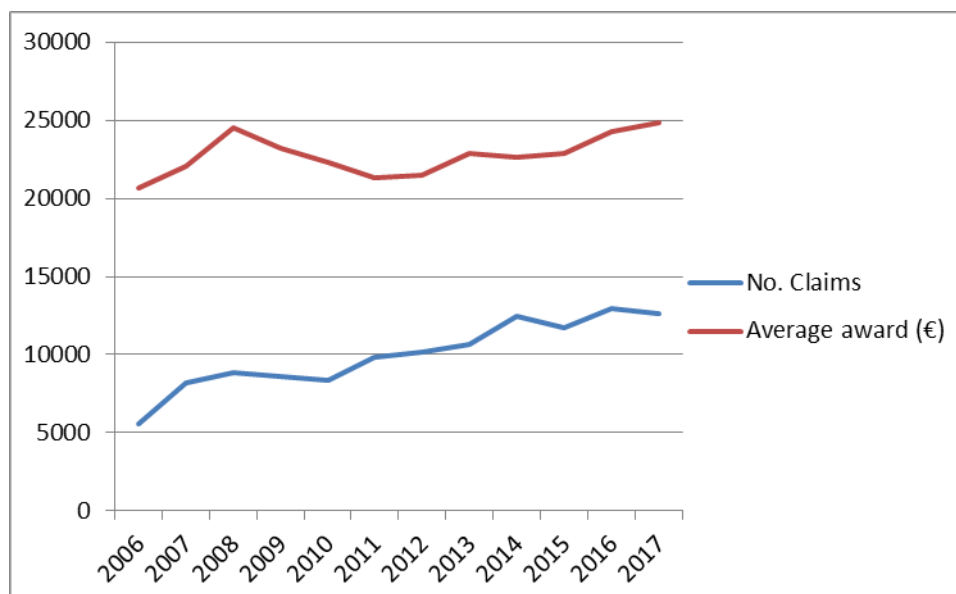
Since its establishment, the number of claims processed annually by PIAB has increased from 5,573 in 2006 to 12,663 in 2017. During that time, the average value of awards increased from €20,685 to €24,879. Figure 1 (overleaf), showing the trends in these figures, indicates that the average value of awards has remained relatively stable over time while the number of claims processed has more than doubled. The total value of all awards made in 2017 was €315.04 million.

²² 2003 Act, section 32.

²³ 2003 Act, section 33.

²⁴ Section 50 of the 2003 Act (inserted by section 56(1)(d) of the *Civil Law (Miscellaneous Provisions) Act 2011*).

Figure 1: PIAB Claims and Average Awards, (2006-2017)



Data: PIAB Annual Reports, [2016](#), [2017](#)

What is a personal injuries claim?

As the PIAB process is limited to personal injuries claims,²⁵ this section will discuss briefly claims that come under this rubric. “Personal injury” is defined in section 2 of the *Civil Liability Act 1961* as including “any disease and any impairment of a person’s physical or mental condition”. Essentially, a personal injury is any injury to someone’s person, as opposed to his or her property, assets or reputation. A personal injuries claim is therefore any civil action brought seeking compensation for injury to one’s person. While the 1961 Act’s definition applies to the 2003 Act,²⁶ it does not fully reflect what is a valid claim for the purposes of the 2003 Act.

First, it somewhat under-represents the scope of a personal injuries claim for the purposes of the Act. A person can also claim for injury to property where both their person and the property have been injured as a result of the same wrong.²⁷

²⁵ Section 12 of the 2003 Act prevents the bringing of an action for a claim to which the Act applies absent an authorisation from the Board.

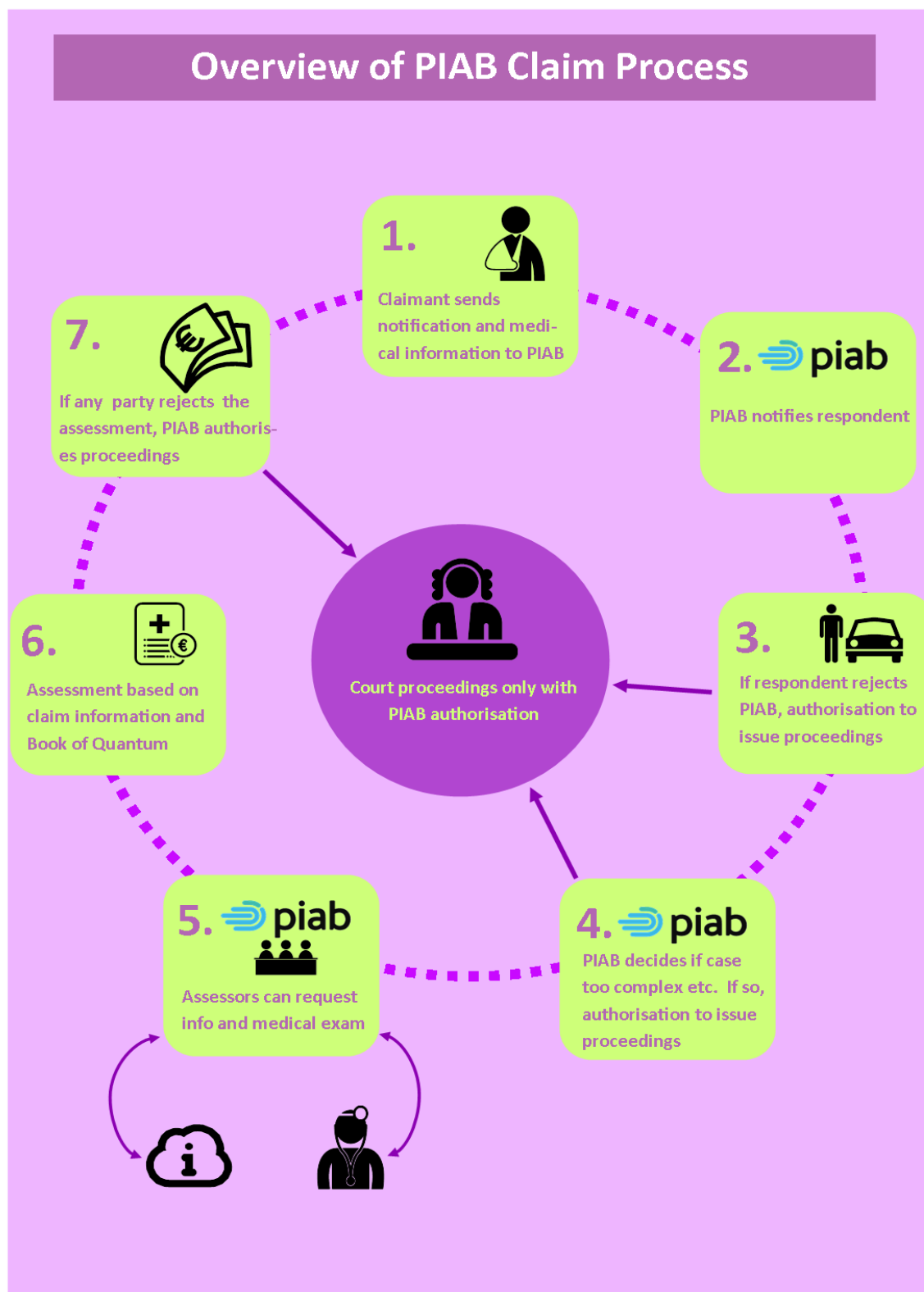
²⁶ Section 4 of the 2003 Act, under the definition of “personal injury”.

²⁷ Section 4 of the 2003 Act, under the definition of “civil action”.

Second, it somewhat over-represents the scope of a personal injuries claim; PIAB does not consider claims for medical negligence, claims for compensation under the *Garda Síochána (Compensation) Acts 1941-1945*, or claims arising under the European Convention on Human Rights or the Constitution.²⁸

²⁸ Section 4 of the 2003 Act, under the definition of “civil action”. The Act also sets down in section 3 a number of specified civil actions that come within the scope of PIAB. They include; (a) a civil action in negligence by an employee against his or her employer; (b) a civil action arising out of the use of motorised vehicle, and; (c) a civil action arising out of a the use or occupation of land.

Infographic: Current PIAB Claim Process



Background to the Bill

This Bill comes on foot of an extensive consultative process conducted by the Department of Business, Enterprise and Innovation, and a report from the Cost of Insurance Working Group in January 2017.²⁹ Broadly, the report recommended maximising the PIAB model so that more claims are settled there rather than in court. The PIAB process is much less costly than that of the courts and this has effects on the cost of insurance.³⁰ Specifically, it sought reforms to address the issue of parties failing to attend independent medical assessments arranged by PIAB, and withholding documents. It also sought limitations on the ability of claimants to adduce new evidence not presented to PIAB at subsequent court proceedings, and to provide pre-action protocols³¹ in personal injury cases.³²

Box: Recommendations of the Cost of Insurance Working Group for maximising the PIAB process:

Recommendation 15: *Assess, within the current review of the PIAB legislation, cases of non-cooperation such as non-attendance at medicals and refusal to provide details of special damages. Measures to address non-cooperation with the Board are provided for in section 8 of the Bill.*

Recommendation 16: *Ascertain and set out the measures necessary to implement Pre-Action Protocols for personal injury cases. This is not addressed in this Bill. Separate legislation to provide for pre-action protocols is being prepared by the Department of Justice and Equality.*

Recommendation 17: *Fully assess viable options for referring rejected PIAB assessments into a judicial process on an appeal basis so that the facts established relating to a personal injury in the PIAB process do not require to be re-established. This is not provided for in the Bill. Further research undertaken by the Working Group indicated this would not be feasible due to constitutional concerns. This is discussed further at p. 25 of this Digest.*

Source: Cost of Insurance Working Group, [Report on the Cost of Motor Insurance](#) p. 113.

²⁹ Cost of Insurance Working Group, [Report on the Cost of Motor Insurance](#).

³⁰ Publishing the General Scheme, Minister Frances Fitzgerald noted that “[t]he cost of settling personal injury claims is recognised as being a major factor in contributing to those [the rising cost of insurance] costs.” Press release available at <https://dbei.gov.ie/en/News-And-Events/Department-News/2017/June/30062017.html>

³¹ Pre-action protocols set out certain obligations that parties must fulfil before their case comes to court. They are designed to encourage settlement of disputes or at least to limit the amount of court time a case takes up. Pre-action protocols may include obligations to disclose medical reports and other relevant documents, and to clarify the issues to be determined. A useful primer on pre-action protocols is provided by the State Claims Agency at <http://stateclaims.ie/ezone/pre-action-protocol-for-clinical-negligence-claims/>.

³² *Ibid* at p.113.

In the Government press release announcing this legislation, the need to address the increasing cost of insurance was identified as a primary motivating factor behind these amendments.³³ Publishing the General Scheme, the then Tánaiste and Minister for Business, Enterprise and Innovation Frances Fitzgerald said:

“This is another important step in our efforts to address the increasing cost of insurance. The cost of settling personal injury claims is recognised as being a major factor in contributing to those costs. The objective of this Bill is to further strengthen the low-cost claims settlement model which the Personal Injuries Assessment Board provides. By encouraging more claims to be settled at an earlier stage, we can take many costs out of the settlement process. These savings should ultimately benefit the consumer through lower insurance costs.”³⁴

Announcing the publication of the Bill, Minister Heather Humphreys spoke of the importance of the PIAB model, noting that “it delivers compensation faster, with lower costs and predictable outcomes.”³⁵ The aim of the Bill is to strengthen the PIAB model by responding to issues that have arisen in its operation over the past several years.

Issues with the existing framework

One issue that has been identified with the PIAB process is with claimant’s failing to attend medical examinations organised by PIAB. These examinations are ordered in addition to medical reports provided by the claimant and are intended to ensure independence and accuracy. The Board estimates that as many as 10% of these appointments are not attended,³⁶ which inhibits the Board’s ability to produce efficient and accurate assessments. It is suggested that this is often a tactic to stymie the process and ensure the claim moves on to court.

Issues have arisen in relation to the process for notifying respondents of a claim against them. Under section 13 of the 2003 Act, as it currently stands, the Board must issue a formal notification to the respondent as soon as practicable after receiving an application for assessment under section 11. However, claimants often submit applications absent the required medical report and/or the prescribed fee.³⁷ Some confusion has arisen as to

³³ Press release available at <https://dbei.gov.ie/en/News-And-Events/Department-News/2017/June/30062017.html>.

³⁴ *Ibid.*

³⁵ Department of Business, Enterprise and Innovation, ‘[Minister Humphreys announces the publication of the Personal Injuries Assessment Board \(Amendment\) \(No.2\) Bill 2018](#)’

³⁶ This figure is quoted in the [General Scheme for a Personal Injuries Assessment Board Bill 2017](#), in the explanatory note under Head 7.

³⁷ The various documents, reports and fees that must accompany an application to PIAB are set out in the [Personal Injuries Assessment Board Rules 2004](#) (S.I. 219 of 2004).

whether a formal notification should issue to a respondent on receipt of a bare application, or if the Board should wait for the accompanying medical report and fee. This can be significant as a respondent may require a medical report in order to make a fully informed decision on whether or not to contest liability.

The issue of when the application is complete i.e. whether before or after the receipt of accompanying medical report and fee, is also of importance in relation to the Statute of Limitations. The courts have had to adjudicate on a number of occasions as to whether the Statute of Limitations is paused on the receipt of the bare application, or from when all the documents are received. The courts have held that a bare application is still an application within the meaning of the Act and the limitation period will be paused from its receipt onwards.³⁸

The Statute of Limitations

The [Statute of Limitations 1957](#), as amended, and associated pieces of legislation, impose time limits within which a civil claim can be brought. It is a basic element of justice that claims should not be excessively delayed; memories may fade and evidence become lost. It is also in the interests of a defendant that he or she not have the threat of litigation hanging over them for longer than is necessary. The statutory limitation period varies depending on the nature of the cause of action.

- In respect of contractual claims, it is 6 years.
- For personal injuries, it is 2 years;
- Defamation actions must be brought within 1 year, or up to 2 years at the discretion of the court.

The limitation period runs from “the date on which the cause of action accrued”, which is generally the date on which the injury occurred. So, for example, if a litigant brought a claim to recover a contractual debt 6 years and one day after this date, a defendant can plead the Statute as a defence. In such circumstances, the claim is described as “statute-barred”.

The [Personal Injuries Assessment Board Act 2003](#) imposes important conditions on the application of the Statute of Limitations to personal injuries actions. The Act provides that upon making an application to PIAB, the limitation period is paused and continues to be so throughout the PIAB process and for 6 months following the issue of an “authorisation” to bring the claim to court, should one be issued.

³⁸ See [Kiernan v J. Brunkard Electrical Limited \[2011\] IEHC 448](#).

Issues relating to the application, or rather the disapplication, of the Statute of Limitations under the 2003 Act have also arisen in case law. Personal injuries actions are subject to a relatively short limitation period of 2 years; that is a claimant must bring a case to court within two years or their claim will become statute barred.³⁹ As all personal injuries claims must now be filtered through PIAB, the 2003 Act provides for a suspension of this limitation period while it considers the claim. The Act provides that the limitation period will be paused from the moment the application is received until 6 months after an authorisation permitting a case to be brought is issued.⁴⁰

While this provision is sensible and straightforward, significant confusion arose in the *Renehan* case, where a claimant sought to amend the authorisation to add an entirely different respondent.⁴¹ The case concerned an injury suffered by a security guard outside a night club. The corporate structure of the organisation that owned the club was somewhat complex and the claimant initially made the claim against one company, before realising that a different company actually owned the club.

Section 46(3) of the 2003 Act allows the Board to add a respondent to an authorisation where “through genuine oversight or ignorance of all the facts” the claimant has omitted that respondent from the claim. PIAB, under section 46(3), allowed the claimant to issue proceedings against the additional respondent. He subsequently brought proceedings that were ostensibly statute-barred.⁴² The claimant argued that the period of disapplication should be extended to account for the amended authorisation.

The second respondent argued that the claim against him was statute-barred as no application was made against him before the limitation period elapsed. The Supreme Court held that section 46(3) could act to extend the disapplication of limitation period and allow a claim to be brought against the second respondent.

The Bill proposes to amend section 50 to definitively clarify the issue. The relevant section is discussed in detail in the Principal Provisions section.

³⁹ Section 7 of the *Civil Liability Act 1961*.

⁴⁰ Section 50 of the 2003 Act.

⁴¹ [Renehan v T&S Taverns Ltd t/a The Red Cow Inn \[2015\] IESC 8](#)

⁴² Estimating for a suspension period running from the initial application to 6 months following the original authorisation.

Private Members' Bill

This particular issue of failure to attend medical examinations and provide further documentation to PIAB was the subject of a Private Members' Bill introduced in the Dáil in June of this year.⁴³

Deputy Michael McGrath, in a speech in the Dáil seeking leave to introduce the [*Personal Injuries Assessment Board \(Amendment\) Bill 2018*](#), described the problem as follows:

“...the current system is being undermined. It is being undermined by some claimants who see the PIAB process as simply a rubber stamp. They see higher pay-outs in the courts and, therefore, do not co-operate in any way with the PIAB process... [t]here is currently no penalty or disincentive for a claimant who fails to attend this important, independent medical examination. This means that the board needs to make an assessment lacking critical information on the injuries obtained. More often than not, the assessment is rejected and legal proceedings are commenced.”⁴⁴

Deputy McGrath's Bill seeks primarily to address this particular issue. It proposes that a court hearing a personal injuries case have regard to the failure of the respondent to provide further information, or the failure of the claimant to attend a medical examination or to provide further information, in determining the admissibility of evidence and the award of costs.⁴⁵ The Bill also seeks to amend section 54 of the 2003 Act to provide for a requirement to revise the Book of Quantum once every three years. The Government Bill also addresses these issues, albeit it approaches the consequences on failure to attend medical examinations slightly differently.

The Bill was not opposed by the Government at First Stage and is due for Second Stage in Dáil Éireann.

The Second and Final Report of the Personal Injuries Commission

It should be noted that since the publication of the Government's Bill, the Personal Injuries Commission has published its second and final report. The establishment of the Commission was a key recommendation of the Cost of Insurance Working Group. The Commission undertook a benchmarking of Irish personal injury awards by international

⁴³ [*Personal Injuries Assessment Board \(Amendment\) Bill 2018*](#).

⁴⁴ Dáil Debates, 4th July 2018, available at <https://www.oireachtas.ie/en/debates/debate/dail/2018-07-04/22/>.

⁴⁵ Section 3 of the Bill.

comparison, as well as comparing alternative compensation and resolution models internationally. The Report noted that Irish personal injury awards are high by European comparison; general damages awarded in this jurisdiction are 4.4 times that of England and Wales.⁴⁶

The Report makes a number of recommendations germane to this Bill. In particular, it recommends that the Judicial Council, when established, should assume responsibility for the review of the Book of Quantum. It recommends that the *Personal Injuries Assessment Board Act 2003* be amended to reflect this.

It further recommends that the Law Reform Commission undertake research to determine the constitutionality of a possible legislative cap on general damages available in personal injury cases. It also supports the recommendation of the Cost of Insurance Working Group in relation to the establishment of a dedicated 'Irish Garda Fraud Investigation Bureau' to investigate and tackle insurance fraud and exaggerated personal injury claims.

⁴⁶ Personal Injuries Commission, [Second and Final Report](#), p. 4

Table of Provisions

The table below summarises the provisions of the [Personal Injuries Assessment Board \(Amendment\)\(No.2\) Bill 2018](#). For further exploration of the key sections in the Bill, see the Principal Provisions section of this Bill Digest.

Section	Title	Effect
1	Definition	This section provides that “Principal Act” refers to the <i>Personal Injuries Assessment Board Act 2003</i> .
2	Amendment of section 13 of Principal Act	This section substitutes section 13(1) of the 2003 Act. The revised subsection provides that the Board may issue a “preliminary notice” to the person against whom liability is alleged where an application has been made but is not yet accompanied by a medical report and/or the requisite fee.
3	Amendment of section 14 of Principal Act	This section makes consequential amendments to section 14 of the 2003 Act necessary to reflect the amendments contained in section 2. It substitutes reference to “a notice served under section 13(1)(b)” for the existing text of a “notice under section 13”.
4	Amendment of section 17 of the Principal Act	This section adds several subparagraphs to section 17(1)(b) of the 2003 Act. These subparagraphs extend the circumstances under which the Board can decline to make an assessment.
5	Amendment of section 22 of Principal Act	This section proposes to empower the Board to levy different charges for the submission of

		documents electronically. It also empowers the Board to levy different charges at different stages of the process.
6	Amendment of section 49 of Principal Act	This section makes consequential amendments to section 49 of the 2003 Act necessary to reflect the amendments contained in section 2. It substitutes reference to “a notice served under section 13(1)(b)” for the existing text of a “notice under section 13”.
7	Amendment of section 50 of Principal Act	This section proposes to amend section 50 to clarify certain issues with the suspension of the Statute of Limitations that have arisen in case law.
8	Costs in proceedings where claimant or respondent does not comply with request of assessors	This section proposes that to empower courts to impose costs on a party who has not complied with certain requests of assessors in the PIAB process, including requests for independent medical reports.
9	Amendment of section 54 of Principal Act	This section proposes to amend the 2003 Act to require that the Board update the Book of Quantum every 3 years, or sooner if the Board thinks it necessary. The Book of Quantum provides a guide to judges, and to the Board, as to the generally appropriate levels of damages to be awarded in respect of various personal injuries.
10	Amendment of section 54A of the Principal Act	This section extends the power of the Board to compel persons and bodies to provide information and documents. This amendment will give the Board power to obtain information from any person or body for the purpose of preparing the Book of Quantum and for collecting and analysing data in relation to amounts awarded or agreed in settlement of personal injuries actions.

11	Amendment of section 56 of Principal Act	<p>This section substitutes section 56(5) of the 2003 Act. In substituting the section, it removes the power of IBEC and ICTU to nominate members to the Board. In doing so, this will free up three places on the Board to be filled through public competition.</p> <p>The Explanatory Memorandum to the Bill states that this is “to reflect Government policy that appointments to the Board of non-commercial bodies are appointed from expressions of interest with the desired skills and expertise, following a Public Appointments Service process.”</p>
12	Amendment of section 57 of the Principal Act	<p>This section inserts new subsections into section 57 of the 2003 Act. The subsections provide that a member of the Board cannot serve more than a maximum of 10 years. It also prescribes that members of Dáil or Seanad Éireann, as well as members of the European Parliament, cannot also serve as members of the Board.</p>
13	Remittance by Board of moneys to Minister	<p>This section inserts a new section 74A into the 2003 Act. It provides that the Minister may, with the consent of the Minister for Public Expenditure and Reform, authorise the Board to retain a specified sum of money for the purpose of the performance of its functions.</p>
14	Amendment of section 79 of Principal Act	<p>This section amends section 79 of the 2003 Act. It provides that the Board may serve a notice or document using electronic means, where the person has consented to the notice or documents</p>

		being served in this manner. It also provides that the Board may serve a notice or a document by way of document exchange service where the party has so consented.
15	Short title, commencement and collective citation	Standard provision defining the short title of the Bill and provides for commencement by Ministerial order. Different sections of the Act may be commenced at different times.

Principal Provisions

Preliminary notification

Section 2 proposes an amendment to section 13 of the 2003 Act so that PIAB will not issue a formal notification to the respondent (the person against whom liability is alleged) until the prescribed fee and full medical report are received by the Board. Where an application has been received, but without the full fee and medical report, the Board **may** issue a preliminary notification to the respondent. The use of the word “may” suggests that it will be within the Board’s discretion to determine whether or not such a preliminary notification should be issued.

The respondent will not be required to consider consent or rejection of the assessment process at the stage of a preliminary notification. When the medical report and the fee have been received, a formal notification will issue to the respondent, who can then decide whether to consent to or reject assessment by PIAB. This amendment will allow a respondent to consider the full facts before making a decision on whether to contest liability or consent to assessment by PIAB. The General Scheme stated that this provision would “balance the rights of the claimant and the respondent.”

As noted above, the courts have had to adjudicate on a number of occasions as to whether the Statute of Limitations is paused on the receipt of the bare application, or from when all the documents are received. The courts have held that a simple application absent the medical report and fee is an application for the purposes of pausing the Statute of Limitations under section 50 of the 2003 Act. The amendment will not affect this. Issues relating to the Statute of Limitations are dealt with under section 7 of the Bill.

Consequences for non-compliance with requests of assessors

As noted above, one issue that has been identified as a problem is claimants who fail to attend medical examinations organised by PIAB.⁴⁷ These examinations are ordered in addition to medical reports provided by the claimant and are intended to ensure the

⁴⁷ See discussion above of the views expressed by the Cost of Insurance Working Group.

independence and accuracy of medical assessments of injury. The Board estimates that as many as 10% of these appointments are not attended,⁴⁸ which inhibits the Board's ability to produce efficient and accurate assessments. It is suggested that this is often a tactic to stymie the process and ensure the claim moves on to court, though this is not a universally held view. John McCarthy, a solicitor with experience in the area, suggested in an opinion piece for the Journal.ie that:⁴⁹

“[p]eople can miss appointments for all kinds of reasons and it is quite a leap to suggest that all of these non-attendances arise out of a deliberate attempt to frustrate or undermine the personal injury claims process. It is far more likely that deliberate non-attendance accounts for only a small minority of these cases, in which case the numbers we are talking about here are small and have no material impact on the overall claims process.”

In order to address this perceived issue, it is proposed that a new section 51C be inserted into the 2003 Act by section 8 of the Bill. The new section states that a court may have regard to the failure of either party to respond to particular requests of the assessors in awarding costs in any subsequent proceedings. The section lists the following as circumstances under which a court may consider an adverse costs order:

“(a) the assessors have requested the claimant to furnish to them additional information or documents ... and the claimant has not complied with the request,

(b) the assessors have requested the respondent or respondents to furnish to them additional information or documents...and the respondent or respondents has or have not complied with that request,

(c) the assessors have requested the claimant or the respondent or respondents to provide assistance to retained experts or furnish information or documents or co-operate with those experts ... and the claimant or the respondent or respondents, as appropriate, has or have not complied with that request, or

(d) the assessors have requested the claimant to submit himself or herself to a medical examination ... and the claimant has not submitted himself or herself to the medical examination.”

⁴⁸ This figure is quoted in the General Scheme for a Personal Injuries Assessment Board Bill 2017, in the explanatory note under Head 7.

⁴⁹ See <http://www.thejournal.ie/readme/opinion-genuine-personal-injury-claimants-should-not-be-penalised-by-new-regulations-3550619-Aug2017/>.

In the circumstances outlined, a court can, within its discretion, make an order for costs that is adverse to the offending party. A court can order the offending party to pay all or part of the other side's costs where subsections (a), (c), (d) apply. At a minimum, the section suggests that a court not make an order for an award of costs *in favour* of an offending party where any of the subsections apply.⁵⁰

The General Scheme initially proposed to provide that a court could have regard to failure to respond to requests for further information, documents or medical reports in determining the admissibility of evidence in subsequent proceedings. In particular, Head 7 provided that a court should have regard to a failure to attend an independent medical assessment in determining what medical evidence was admissible. The Costs of Insurance Working Group noted that claimants could introduce wholly new evidence when the claim proceeded to court, evidence that they withheld from PIAB.⁵¹ This proposal was therefore designed to limit as far as possible the evidence admissible at court to that which PIAB had had the benefit of examining.

However, it was decided that a proposal to condition a court's discretion as to the admissibility of evidence might pose constitutional issues having regard to Article 34.1 and the reservation of the administration of justice to the courts and the constitutional principle of the Separation of Powers.⁵² This principle is further reflected in the language adopted in this provision, which is more deferential in tone, and the express reservation of the court's discretion to determine orders for costs notwithstanding these provisions.

⁵⁰ Where subsection (b) of section 51C(1) applies, the case of a respondent who has failed to comply with a request for further information or documents, a court may, under section 51C(2) decide not to make an award of costs in their favour (i.e. an order to the other side to pay the respondent's costs) but the court is equally not directed to make an award against them (i.e. an order for the respondent to pay the claimant's costs). In relation to the other circumstances outlined in subsections (a), (c), (d), a court may, under section 51C(2)(b), within its discretion, make an order directing the offending party to pay all or part of the other side's costs.

⁵¹ Cost of Insurance Working Group, [Report on the Cost of Motor Insurance](#), p. 113.

⁵² The Cost of Insurance Working Group published a separate report in January 2018 that considered this issue in detail. The Report reached the conclusion that directions to the judiciary as to the admissibility of evidence would pose constitutional issues for the reasons listed. See Cost of Insurance Working Group, [Report on the Cost of Employer and Public Liability Insurance](#), Chapter 9. The author also understands from communication with the Department that advice was received from the Office of the Attorney General that recommended against making directions as to the admissibility of evidence.

Clarification of issues relating to the Statute of Limitations

As discussed above, difficulties have arisen in case law with respect to the application, or disapplication, of the Statute of Limitations on foot of a PIAB application. In *Rehehan v T&S Taverns Ltd*,⁵³ an authorisation was issued in respect of a particular respondent, but it subsequently emerged that a different respondent was more appropriate. The case concerned a security guard who was injured in the course of his employment at a night club. He sought to bring a claim to PIAB in respect of this injury but owing to the complex corporate structure of the night club, he named the wrong company as a respondent.

Section 46(3) of the 2003 Act allows the Board to issue a further authorisation and add a respondent where “through genuine oversight or ignorance of all the facts” the claimant has omitted that respondent from the claim. PIAB, under section 46(3), allowed the claimant to issue proceedings against the additional respondent. He subsequently brought proceedings that (estimating for a suspension period running from the initial application to 6 months following the original authorisation) were ostensibly statute-barred. However, the claimant argued that the period of disapplication should be extended to account for the amended authorisation. The dispute came to be decided on by the Supreme Court.

The Supreme Court had to determine what effect section 46(3) has on the suspension of the Statute of Limitations. The Court held in favour of the claimant. It held that the suspension period ran from the time of the initial application to the Board to 6 months following the issuance of the final, additional authorisation. The Court did not find it necessary to decide whether or not this acts to extend the disapplication period in respect of the original respondents, as opposed to just the additional respondent, as that was not in issue in the case before it.

While this can be read as quite a substantial extension of PIAB’s power to suspend the operation of the Statute of Limitations, it avoids an unforgiving application of the Statute of Limitations that would punish small errors and oversights.⁵⁴

⁵³ [2015] IESC 8.

⁵⁴ For discussion of this balance, see Jennings, Scannell & Sheehan, *The Law of Personal Injuries* (2nd ed. Round Hall, 2016) pp. 20-21.

The proposed amendment in section 7 of the Bill will clarify that the Statute of Limitations will be disapplied as against any individual respondent from the time they are added to the claim and for six months following the issuing of an authorisation. That is, the Statute will be disapplied as against:

- a. The original respondent, from the time of the original application;
- b. The additional respondent, from the time they are added to the claim.

This reflects the Supreme Court's judgment, while clarifying the issue the Court left open i.e. the disapplication period will only be extended in respect of the respondent or respondents who are subsequently added under section 46(3) and not the original named respondents.

Extension of circumstances under which the Board can decline to make an assessment

Section 4 of the Bill proposes to amend section 17 of the 2003 Act. Section 17 provides for a listed set of circumstances under which the Board can decline to make an assessment and directly issue an authorisation for the parties to bring the case to court. The circumstances currently include; a situation where there does not exist a sufficient body of relevant case law for the Board to draw on in making an assessment; or where there is a particular degree complexity involved in the case. The Bill proposes to insert four new subparagraphs to the section to extend the circumstances under which the Board can decline to make an assessment. These subparagraphs will provide that the Board can decline as assessment in circumstances where:

- (a) the Board is unable to serve a notice under section 13(1)(b) on the person against whom the claimant alleges liability;
- (b) where the respondent indicates that they intend to reject the assessment of the Board in any event;

- (c) the claim falls within the remit of EU Regulation No. 864/2007 on the law of non-contractual obligations⁵⁵ or;
- (d) the case concerns a claim where a settlement has been negotiated for a minor or a person of unsound mind to be approved by a court.

The General Scheme of the Bill initially proposed a more general discretion for the Board to determine whether or not to make an assessment. However, the Department received advice from the Office of the Attorney General that enumerating specific circumstances in which the discretion applies would constitute best practice.⁵⁶ The Department consulted with PIAB in determining what further circumstances under which the Board can decline to make an assessment should apply.

Incentivising paperless communication with Board

Section 5 of the Bill proposes to amend section 22 of the 2003 Act, which provides for the power of the Board to impose charges on users of the service. The amendment proposes to empower the Minister to make regulations allowing for the imposition of differing levels of charges for the processing of claims, based on the stage of the claim, and on the means by which documents and information are provided to the Board. Significantly, this will allow the Board to impose lesser charges for the processing of claims where documents are submitted entirely by electronic means. It is cheaper for the Board to process claims electronically and therefore it is considered appropriate that this means of interacting with the Board be incentivised and encouraged.

⁵⁵ This Regulation, commonly referred to as “Rome II”, provides a framework for how parties can determine what law to apply where a non-contractual dispute has transnational elements i.e. the act might have occurred in one jurisdiction but the injury in another.

⁵⁶ Personal communication by the author with the Department, 31st October 2018.

Review of Book of Quantum

Section 9 of the Bill proposes to insert a new section 54(1)(ba) into the 2003 Act. This new subparagraph will provide that PIAB will be required to prepare and publish a revised Book of Quantum at least once every 3 years. The Book of Quantum provides a guide to judges, and to the Board, as to the generally appropriate levels of damages to be awarded in respect of various personal injuries.⁵⁷ The Book needs to be updated in order to reflect inflation and changes in the cost of living.

Extension of power of Board to compel the production of documents and information

Section 10 of the Bill proposes to amend section 54A of the 2003 Act. Section 54A was inserted into the 2003 Act by the *Civil Liability and Courts Act 2004*. It provides the Board with the power to require any person, including a Minister or State body, to produce documents or information that the Board may reasonably require to perform its statutory duty to conduct a cost-benefit analysis of legal procedures employed by the State for the awarding of compensation for personal injuries. Section 10 proposes to extend this power. It is proposed that the Board should be empowered to require the production of documents and information it requires in the performance of other statutory functions, including the revision of the Book of Quantum, as provided for in section 9 of this Bill. It also provides that a failure to produce such documents or information to the Board will constitute a criminal offence.

Membership of the Board

The Bill proposes in section 11 and 12 changes to the provisions of the 2003 Act dealing with the membership of the Board. Section 11 proposes to substitute section 56(5) of the Principal Act. In doing so, it will remove the right of the Irish Congress of Trade Unions and the Irish Business and Employers Confederation to nominate members of the Board. At present, the ICTU is empowered to appoint two members, while IBEC is empowered to

⁵⁷ [The Book of Quantum](#) (Dublin, 2016).

appoint one. The amendment is proposed to allow for more Board members to be recruited through the Public Appointments System. This allows persons of particular expertise or suitability to be recruited through public competition.

Section 12 proposes amendments to section 57 of the 2003 Act. These amendments would place conditions on eligibility for membership of the Board. It proposes that a person shall not be a member of the Board for an aggregate period of more than 10 years. This is consistent with the Code of Practice for Governance of State Bodies.⁵⁸ The section further provides that a member of the Board who is nominated as a member of Seanad Éireann, elected to either House of the Oireachtas, the European Parliament, or a local authority, shall on that date cease to be a member of the Board.

Remittance of moneys to the Exchequer

Section 13 of the Bill proposes to insert a new section 74A into the 2003 Act. This new section will govern the remittance of moneys back to the Exchequer, and the circumstances under which the Board can retain the moneys it gathers in. It provides that the Minister can authorise the Board to retain a specified amount of money for the purposes of expenditure on the performance of its functions. It is further provided that the Minister can require the Board to remit moneys in excess of that required for the performance of its functions to the Minister. The Minister is then required to pay such moneys into the Exchequer.

⁵⁸ [Code of Practice for Governance of State Bodies 2016](#), p. 25.



Contact:

Houses of the Oireachtas
Leinster House
Kildare Street
Dublin 2
D02 XR20

www.oireachtas.ie

Tel: +353 (0)1 6183000 or 076 1001700

Twitter: @OireachtasNews

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