



THE BAR
OF IRELAND

The Law Library

Submission by the Council of The Bar of Ireland to the European Commission

Targeted Stakeholder Consultation on the 2020 Rule of Law Report

June 2020

INTRODUCTION

The Council of The Bar of Ireland (“the Council”) is the accredited representative body of the independent referral Bar in Ireland, which consists of members of the Law Library and has a current membership of approximately 2,170 practising barristers. The Bar of Ireland is long established, and its members have acquired a reputation amongst solicitors, clients and members of the public at large as providing representation and advices of the highest professional standards. The principles that barristers are independent, owe an overriding duty to the proper administration of justice and that the interests of their clients are defended fearlessly in accordance with ethical duties are at the heart of the independent referral bar.

SCOPE OF SUBMISSION

The Council has prepared these submissions at the request of the European Commission which is in the process of preparing its first annual report on the Rule of Law, one of the major initiatives of the Commission’s Work Programme for 2020.

The European Commission has invited submissions on the following questions:

1. Is there any assessment on whether the current level of legal fees might hamper access to justice? Which recent measures were taken in this regard? **p.2**
2. Is there any assessment on the needs for legal aid and whether the current system respond to them adequately? **p.7**
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LEGAL FEES

1. Is there any assessment on whether the current level of legal fees might hamper access to justice? Which recent measures were taken in this regard?

Ireland is not found to be a high-cost jurisdiction for legal costs

The *Doing Business* survey of the World Bank Group for 2020 offers a useful benchmark for the comparison of legal costs.¹ While the cost of legal services in other EU Member States can appear an obvious comparator, the fundamental procedural and structural differences between common law and civil law jurisdictions must be accounted for in any meaningful comparison.

It has been estimated that the total cost to the tax payer of providing a court system in a country which operates a broadly common law courts process is approximately one quarter to one third of the costs applicable in a civil law jurisdiction. Clarke J (as he then was), speaking extra-judicially in 2016, explained the reason for this as follows:

“In the common law world, we place a much greater onus on the parties in relation to the fact finding and legal determination aspects of the court’s work. In civil law countries a much greater part of that burden is undertaken by the court itself coupled with research and assistance provided from the court’s own resources. That is why a civil law courts system costs an awful lot more. The saving achieved in the common law world for the taxpayer is at the expense of the transference of a significant part of the burden onto the parties and, in particular, onto those representing them.”

In his capacity as Chief Justice of Ireland, the Honorable Mr. Justice Franke Clarke reiterated these fundamental differences in a recent address to the Legal Aid Board – the independent, publicly funded organisation which provides civil legal aid and advice services to persons unable to afford a solicitor - on the occasion of its 40 year anniversary in January of this year:

“The cost of running the Irish courts system, as per the annual figures produced by the European Commission, show that the Irish taxpayer makes a significantly smaller contribution to running our justice system, when compared with population and GDP, to almost all other countries and is very significantly below most. However, the other countries towards the bottom of the scale are mainly also those operating a common law system. While there may be some difficulty in obtaining exactly parallel figures, it seems to be an almost inescapable conclusion from the published data that the taxpayer in a country which operates a common law litigation system saves a great deal of money.

The Court itself, in a civil law system, bears a much greater burden in training judges, securing expert opinion, researching the law and the like. We recruit as our judges people who are already experienced lawyers and the State gets that training and experience for nothing. We

¹ *Doing Business*, World Bank Group (2020) available at <https://www.doingbusiness.org/>

require the parties to provide the legal research to inform the judge on any relevant legal materials necessary to answer the case, whether it be complex or simple, and we impose an obligation on those lawyers to inform the Court of any relevant legal materials even if unfavourable. I was struck, in telling some European colleagues of that Irish ethical rule, by the reaction of some who suggested that in their jurisdiction it would be likely considered unethical for a lawyer to actually draw attention to a legal authority or measure which was unfavourable to their case. But that places a burden on the Court to research the law itself.”

Lawyers’ fees will inevitably constitute a much higher proportion of the overall costs of settling a legal dispute in countries with a common law legal system than they will in civil law jurisdictions. The comparatively high cost of lawyers’ fees in a common law jurisdiction is an inescapable consequence of the particular demands made of the parties by the common law system itself, which expects the parties to carry a greater proportion of the costs than does the civil law.

Focusing on lawyers’ fees when comparing a common law jurisdiction to civil law legal systems does not fully reflect the total cost of resolving a legal dispute. Therefore, the most appropriate comparators for Ireland in an assessment of legal costs are jurisdictions which share a common law legal tradition e.g. countries such as the UK, Canada and Australia whose legal systems bear the greatest resemblance to our own.

When an assessment of legal costs is confined to common law jurisdictions, Ireland, contrary to popular belief, is not found to be a high-cost jurisdiction for legal costs. According to the World Bank survey, of the eight common law jurisdictions compared, Ireland has the fourth lowest lawyers’ fees at 18.8% the value of the claim which is almost identical to Australia’s figure of 18.5%, the third lowest rate of lawyers’ fees across the common law jurisdictions surveyed.

Severe reduction in professional fee levels paid to barristers over the last decade

The market for barristers’ services is more competitive than it has ever been. This has led to very considerable reductions in fees paid to most barristers, particularly by private clients where there is no set scale of fees and the fee and manner of payment is usually negotiated by the solicitor on behalf of the client. On the other hand, barristers who undertake work on behalf of the State - the largest single consumer of legal services - are, in the main, working to a set schedule or scale of fees that is set by the State. As such there is little or no negotiation, and in many cases, this involves barristers appearing for a client at less than the normal commercial rate and at no cost to the client. This high standard but low-cost representation was recognised by the government in its 2018 *Spending Review* report on Criminal Legal Aid.²

Similar to public and civil servants and other State contractors, barristers’ fees were impacted by the budgetary restraints imposed by the State across many public services due to the economic downturn. Since 2008, cuts to professional fee levels for work undertaken on behalf of the Director of Public

² Spending Review 2018: Criminal Legal Aid: Overview of current system and potential lessons from an international comparison, Department of Justice and Equality (2018) available at <https://assets.gov.ie/7320/b26e8d13fb42468fb66a40aed88fe875.pdf>

Prosecutions and under the Criminal Legal Aid Scheme have ranged in the order of 28.5% to 69%. A series of cuts imposed by the Legal Aid Board on brief fees in Circuit Court cases amount to an overall reduction of 32% since February 2009. Despite the fact that a reversal in the cuts applied to public and civil servants has already taken place, no such reversal in the cuts applied to the professional fees of barristers. For many legal practitioners, these cuts have made it unattractive, and unviable, to continue to participate in State-funded schemes such as the civil and criminal legal aid schemes.

A competitive profession

Members of the Law Library are independent sole practitioners, who compete with each other on a daily basis. Barristers practice in a highly competitive market, and it usually takes many years to become established. At the start of the 2019-2020 legal year, the total number of barristers in membership of the Law Library comprised 2,170 members; 1,813 of whom are Junior Counsel (84%) and 357 are Senior Counsel (16%).

Cost-savings achieved through the collective structure of the Law Library

While it is not a requirement for a barrister to be a member of the Law Library, membership offers numerous advantages to the sole practitioner. The collective structure of the Law Library aims to ensure value for money for members in the delivery of services and benefits and ensures that overheads of a barrister in practice are maintained at a competitive rate. A comparison between the cost that would be incurred by a barrister who practises outside of the shared structure provided by membership of the Law Library versus the cost of the annual membership subscriptions, demonstrates savings ranging from 38% to 90% depending on the stage of practice. Ensuring value for money for members in the delivery of services and benefits through the collective structure of the Law Library translates into cost-savings and value for money for the consumer.

Transparency

The relationship between transparency and costs has been central to over a decade of research, discussion and reform of legal costs in Ireland, with a view to lowering the cost of legal services for the consumer and consequently improving access to justice.

The Council recognises that unduly high legal costs can constitute a barrier to access to justice and it has long been supportive of the recently enacted provisions of the Legal Services Regulation Act 2015 dealing with legal costs and the fair delivery of legal services to the citizens of Ireland.

It is a longstanding requirement that, on receiving instructions from a client, a barrister must on request provide the client with a written fee estimate. This requirement is set out in the Code of Conduct of The Bar of Ireland and the obligation is now reinforced under the new costs provisions of the Legal Services Regulation 2015 Act which demand a certain level of detail to enhance clarity and transparency for the client.

Transparency in legal costs will have the inevitable effect of generating more competition among legal service providers. By increasing the amount of information available to consumers about the price of

legal services it enables consumers to make informed decisions about which lawyer to choose and at what rates. If consumers are able to compare the prices for legal services, this creates an additional incentive for lawyers to compete on price. This empowers the client to shop around and ensure they obtain the best representation and the best value for money.

The key benefits of the new cost provisions under Part 10 of the 2015 Act include:

- (i) Greater visibility and transparency for clients in advance in terms of the costs of litigation

On receiving instructions, legal practitioners are required to disclose to clients in writing the amount of legal costs that will be incurred, or at the very least to set out the basis on which the legal costs are to be calculated. Practitioners must furthermore notify clients as to: the likely legal and financial consequences of the client withdrawing from the litigation; the circumstances in which the client would be likely to be required to pay the costs of other parties; and, the circumstances in which it would be likely that the costs of the legal practitioner would not be fully recovered from the other parties. A 10-day cooling-off period allows the client time to consider the costs and the associated financial risks before he or she commits to the services of the practitioner.

- (ii) Greater visibility and transparency for clients in terms of the costs as the case progresses

The legal practitioner is obliged to notify the client where he or she becomes aware of any factor that would make the legal costs likely to be incurred significantly greater than those disclosed or indicated at the outset. This provision reflects current practices under the Code of Conduct. Communicating up-to-date information to clients at each stage of the legal process is imperative as it ensures that the client is always fully aware and informed of the financial consequences

- (iii) More detailed information on bills of costs

After concluding the provision of legal services, a legal practitioner must prepare and sign a detailed bill of costs which must include the following information:

- a summary of the legal services provided;
- an itemised statement of the amounts of costs in respect of the legal services provided;
- the registration number of the legal practitioner for the purposes of value-added tax, and the amount of value-added tax chargeable;
- where time is a factor in the calculation of legal costs, the time spent in dealing with the matter;
- the amount of any damages or other monies recovered or payable to the client; and,
- the amount of any legal costs recovered by or payable to the legal practitioner from another party or an insurer on behalf of another party.

A detailed outline of the work completed and an itemised statement of costs will increase clarity and transparency for the client so that they know precisely what it is they are being charged for.

- (iv) A facility for clients and opposing parties to challenge costs in accordance with clear principles

The legal practitioner must provide with the bill of costs an explanation of the procedure to be followed should the client wish to dispute any aspect of the bill of costs. Where a dispute is made, the legal practitioner must take all appropriate and reasonable steps to resolve the dispute by informal means, for example through mediation. However, where these attempts are unsuccessful, the client can apply to the Office of the Legal Costs Adjudicator for any matter or item in the bill of costs to be adjudicated upon. The Legal Costs Adjudicator shall have regard to a set of defined principles and verify that: the work was actually done; that it was appropriate that a charge was made; and, that the charge was fair and reasonable in the circumstances. Such principles allow considerable scope for the scrutiny and review of fees.

(v) Greater transparency and consistency in the adjudication of legal costs

One of the most important provisions designed to address the issue of transparency in the new costs adjudication system is the establishment and maintenance of a publicly available register of determinations, which will record the outcome and reasoning behind each determination. This will ensure a consistent approach in the adjudication of costs and serve to codify reasonable and appropriate fee levels for legal work.

Alternative dispute resolution mechanisms

Barristers, who are members of the Law Library, provide specialist advocacy and advisory services in a wide variety of areas and in many different types of forum, including the courtroom, and in other dispute resolution forums such as arbitration and mediation.

Access to alternative legal mechanisms can resolve disputes at a fraction of the legal cost by keeping matters out of Court. The Mediation Act 2017 requires that solicitors must advise their client to consider mediation to resolve a dispute, as well as the possible advantages of resolving a dispute otherwise than by court action. The Act also provides for the Court to invite parties to litigation to mediate having regard to the circumstances of the case. The Court could penalise a litigant in costs where they have been unreasonable in their refusal to consider mediation. According to the *Doing Business* survey of the World Bank Group for 2020, Ireland scores favourably in comparison to other jurisdictions in terms of its alternative dispute resolution processes (2.5 out of 3).³

No Foal No Fee

In appropriate cases that are not covered by legal aid schemes, a barrister may be willing to take on individual client cases on a “no foal, no fee” basis. This means that the barrister will not require the payment of fees unless his or her client is successful (in which case the fees are usually ordered by the court to be paid by the other side). This is, in effect, a free legal aid system operated by barristers at their own risk and provides many people with access to the courts where they would not have had access otherwise. The importance of a “no foal, no fee” system has been highlighted by FLAC (Free

³ *Doing Business - Economy Profile Ireland*, World Bank Group (2020) available at <https://www.doingbusiness.org/content/dam/doingBusiness/country/i/ireland/IRL.pdf>

Legal Advice Centres) and independent law centres such as Community Law and Mediation (CLM), particularly where there is no comprehensive civil legal aid system in the State.

Pro Bono

Members of The Bar of Ireland dedicate significant time to pro bono initiatives. A survey conducted by The Bar of Ireland reported that 82% of barristers undertake pro bono legal services for clients where otherwise such clients would not be able to access justice.

The Voluntary Assistance Scheme (VAS) is the formal pro bono scheme of The Bar of Ireland which makes pro bono voluntary legal assistance available directly to charities, non-government organisations and civic society groups. Since its establishment in 2004, the VAS has provided pro bono legal assistance in over 650 matters for over 100 charities and NGOs. Most areas of law are covered by the Scheme including issues relating to debt; housing; landlord and tenant law; social welfare appeals; employment law; equality law; and prison-related issues. No minimum contribution is required – once a request for assistance is made, a barrister is assigned, and the service is provided free of charge.

Members of the Law Library also provide voluntary legal assistance through a number of community outreach projects that operate outside of the Bar, including the law clinics run by FLAC (Free Legal Advice Centres) and Community Law and Mediation (CLM). In 2019, CLM ran 47 free legal advice clinics with the assistance of 18 volunteer barristers. Assistance was provided in relation to 715 legal matters in that time, the majority of which related to family law and employment law.

LEGAL AID

2. Is there any assessment on the needs for legal aid and whether the current system respond to them adequately?

Joint Oireachtas Committee on Justice & Equality

A review of access to justice and legal costs was commenced by the Joint Oireachtas Committee on Justice & Equality in November 2019. The Joint Committee commenced engagement with a number of key stakeholders including the Council of The Bar of Ireland which appeared before the Committee on 27th November 2019 alongside the Free Legal Advice Centres (FLAC), the Legal Aid Board, and the Law Society.⁴ Among the issues discussed was the need for increased funding, resourcing and expansion of the legal aid system in Ireland. The work of the Committee was suspended upon the dissolution of the Dáil (parliament) in February however and it remains to be seen whether the topic will be reintroduced once a new government is formed and ordinary Oireachtas (parliamentary) business resumes.

⁴ Joint Committee on Justice and Equality debate - Wednesday, 27 Nov 2019: Access to Justice and Legal Costs: Discussion available at https://www.oireachtas.ie/en/debates/debate/joint_committee_on_justice_and_equality/2019-11-27/3/

Underfunding of Civil Legal Aid

According to the latest data (2016) by the European Commission for the Efficiency of Justice (CEPEJ), Ireland's annual public budget allocation to civil and criminal legal aid decreased from €87m in 2010 to €82m in 2016. Legal aid represented 35.1% of Ireland's total budget for the judicial system (which comprises the courts, legal aid, and public prosecution services) at €19.61 per capita in 2016. By contrast, our common law neighbour in England and Wales allocated a generous 39% at €31 per capita, the second most substantial budgetary effort of all European states in facilitating access to justice through legal aid.

The civil legal aid system in Ireland is chronically under-resourced and significant additional resources are required if the scheme is to provide meaningful legal aid to the most vulnerable sectors of society on a long term and sustainable basis.

Despite the best efforts of practitioners, there are regularly lengthy delays where either or both parties are represented by the Legal Aid Board and are awaiting assessment of their eligibility, or require an extension of their legal aid certificate; all of which adds to delays and costs and leads to additional stress for clients.

There is manifest desirability for improvements in terms of eligibility and the areas of law to which civil legal aid applies. In the event that civil legal aid was to be made more widely available this would help, not only to achieve equal access to justice and to secure effective legal representation for all, but also to address the increasing incidence of litigants in person in the Courts. There are a number of reasons behind self-representation but the inability to afford legal representation and non-qualification for legal aid are predominant factors.

In his address to the Legal Aid Board on the occasion of the Board's 40 year anniversary celebrations (referred to earlier in this submission), the Hon. Mr. Justice Frank Clarke, Chief Justice, highlighted the necessity for the expansion of legal aid in a country which operates within the common law legal tradition:

"By placing a significantly larger burden on the parties to run civil litigation, we inevitably create a situation where legal representation is, in the sense in which it was used in Airey⁵, necessary in a wider range of cases than might be the situation in civil law countries. When that is taken in conjunction with the right now enshrined in the charter of the European Union to have legal aid provided in any case where it is necessary to vindicate rights guaranteed under European Union law, there is at least scope for suggesting that, just as was the case at

⁵ The seminal judgment of the European Court of Human Rights (ECHR) in *Airey v Ireland* in 1979, deemed Ireland's failure to facilitate effective access to court to enable the applicant to obtain a judicial separation a breach of Article 6 of the European Convention of Human Rights and Fundamental Freedoms: the right to a fair trial. A right to civil legal aid in complex cases was recognised by the Court and it soon followed that the institution of a Civil Legal Aid Scheme was essential if Ireland was to guarantee litigants, particularly those of limited means, effective access before the courts.

the time of Airey, there is a need for legal aid in a wider range of cases than might previously have been considered.”

The Chief Justice further remarked that “a powerful moral case for enhanced legal aid” exists in a common law legal system:

If it is correct that the Irish taxpayer benefits very considerably by having a common law litigation system and does so by passing the burden to a significant extent onto the parties, then no-one may shed too many tears if those parties are significant corporations fighting over millions of euro in the Commercial Court. But where that extra burden is placed on people who are unable adequately to bring or defend civil proceedings then there is, in my view, a strong moral argument that the State should use some of the monies saved by the very system which places that burden on such persons by providing them with an enhanced system of civil legal aid.

Severe reduction in professional fee levels paid to barristers participating in legal aid schemes

As noted earlier in this submission, the cuts applied to the professional fees of barristers who provide legal services on behalf of the State have not yet been restored and these cuts have made it unattractive for many legal practitioners to continue to participate in State-funded schemes such as the civil and criminal legal aid schemes.

A recent analysis of the number of barristers opting to practice in criminal law has demonstrated that there is an emerging dearth of experienced junior barristers who can survive the early years of poor income from a criminal practice and survive long enough to then go on to maintain a career at the criminal bar. Our data has indicated that following six years of criminal practice, retention rates at the criminal bar drop to less than a third of those who set out to pursue a career in criminal law. This points to a real and developing concern within the criminal bar as the numbers of junior barristers with experience in crime are simply too low to replenish the loss of senior barristers who retire from the profession. If the situation is not addressed, it will undoubtedly have a profound effect on the administration of justice and the public good. As further recognised by the Government in its 2018 *Spending Review on Criminal Legal Aid*, the fee structure and the incentives of this fee structure must be monitored on an ongoing basis to ensure a fair, effective and efficient criminal justice system.⁶

Economic Value of Legal Aid

There are strong economic arguments that support investment in legal aid. A recent report of the World Bank, in collaboration with the International Bar Association (September 2019)⁷ notes that the failure to address the justice gap through legal aid can be “a false economy, as the costs of unresolved

⁶ *Spending Review 2018: Criminal Legal Aid: Overview of current system and potential lessons from an international comparison*, Department of Justice and Equality (2018) available at <https://assets.gov.ie/7320/b26e8d13fb42468fb66a40aed88fe875.pdf>

⁷ *A Tool for Justice: A Cost Benefit Analysis of Legal Aid*, International Bar Association (IBA) Access to Justice and Legal Aid Committee and the World Bank (2019) available at <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=341684c7-5ad5-4f20-810a-54473bfa5829>

problems shift to other areas of government spending such as health care, housing, child protection, and incarceration... Studies find significant net economic benefits [as a result of public investment in legal aid], even in the short term, including immediate benefits to clients and cost-savings to governments”.

The report demonstrates that by facilitating access to justice through the provision of an efficient, well-resourced, end-to-end legal aid service, it can help maximise positive outcomes for clients and decrease cycles of disadvantage, whilst alleviating pressures on other areas of public expenditure and contributing to the wider economy. The Council is of the view that a cost-benefit analysis in an Irish context would be of considerable assistance to the Government in understanding the additional value that can be gained from increased investment in legal aid.

LENGTH OF PROCEEDINGS AND JUDICIAL INDEPENDENCE

3. Could you please elaborate on the main challenges faced by the Irish justice system as regards length of proceedings and judicial independence?

Administration of Civil Justice Review Group

The Administration of Civil Justice Review Group chaired by the President of the High Court, Mr. Justice Peter Kelly, was established in 2017 to review the administration of civil justice in the State. It is examining a wide range of measures to improve access to justice and to achieve a courts system that is more effective, efficient and streamlined for all court users. The Council of The Bar of Ireland has made numerous submissions at the invitation of the Group during the course of its review, on matters including litigation costs and court jurisdictions and procedure and awaits publication of the final report which is expected this year.

Efficiency of the Courts System

According to the *Doing Business* survey of the World Bank Group for 2020⁸, Ireland ranks 91 out of 190 countries in the category relating to “ease of resolving a contractual dispute” which measures whether each economy has adopted a series of good practices that promote quality and efficiency in its court system.

Of the common law jurisdictions referred to in the survey (which are the appropriate comparators given that we share a common legal system), Ireland performed the second worst in the category of “time” which measures in calendar days the average duration of dispute resolution in commercial cases (from the moment that a claim is filed until payment). Only Canada (910 days) takes longer than Ireland’s score of 650 days, which is well above the average of 442 days across the eight common law jurisdictions surveyed. Albeit that the World Bank survey data pertains to commercial disputes, the deficiencies identified resonate across most areas of litigation, and are, in some areas of law, far worse.

⁸ *Doing Business*, World Bank Group (2020) available at <https://www.doingbusiness.org/>

Despite strong results in the sub-categories of “Court Structure and Proceedings” and “Alternative Dispute Resolution”, Ireland’s low rank would appear to be attributable largely to its low scores for “Case Management” and “Court Automation”. Unnecessary court appearances; over-listing of court dates; listing of all cases at the same time, and; uncertainty over whether a case will proceed, increase the cost of litigation and result in lengthy court days and delays in cases being heard, all of which act as a barrier to justice to citizens.

There are a wide range of reforms required so that timely and efficient access to justice is accessible to all those that need it. Reforms to the discovery process, the increased use of electronic filing and service procedures, improvements to the process for listing cases, enhanced case management tools across all courts, and class action litigation are but some of the changes which would increase the efficiency of civil litigation in Ireland and reduce costs.

The Courts Service is commended in its efforts to reduce time for case processing and facilitating greater efficiency in the way trials are managed through initiatives such as e-filing, the e-courts system and other procedural and legislative reforms such as the recent amendments to the Rules of the Superior Courts in relation to the conduct of trials and pre-trial procedures. However, depleting court budgets have restricted the Courts Service ability to realise the full potential for increased technological solutions through increased investment in Information & Communications Technology. The Council is supportive of innovative solutions to improve access to justice - the profession itself has introduced initiatives which facilitate, for example, paperless litigation which help to improve efficiencies and minimise costs.

Shortage of Judges

The ability of courts to cope with caseload is closely related to a continuing shortage of judges. The recent increase in the number of Judges appointed to the Court of Appeal to 15 is welcomed, however according to latest CEPEJ data, Ireland continues to have one of the lowest number of judges at 3.5 per 100,000 inhabitants. This deficit must be confronted as a possible factor in delays and inefficiencies of the courts system.

Judicial Independence

Ireland has a long and respected tradition of judicial independence. Since the establishment of the State, the principles of the separation of powers have been fundamental to the success of Irish democracy. The doctrine instils a degree of independence between the three branches of Government and allows for the necessary checks and balances between them. This is vital in maintaining a fair and just society.

According to the 2019 Global Competitiveness Report, Ireland ranked 13 out of 141 countries for the extent to which the judiciary is independent from influences of members of Government, citizens or

firms. Ireland attained a score of 5.6 out of 7 (where 1 = not independent at all and 7 = entirely independent).⁹

Judicial Appointments

While it is widely recognised and agreed that some reform of judicial appointments in Ireland is required, the Council shared the concerns of the European Commission in relation to the Judicial Appointments Commission Bill 2017. The European Commission stated in its 2019 Country Report for Ireland that insufficient input from the judiciary on the proposed body to appoint judges will result in legislation which will not be in line with European standards:

*“The envisaged composition of a new body for proposing judicial appointments raises concerns regarding the level of participation of the judiciary. The proposed composition of the Judicial Appointments Commission, which — according to the amended proposal — would comprise only five judges out of 17 (including a lay chairperson ‘accountable to the Oireachtas’) would not be in line with European standards (Council of Europe, 2010) and with the recommendation of the Council of Europe’s Group of States against Corruption (Group of States against Corruption, 2018) which require that an independent and competent authority drawn in substantial part from the judiciary be authorised to make recommendations or express opinions which the relevant appointing authority follows in practice”.*¹⁰

The Judicial Appointments Commission Bill 2017 has since lapsed with the dissolution of parliament in January 2020 however future developments in this area will continue to be closely monitored by the Council.

PERSONAL INJURIES GUIDELINES COMMITTEE

4. The newly established Personal Injuries Guidelines Committee is tasked with drafting personal injuries guidelines. What is your assessment on this?

The Council welcomes the establishment of the Personal Injuries Guidelines Committee and agrees that the judiciary is the appropriate organ of the State to determine compensation for personal injuries. Judges are fully independent and act without favour to either claimants or defendants. They make awards based on what they assess to be fair and appropriate compensation to reflect the level of injuries, and the impact of those injuries on the claimant, based on the evidence before them.

In attempting to ascertain what effect the new guidelines may have on the future landscape of personal injuries litigation, it is helpful to look at the present environment. Since the establishment of the Court of Appeal in 2014, there has been a significant recalibration downwards in the level of awards. The principles driving this downward trend have been set out in a number of recent

⁹ Global Competitiveness Report (2019)

http://www3.weforum.org/docs/WEF_TheGlobalCompetitivenessReport2019.pdf

¹⁰ European Commission Country Report Ireland 2019

https://ec.europa.eu/info/sites/info/files/file_import/2019-european-semester-country-report-ireland_en.pdf

judgements – the Court should be: (i) fair to the plaintiff and the defendant; (ii) objectively reasonable in light of the common good and social conditions in the State; and, (iii) proportionate within the scheme of awards for personal injuries generally. The Court of Appeal has furthermore stated that minor injuries should attract appropriately modest general damages, middling injuries moderate damages, severe injuries significant damages. This ‘test’ has been reaffirmed in a number of subsequent High Court and Court of Appeal decisions.

This approach, along with other factors, has resulted in the average personal injury award at High Court level dropping by 29% in 2018. Total awards made in the High Court in 2018 were €57.5 million, down from €85.3 million the previous year. These figures highlight the practical and fluid approach adopted by the courts in relation to the level of personal injury awards in attempting to strike a balance between the needs of the injured individual, who is entitled to compensation on the one hand, and the needs of a modern and buoyant society on the other.

Law Reform Commission Issues Paper on Capping Damages in Personal Injuries Actions

The Law Reform Commission (“the Commission”)¹¹ is currently examining whether it would be constitutionally permissible, or otherwise desirable, to provide for a statutory regime that would place a cap or tariff on some or all categories of damages in personal injuries cases. In response to a public consultation carried out by the Commission on the topic in March of this year, the Council provided submissions on the constitutional implications of each of the four potential models put forward by the Commission as a means of limiting the damages that courts may award, namely the doctrine of the separation of powers, the right to bodily integrity, the right to an effective remedy, and the right to equality before the law.

It is the view of the Council that the balance between providing more certainty to awards of damages, yet retaining judicial discretion, is best achieved with the Commission’s fourth model i.e. that the courts continue to set a maximum cap for catastrophic cases, and a proportionality test for others cases, taking into account the significant new arrangements for setting guidelines under the Judicial Council Act 2019. The Oireachtas has already established the Personal Injuries Guidelines Committee under the 2019 Act and empowered that body to create guidelines with the strong implication that those guidelines will impose ranges of awards for injuries that are lower than current awards. The guidelines should be allowed to take their course to see whether the effect is appreciable or not. If the effect is not appreciable, then other more radical models may be considered.

The Council furthermore noted in its submission that the selection of any particular model to limit damages in personal injuries actions will not by itself resolve the issue of the cost of insurance. It would be overly simplistic to assume that an issue as complex and multifactorial as this could be solved solely by capping damages for personal injuries.

¹¹ The Law Reform Commission is an independent body established under the Law Reform Commission Act 1975. The Commission’s principal role is to keep the law under review and to make proposals for reform, in particular, by recommending the enactment of legislation to clarify and modernise the law.

FURTHER READING

1. Submission by Council of The Bar of Ireland to the Law Reform Commission Issue Paper: Capping Damages in Personal Injuries Actions (March 2020)
Link to submission: https://www.lawlibrary.ie/media/lawlibrary/media/Submission-to-the-LRC-Issues-Paper-on-Capping-Damages-in-PI-Actions_For-Issue-05-03-20.pdf
2. Submission by Council of The Bar of Ireland to the Joint Committee on Justice and Equality on Access to Justice and Legal Costs (November 2019)
Link to submission: [https://www.lawlibrary.ie/media/lawlibrary/media/Submission-Access-to-Justice-Legal-Costs-25-November-2019-FINAL-FOR-ISSUE-25-11-19-\(1\)_1.pdf](https://www.lawlibrary.ie/media/lawlibrary/media/Submission-Access-to-Justice-Legal-Costs-25-November-2019-FINAL-FOR-ISSUE-25-11-19-(1)_1.pdf)
3. Submission by Council of The Bar of Ireland to the Review Group on the Administration of Civil Justice (February 2018)
Link to submission: <https://www.lawlibrary.ie/media/lawlibrary/media/Secure/Submission-to-the-Review-Group-on-the-Administration-of-Civil-Justice-February-2018.pdf>
4. Submission by Council of The Bar of Ireland to the Joint Committee on Justice and Equality on the Scheme of Judicial Appointments Commission Bill 2016 (January 2017)
Link to submission: <https://www.lawlibrary.ie/Membership/Submission-on-Heads-of-Judicial-Appointments-Commi.aspx>



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