



THE BAR
OF IRELAND

The Law Library

BARRA NA hÉIREANN

An Leabharlann Dlí



**SUBMISSION TO INDECON ECONOMIC CONSULTANTS
ECONOMIC EVALUATION OF OPTIONS TO CONTROL
LITIGATION COSTS**

21 FEBRUARY 2022

1. 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 advice 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.

The Law Society of Ireland ('the Society') is the representative and educational body of the solicitors' profession in Ireland, governed by a Council, comprising elected and nominated members of the solicitors' profession. It is the professional body for 12,000 solicitors in Ireland to whom it also provides services and support. It exercises statutory functions under the Solicitors Acts 1954 to 2015 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession.

2. SCOPE OF THE SUBMISSION

The Council and the Society have prepared this joint submission in response to an invitation of 11 January 2022 from Indecon Economic Consultants to make a written submission in relation to their economic evaluation of options to control litigation costs.

The background to this evaluation is the 2020 Administration of Civil Justice Review ('Kelly Review') and the review's recommendations regarding control of litigation costs.

As set out in the invitation from Indecon, the Council and the Society understand that the Indecon evaluation will focus on:

'...assessing the economic impact of alternative approaches to controlling litigation costs to the State, individuals and businesses. This will include examination of the potential application of the two models put forward as part of the Kelly Review (namely binding controls versus non-binding guidelines). It will also include a review, informed by international research, of any alternative models that could meet the goal of reducing the litigation costs. The evaluation will then undertake a formal economic appraisal of these alternative models.'

The scope of the Indecon evaluation is set out in further detail in **Appendix 1**.

This submission is structured in the following manner:

1. A history of legal costs
2. Matrix of issues that determine legal costs
3. Assessment of the models put forward in the Kelly Review
4. Optimal approach to control litigation costs

3. A HISTORY OF LEGAL COSTS

Legal costs in Ireland have been the subject of many discussions over almost twenty years. The subject of legal costs has emerged in discussions about the competitiveness of the Irish economy and restrictive competitive practices in professional services, as well as in debates about equality and access to justice issues. Ireland has long been described as a high-cost economy and is a relatively expensive location in which to do business. Strong economic growth has resulted in a series of upward cost pressures. Increases in property, business services and energy prices mean all businesses, not just the legal profession, face unavoidable fixed costs to operate.

Much of the research to date has focused on the reform of legal costs in Ireland with a view to lowering the cost of legal services for the consumer and improving access to justice. A person's constitutional rights of access to the courts and to a fair hearing are fundamental in any democratic society. Equally important is that there should be greater visibility and transparency for consumers in terms of the cost of litigation, which can include a range of different charges, in addition to the charges for professional services.

High legal costs have been highlighted as a barrier to access to justice. Although a range of assertions have been made in a number of state-sponsored reports about high legal costs in Ireland, the evidential basis for such claims is at best mixed.

Any policy intervention by the State should be based on sound evidence. It is therefore important to examine the history of the debate and reports in order to assess the evidential basis of the assertion that Ireland is a high legal cost jurisdiction.

2005: Report of the Legal Costs Working Group

The Legal Costs Working Group was established in 2004, to investigate the way in which legal costs were determined and assessed and to make recommendations which would lead to a reduction in the costs associated with civil litigation. This Group released the **Report of the Legal Costs Working Group**¹ in 2005. Importantly, the Report commissioned research on legal costs and based their evidence on data gathered from the Taxing Master for 1984 to 2003, the State Claims Agency (1998-2004) and four Circuit Courts.

The report explored the feasibility of introducing fixed scales of legal fees; it concluded that the advantages of this proposal would be to limit recoverable costs to specified amounts. However, several disadvantages were also identified. The Group expressly did not recommend the introduction of a table of maximum legal costs levels on the basis that fixed

¹ <https://www.justice.ie/en/JELR/legalcosts.pdf/Files/legalcosts.pdf>

scales do not take into consideration the complexity of work involved, i.e., the work involved in cases that are similar on the face of it but may be vastly different. In addition to this, fixed scales of legal costs may lead to lawyers restricting their level of input and effort to a level they believe is consistent with the fee available. The research also found that the level of award was the main factor in determining legal fees in personal injury cases but stated that it should not be: *“the primary factor in determining the level of the fee.”* This approach is now enshrined in law as provided in section 155 of the Legal Services Regulation Act, 2015².

2006: Report of the Legal Costs Implementation Advisory Group

Following the recommendations of the Report of the Legal Costs Working Group (Nov 2005), the Legal Costs Implementation Advisory Group (IAG) was established in 2006 to progress the recommendations of the Report. The **November 2006 Report of the IAG**³ made several recommendations including that the legal costs regulatory body be established, and be tasked, inter alia, with the drawing up of appropriate guidelines governing the items of legal costs recoverable on a party and party basis. In reaching this recommendation the IAG states that it *“is opposed to the introduction of scales containing fixed costs, save possibly in relation to routine administrative tasks and the current Appendix W should be abolished.”*

2000 – 2006: National Competitiveness Council Annual Competitiveness Reports

The National Competitiveness Council (NCC) has consistently referenced the issue of legal fees as a negative factor impacting competitiveness in Ireland since the early 2000s. One of the NCC’s earlier publications in 2006 asserted that Ireland had experienced a significant loss of international price competitiveness between 2000 and 2006. The report also suggested that price levels, particularly in the legal profession, were among the highest in Europe, making it a particular area of concern in weakening Ireland’s competitiveness.

2011: European Commission – The Economic Adjustment Programme for Ireland

The European Commission released a report entitled *‘The Economic Adjustment Programme for Ireland’*⁴ in February 2011 which commented on Ireland’s high price levels particularly in “sheltered professional service sectors such as the legal and medical professions”. The evidential basis for this assertion is unknown. The report reiterates the recommendations of the 2005 Report of the Legal Costs Working Group to establish an independent regulator.

² <https://www.irishstatutebook.ie/eli/2015/act/65/section/155/enacted/en/html#sec155>

³ <https://www.justice.ie/en/JELR/LegalCostsImpGrp.pdf/Files/LegalCostsImpGrp.pdf>

⁴ https://ec.europa.eu/economy_finance/publications/occasional_paper/2011/pdf/ocp76_en.pdf

2011: National Competitiveness Council – Cost of Doing Business in Ireland in 2011

In June 2011, the National Competitiveness Council (NCC) released the *Cost of Doing Business in Ireland in 2011*⁵ report. It suggested that, while prices had fallen in other sectors following the crash in 2008, the cost of a range of other business inputs, including legal costs, remained relatively expensive compared to other jurisdictions, with prices for legal services up by 12% since 2006. However, this assertion was based on a small sample size, and did not include fees for barrister services. In ensuring transparency in the manner in which legal costs are formed, the NCC recommended that a Legal Costs Assessment Office be established, to replace the Taxing Master's Office, with a remit to cover costs arising from all courts. It also recommended that costs should be assessed on the work carried out.

Following the recommendations of the Legal Costs Working Group and the Competition Authority, the *Legal Services Regulation Bill*⁶ was published in late 2011 with the aim to implement key structural reforms to promote competition and transparency in relation to legal costs.

2013: IGEES – Public Expenditure on Legal Services Report

The Irish Government Economic and Evaluation Service (IGEES) released the *Public Expenditure on Legal Services Report*⁷ in 2013 to assess the draw of expenditure on legal services on exchequer resources, and to set out ways in which expenditure on legal services could be avoided, minimised, and recovered. This report noted the complexities associated with establishing legal expenditure by State bodies due to the level of variability involved and the fact that expenditure on the specific items which make up legal costs are not generally recorded separately. At the time of writing, the analysis noted a reduction in expenditure on legal fees. This was considered a positive development in grounding a more systematic approach to the management of legal costs. It is important to note that the reductions applied to professional legal fees, ranging from 8% - 69%, have never been re-instated.

2013: EC Ex-Post Evaluation of the Economic Adjustment Programme for Ireland 2010-2013

An *ex-post evaluation of the Economic Adjustment Programme for Ireland 2010-2013*⁸ by the European Commission referenced a lack of progress in respect of bringing down legal costs, suggesting that initial progress in reforms to increase competition in legal services had been followed by legislative delays. The evidential basis for this assertion is unknown and appears to contradict the findings in the 2013 IGEES Report.

⁵ https://www.itic.ie/wp-content/uploads/2015/05/NCC110623-cost_of_doing_business_2011.pdf

⁶ <https://www.oireachtas.ie/en/bills/bill/2011/58/>

⁷ <https://igees.gov.ie/wp-content/uploads/2014/02/Public-Expenditure-on-Legal-Services.pdf>

⁸ https://ec.europa.eu/dgs/economy_finance/evaluation/pdf/ex-post_ireland_en.pdf

2015: Legal Services Regulation Act 2015

The *Legal Services Regulation Act 2015*⁹ was then introduced to provide for:

- The regulation of the provision of legal services
- The establishment of the Legal Services Regulatory Authority
- Reform of the law relating to the charging of costs by legal practitioners and the system of the assessment of costs relating to the provision of legal services.

2018: IGEES – Spending Review of Criminal Legal Aid

In July 2018 the IGEES unit of the Department of Justice and Equality (DOJE) published its *Spending Review of Criminal Legal Aid ('CLA')*¹⁰. This report recognised that the cost effective and robust criminal legal aid system facilitates a high standard but low-cost representation of defendants through skilled advocates engaged by the State. While this review related to criminal matters, it is highly likely that its findings could be applied to civil legal aid. In addition, the review recognised that a 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.

2019: Office of the Legal Costs Adjudicator Established

The *Office of the Legal Costs Adjudicator (OLCA)*¹¹ was established in October 2019 with the abolition of the Office of the Taxing Master, following the Legal Services Regulation Act 2015. Since the introduction of the new OLCA, a range of legal costs transparency and reform measures have come into operation.

2018 and 2020: Annual World Bank Doing Business Reports

The annual World Bank Doing Business Reports has been one of the primary sources relied upon by the National Competitiveness Council (NCC) in preparation of their annual Competitiveness Scorecard and Competitiveness Challenge reports. However, in September 2021 the World Bank issued a statement in relation to their 2018 and 2020 Doing Business Reports citing data irregularities that led to a decision to discontinue the Doing Business Reports. The National Competitiveness Council has consistently based their assertion that Ireland is a high legal cost jurisdiction on the World Bank Doing Business Reports, however, it is now apparent that their reliance on that data is unsound.

2020: Review of the Administration of Civil Justice

⁹ <https://www.irishstatutebook.ie/eli/2015/act/65/enacted/en/html>

¹⁰ <https://assets.gov.ie/7320/b26e8d13fb42468fb66a40aed88fe875.pdf>

¹¹ <https://www.courts.ie/office-legal-costs-adjudicators>

The Review Group, established by Government in March 2017, and chaired by the Hon. Mr. Justice Peter Kelly, published its comprehensive *Review of the Administration of Civil Justice*¹² (“Kelly Review”) in October 2020. Although the Kelly Review highlighted that up-to-date, comprehensive data regarding the costs involved in litigation cases were unavailable, it stated that it is understood from surveys, reports and experience in individual cases, that Ireland was a high-cost jurisdiction for civil litigation. It should be noted that the World Bank Doing Business Report, whose soundness has been called into question, is cited as one of the key surveys/evaluations the Review group considered and is cited numerous times throughout the report.

It is noteworthy that, following the comprehensive review which reviewed caseload data and consulted widely (over 90 submissions from a range of stakeholders), the Review Group was unable to reach a consensus regarding recommendations on how to reduce litigation costs. A majority of the Review Group members recommended the drawing up of non-binding guidelines for costs levels, while a minority in the Review Group recommended a table of maximum costs levels to be prescribed by a new Litigation Costs Committee. The majority did not agree with the recommendation for a table of maximum costs levels for a variety of different reasons. Chief among those was the fact that it was too early to assess the efficacy of the new adjudication system provided for by the 2015 Act. Other reasons included concerns about access to justice, an apprehension that the proposals may infringe EU competition law and the fact that the 2005 Legal Costs Working Group and 2006 Legal Costs Implementation Advisory Group reports expressly did not make such a recommendation.

Conclusion:

The above analysis of the various reports published over the past 20 years demonstrates that the evidential basis for claims that Ireland is a high legal cost jurisdiction is very limited. The only evidential assessment of legal costs was undertaken in the Haran Report (2005), which commissioned research on legal costs. This evidence was based on data gathered from the Taxing Master for 1984 – 2003, the State Claims Agency for 1998 – 2004 and four Circuit Courts. The NCC Cost of Doing Business in Ireland report drew from an extremely narrow survey that omits the fees of one half of the profession. The validity of the World Bank Doing Business reports for 2018 and 2020 has been called into question, these reports were cited by both the NCC in a number of their reports and were noted as a key research document for the Kelly Report. The Kelly Report acknowledged that “*it is understood from surveys, reports and experience in individual cases, that Ireland is a high-cost jurisdiction for civil litigation*” but was not in a position to provide its own assessment of legal costs.

¹² https://www.justice.ie/en/JELR/Review_of_the_Administration_of_Civil_Justice

The review of reports over the last 20 years has demonstrated there are considerable questions to be raised on the evidential basis of the assertion that Ireland is a high legal cost jurisdiction.

On the contrary, there is evidence that legal costs have reduced over the last 10 years. The Government's own report published in 2013 - IGEES Public Expenditure on Legal Services Report states:

'...many Agencies and Offices have already taken steps to deliver better value for money and reduce spending on legal services. Initiatives in this regard include:

- 1. The Financial Emergency Measures in the Public Interest (FEMPI) which imposed reductions on levels of professional fees, including legal fees.*
- 2. The State Claims Agency is reducing fees paid to barristers by 25 percent and is establishing a legal costs unit which will handle third party costs associated with the Mahon and Moriarty Tribunals.*
- 3. A range of Offices have unilaterally sought and achieved reductions in legal fees.'*

The reductions applied to legal fees have never been re-instated.

The Council and the Society are unequivocal in their support of efforts to improve access to justice. However, both are concerned that a single policy intervention by the State in the form of a mechanism to control costs of civil litigation in Ireland without having a sound evidential basis to do so and without giving the same weight and consideration to the investment required to improve the operation of the justice system as a whole, will result in severe restrictions on access to justice for ordinary citizens. As the Kelly Report pointed out, fixed scales, while superficially attractive, are of dubious legality.

4. MATRIX OF ISSUES THAT DETERMINE LEGAL COSTS

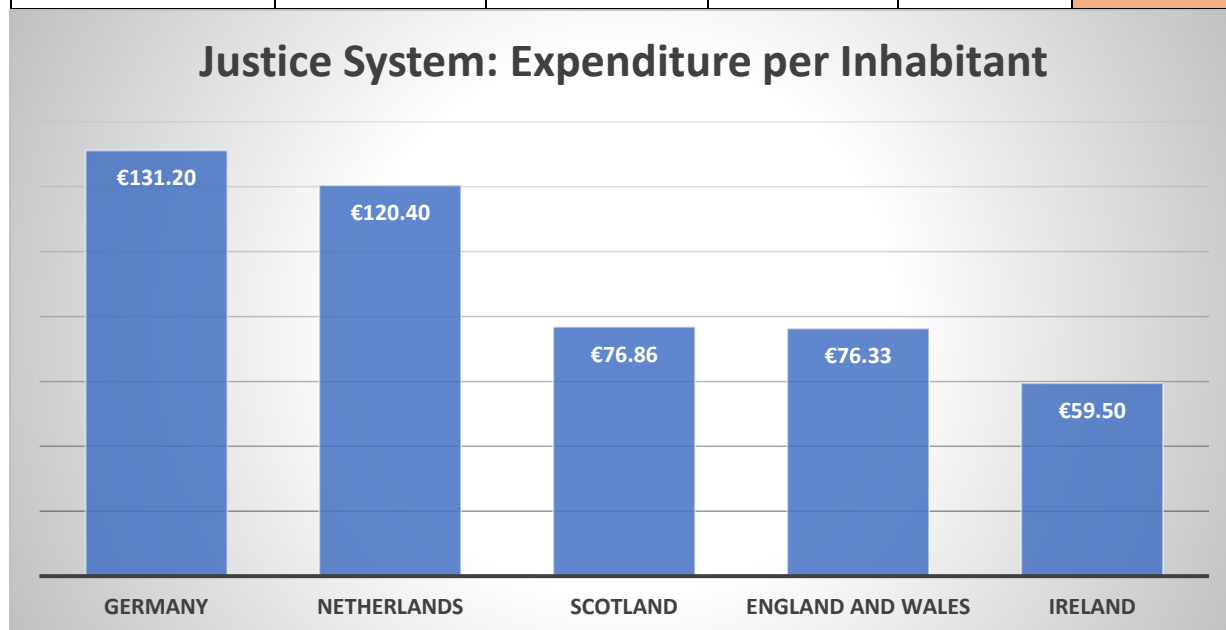
The overall cost incurred by a party bringing or defending a civil action in any jurisdiction will be determined by a matrix of issues, including:

- Resourcing of the judicial system;
- Nature of the litigation process (common v civil);
- Level of legal fees incurred and any recoverable legal fees from the losing party;
- Administrative costs imposed by the courts;
- Liability for the payment of expert witnesses and expert reports.

Resourcing of the judicial system

While many other EU countries *appear* to offer consumers lower exposure to legal costs, the table below shows that in other jurisdictions, a greater number of judges and non-judge court staff are required to manage the passage of litigation, paid for through general taxation.

Table: Number of judges and expenditure on the justice system in 2018					
	Germany	Netherlands	Scotland	England and Wales	Ireland
Professional judges per 100,000 inhabitants	24.5	14.6	3.7	3.1	3.3
Lawyers per 100,000 inhabitants	189.9	102.9	215.6	270.3	270.6
Non-judge staff per 100,000 inhabitants	65.1	43.4	29.3	24	21.6
Justice system expenditure €per inhabitant	€131.20	€120.40	€76.86	€76.33	€59.50



Extreme care should be taken when attempting to rank countries by the direct cost of litigation without considering the indirect costs to the exchequer of funding the legal system in place, the extent of court fees and charges, and the payment by the courts of expert witnesses and expert reports.

Based on the European Commission for the Efficiency of Justice 2018 Data¹³, Ireland falls well below other jurisdictions in terms of resources:

- There are 3.3 judges per 100,000 inhabitants in Ireland compared with 17 judges per 100,000 inhabitants across the EU.
- There are 21.6 non-judge staff per 100,000 inhabitants in Ireland compared with 59.7 non-judge staff per 100,000 inhabitants across the EU.
- Ireland has the second lowest clearance rate in Europe at 63% (European average is 99%) which is a measure of how well a system processes the volume of cases it works with.
- The justice system expenditure per inhabitant of €59.50 is significantly below other similar common law jurisdictions such as England and Wales (€76.33).
- The justice system expenditure per inhabitant of €59.50 is less than half the expenditure evident in civil law jurisdictions where scales exist, such as in Germany (€131.20).

In order to reduce litigation costs, it is essential that the State facilitates greater expenditure on the justice system. There are a wide range of reforms required so that timely and efficient access to justice is accessible to all those that need it. Over the past 10 years, legal practitioners have been reporting an increase in case duration across all cases. This is likely to be a result of inadequate judicial numbers, case management and the overall judicial process in Ireland at present. It is also likely that this will have worsened as a result of delays associated with the COVID-19 pandemic induced restrictions on court operations.

The appointment of additional judges is an obvious solution - the ability of courts to cope with caseload is closely related to a continuing shortage of judges (at 3.3 per 100,000 inhabitants) and this must be confronted as a factor in delays and inefficiencies of the courts system. 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 other changes which would increase the efficiency of civil litigation in Ireland and reduce costs. If the purpose is to compare individual costs levels with those of civil-law jurisdictions, the Courts must be resourced properly, with (for example) additional human resources to match the levels in those jurisdictions. To take the Dutch example this requires the State to invest an additional €60 per capita, or circa €300,000,000, on an annual basis.

¹³ European Commission for the Efficiency of Justice (CEPEJ), [‘European Judicial Systems’](#)

The Courts Service is to be commended for its recent 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. Its recently published long-term strategic vision for the digitalisation of justice aims to introduce new and enhanced digital services including e-filing and digital case management which will reduce the need to file and process paper, reduce non-value-added work, and drive greater efficiency in accessing justice.

Nature of the litigation process (common v civil law systems)

There are significant differences between the litigation system in common and civil law countries. As outlined above, Ireland has one of the lowest number of judges per head of population in the developed world. 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.

It is an 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. In Ireland, a common law jurisdiction, judges are recruited as individuals who are already experienced lawyers and the State benefits from that training and experience without the cost of that investment.

In Ireland, we place a significantly larger burden on the parties to run civil litigation and inevitably create a situation where legal representation is necessary in a wider range of cases than might be the situation in civil law countries. The parties are required 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 an obligation is imposed on those lawyers to inform the Court of any relevant legal materials even if unfavourable. 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. For example, judges in the common law system have limited resources for research and therefore rely on the ethical obligations of advocates to the Court to ensure that their decisions are correct.

Level of legal fees incurred and any recoverable legal fees from the losing party

In jurisdictions without a statutory maximum scale for recoverable costs (such as Ireland, or England and Wales), the general rule is that the costs of litigation can be recovered from the other side as costs are awarded to “indemnify” the winning party for the cost and expenses incurred in vindicating or defending their rights. Those recoverable costs are fixed at what is described as the “*de minimus*” level i.e. only so much as it is reasonable to indemnify the successful party. A sophisticated and complex statutory mechanism, with the Legal Costs Adjudicators at its head, exists to police this principle.

However, in England and Wales, for example, it is rare that the winner will be fully indemnified. In determining an appropriate amount which can be recovered from the losing side, the court may consider a variety of factors (including the party’s conduct during trial) and the nature of the claim. Where the losing side of a case is ordered to pay the costs of the winning side, in all countries, the actual amount awarded may not necessarily equal the amount paid by the party seeking the award. In countries without a standard lawyer fee scale, the court will use its discretion to multiply reasonable expected billable hours by a reasonable hourly rate. In certain US states including New York, where a “loser pays” approach is followed, it is common for the court to consider the attorney’s experience and skill and determine what an attorney of similar expertise might charge in the community in which the court sits. In many other US states, no costs are recoverable from the losing party.

While several legal systems try to provide certainty to the public about the likely cost of engaging a lawyer to conduct civil litigation, these costs will ultimately be determined by the market rate of a lawyer and the complexity and nature of the case. In countries with a periodically updated matrix of recoverable costs, these too reflect standard rates of lawyers’ fees and tend to be more common in civil law jurisdictions where much of the pre-hearing litigation is in written submissions and where there may be fewer (or no) prehearing applications before a judge.

Administrative costs imposed by the courts

Court fees are a feature of all systems. These fees will be levied either (a) as a fee for the transaction of the entire case, or (b) at various stages, based on each matter before the court. The levying of court fees or filing fees is dependent upon whether the court levies a set fee for the entire case, which is common in civil law countries, or per action which is more common in common law countries where there may be more regular pre-hearing application. Approximately one-third of the Bill of Costs goes towards state revenue made up of court duty (currently 8.5% of the total cost), and VAT (at 23% on solicitors’ and barristers’ fees).

Liability for the payment of expert witnesses and expert reports

In addition to lawyers' fees another outlay for parties to litigation is the cost of expert reports and expert witnesses. In circumstances where the proceedings involve a dispute as to fact, it is a regular feature of common law jurisdictions for each party to hire its own expert to put forward their professional views in a written report before the court. Each expert may be subject to cross examination by the parties and the judge. In countries with a civil law tradition, a more active role has customarily been assigned to the judge than in countries with a common law tradition. In civil law courts, the procedure is inquisitorial. While the civil legal tradition removes the need for a duplication of expert evidence, such court-appointed experts are paid by the courts from fees which are, in turn, levied on the parties to litigation and recouped from the losing side. However, by avoiding the necessity for all parties to engage their own experts, the overall cost to the parties is reduced.

5. ASSESSMENT OF THE MODELS PUT FORWARD IN THE KELLY REVIEW

The Council and the Society are grateful to have the opportunity to provide their views on the models examined in the Kelly Review. The Review Group recommended that a table of non-binding guidelines regarding costs be established (the majority view).

The report records that a minority favoured, as an alternative, the creation of a table of binding maximum costs chargeable. The minority noted that the maximum table of costs concept it proposed should not preclude legal practitioners from agreeing costs lower than the levels specified. It noted that the table of costs could be developed with regard to principles and policies which would be applied to both legal practitioner and client costs, and party to party costs.

However, the majority group recommendation noted that guidelines should be expressed by reference to schedule 1 of the Legal Services Regulation Act 2015, at the levels at which parties have either resolved or had adjudicated costs disputes. They should take into account prevailing economic conditions and refer to the need to ensure no more than a reasonable level of remuneration on a party and party basis, and that similar guidelines for practitioner and client costs also be formulated.

The group envisaged that these proposals would relate to contentious costs of litigation before the courts.

Scales of costs impede access to justice

Consideration firstly should be given to evidential experiences where party and party costs are strictly subject to a scale of costs.

The experience of District Court scales is a useful example and is an indicator of what lies ahead for the other courts if tables of binding maximum costs are introduced. The scales refer to solicitors' professional fees, petty outlay, and counsels' fees, which must be certified by the District Court Judge on conclusion of the hearing of the action. The scale of costs does not provide for any other outlay or witness expenses. Any such expenses are measured by the District Court Judge on the application for costs following the hearing of the matter.

In respect of professional fees, the scale of costs is primarily determined on the amount of damages that are awarded or agreed, regardless of the amount of work that may be required by a solicitor to achieve the desired outcome for the client. This is contrary to the criteria for the assessment of fees pursuant to Schedule 1 of the Legal Services Regulation Act 2015. The scale provides no scope for the number of hours that legal practitioners are required to work and has no relevance to the novelty or difficulty that may be present in any given case. In such an instance where the legal practitioner is required to carry out certain work that is not sufficiently covered by the scale fee, it falls to the client to pay his or her legal practitioner, effectively reducing the sum recovered for damages and increasing the costs for the client as the buyer of legal services. This raises issues of inequality of arms for less well-resourced litigants and may constitute an impediment to access to justice.

Anecdotally, there are reports in recent years of solicitors not willing to take on cases for clients at District Court level owing to the outdated and poor fee levels in place. Again, this raises issues of impediments to accessing justice.

Legal Costs Adjudication System

Secondly consideration needs to be given to the Legal Costs Adjudication system which has only been in place since 2019. Schedule 1 of the Legal Services Regulation Act 2015¹⁴ sets out the principles relating to legal costs which the Adjudicator must adhere to when adjudicating on a bill of costs pursuant to an application under Section 154, namely:

- that the costs have been reasonably incurred, and
- that the costs are reasonable in amount, in which case the Adjudicator must consider the matters such as complexity and novelty of the issue and the skill and knowledge of the legal practitioner.

Under a table of non-binding guidelines, these would be determined by Legal Costs Adjudicators or the Legal Services Regulatory Authority, with input from the former. The introduction of guidelines therefore would not require the establishment of a new body at

¹⁴ See [Schedule 1 of the Legal Services Regulation Act 2015 Principles relating to Legal Costs](#)

further cost to the clients of legal services. Where the costs allowed under the guidelines do not reasonably remunerate legal practitioners for the complexity of the work and time incurred, they would be allowed to make their case to the Legal Costs Adjudicator, as is currently the case under the Legal Services Regulation Act 2015.

In contrast, the introduction of a table of binding maximum costs would be prescribed by an independent Litigation Costs Committee, which would be legally obliged to rely on appropriate evidence and would take into account general economic conditions which the Committee considered affected the market for provision of legal services. This new Committee would prescribe the initial Table of Costs via a statutory instrument within two years of its establishment. It would also have powers to consult with the Chief Legal Costs Adjudicator to request assistance in evaluating litigation costs and provide data on costs adjudications to assist in the determination of the Table of Costs.

The Kelly Report suggests that “*ease of implementation*” is a factor that should be kept in mind in regard to the recommendations of the Review Group being accepted and that “*any mechanism must be fair and efficient*”. Following this approach, the new model established by the 2015 Act must be permitted to bed down fully as it is only in place since 2019 and was impacted by the disruption of the Covid-19 pandemic. In addition, if an independent Litigation Costs Committee is to be established to facilitate the introduction of a table of binding maximum costs this could have the effect of indirectly increasing legal costs as it will require further state funding which would have to be paid for through general taxation.

Advantages & Disadvantages

While a table of binding maximum costs may provide some advantages in that it may provide clients with an additional level of transparency and certainty about the potential costs associated with their case, and up-front publication may act as a deterrent against imposing additional unnecessary costs e.g., duplication of expert evidence, or unnecessary medical reports, the Council and the Society believe these are largely outweighed by the potential disadvantages.

The introduction of a table of binding maximum costs may suppress competition, as the table of maximum costs may encourage an upward push to the ceilings set by the tables. Maximum costs levels may not compensate fully, an exceptional aspect, or development of a case, and as noted above this can lead to inequalities in the access to justice for less well-resourced litigants. The table of costs may not be revised for several years, as seen with the District Court scales. This may result in the values being understated in the prevailing economic environment. Also as noted it is too early to assess the efficiency of the new adjudication system introduced in the 2015 Act and operational since 2019. A fixed level of costs may not

comprehend the totality and complexity of the range of legal proceedings that emerge. Lawyers may restrict their input and effort in a case to a level of input which they related to the scale fee available, and fixed scales maxima could become the standard charge.

The Council and the Society on the other hand can see more advantages for the justice system with the introduction of non-binding guidelines regarding costs. The introduction of non-binding guidelines could improve the certainty and transparency of the adjudication process, but with minimal legislative intervention. The introduction should be simple and straightforward and would not require any additional resources to implement. The guidelines should allow for flexibility to reflect the individual and exceptional circumstances which may arise at different stages of a particular case. The guidelines could consider prevailing economic conditions. In addition, depending on how the guidelines were set out, they could be weighted towards encouraging early settlement in cases so that there is no benefit in seeking defence from a defendant.

The introduction of non-binding guidelines is also not without its disadvantages. Non-binding guidelines could lead to inequalities if they are not independently reviewed on a regular basis. Also, there is a wide range of litigation and it would neither be desirable nor feasible to put in place guidelines of a type which would provide a simple, mathematical model designed to pre-determine the legal costs recoverable in every type of case.

Ultimately, the Council and the Society are of the view that if any mechanism were to be introduced that it should take the form of non-binding guidelines only, which should operate only as a starting point for the assessment of costs. The introduction of a table of binding maximum costs would represent a fundamental departure from what heretofore has been the method of calculating costs in this jurisdiction and the principle of costs being referable to work actually done. Such binding costs are inconsistent with Paragraphs 1 and 2 of Schedule 1 to the 2015 Act. As noted earlier in the report if such binding costs do not sufficiently cover the work a legal practitioner has completed, it falls to the client to pay his or her legal practitioner, effectively reducing the sum recovered for damages and increasing the costs for the client as the buyer of legal services and potentially raising an issue of inequality of arms for less well-resourced litigants and/or constituting an impediment to access to justice.

6. OPTIMAL APPROACH TO CONTROL LITIGATION COSTS

In the view of the Council and the Society, the most optimal manner to positively impact on legal costs is through a combination of four measures:

1. Increased investment in the justice system, in particular the number of judges and support staff, better case management and adoption of technology.

When comparing Ireland to other EU countries, it appears that other EU countries offer consumers lower exposure to legal costs, however, as shown above a greater number of judges and non-judge court staff are required to manage the passage of litigation, which is paid for through general taxation. The submission has shown that for example if Ireland were to have a similar justice system to the Dutch, it would require an additional investment of €60 per inhabitant or circa €300,000,000, on an annual basis.

It is essential that the State facilitates greater expenditure on the justice system if they wish to reduce litigation costs. There are a wide range of reforms required so that timely and efficient access to justice is accessible to all those that need it. Increased efficiency and in turn a reduction in costs could be achieved by the appointment of additional judges, reforms to the discovery process, the increased use of electronic filing and service procedures, improvements to the process for listing cases, and enhanced case management tools across all courts.

2. Investment in effective civil legal aid to ensure access to justice for all regardless of means.

For any legal system to operate at its optimum level, access to justice must be available to all. The availability of legal aid to those who cannot afford legal representation is an essential element in the administration of justice in a democratic society. Legal aid has long been recognised as a vital component to ensuring that a person's constitutional rights of access to the courts and to a fair hearing are given effect to, and that litigation can and (can be seen to) operate on an equality-of-arms basis.

A recent report of the International Bar Association Access to Justice and Legal Aid Committee, 'A Tool for Justice: The Cost Benefit Analysis of Legal Aid'¹⁵ (September 2019) notes that:

¹⁵ <http://documents.worldbank.org/curated/en/592901569218028553/pdf/A-Tool-for-Justice-The-Cost-BenefitAnalysis-of-Legal-Aid.pdf>18

'Legal aid has long been viewed as an expression of society's values. The primary arguments for supporting legal aid have rested on the inherent value to society of protecting the most vulnerable, and of ensuring access to justice for those who cannot afford a lawyer. By leaning heavily on constitutional, human rights and ideological principles underpinning the concepts of "access to justice" and "rule of law," proponents highlight how legal aid is intrinsically tied to the concept of the state and its duty to guarantee equality of arms as an element of equality under the law. Legal aid can help to ensure that people have access to information about their rights, entitlements, and obligations. It is also essential for the protection and promotion of all other civil, cultural, economic, political and social rights. Without it, people who are living in poverty or otherwise vulnerable are denied the opportunity to claim their rights, resolve disputes, or challenge crimes, abuses or human rights violations committed against them.'

The Report goes on to state:

'There are also economic arguments that support investment in justice and legal aid in particular. The price of failing to address the global justice gap is high. Not providing legal aid can be a false economy, as the costs of unresolved problems shift to other areas of government spending such as health care, housing, child protection, and incarceration.'

'Investments in legal aid can lead to significant government savings through avoided cost of arrest, conviction, incarceration, probation, and post-prison supervision. In addition, public investments in legal aid are also found to generate net savings in terms of avoided shelter/housing costs. Studies find significant net economic benefits, even in the short term, including immediate benefits to clients and cost-savings to governments.'

The Report examines the findings of the various cost benefit analyses throughout the world and provides guidance on how to conduct a cost benefit analysis of a legal aid programme. 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.

3. The introduction of non-binding guidelines in respect of legal costs.

As noted above the Council and the Society strongly oppose the introduction of a table of maximum costs for a variety of reasons set out above and are of the view that if any new mechanism were to be introduced, it should take the form of non-binding guidelines only, which should operate only as a starting point for the assessment of costs. The introduction of non-binding guidelines could improve the certainty and transparency of the adjudication process, but with minimal legislative intervention. Legal costs should be assessable primarily

by reference to the work actually done by the legal practitioner in question. The guidelines should allow for flexibility to reflect the individual and exceptional circumstances which may arise at different stages of a particular case.

This is in line with the majority recommendation from the Kelly Report that states:

“The majority favoured the drawing up of guidelines for the assistance of parties and their representatives, by reference to individual items that could be outlined in a table. The obligation to produce such guidelines could be achieved with minimal legislative intervention, with the function assigned either to the Legal Costs Adjudicators or the LSRA (with input from the former). “

“The advantage of such a recommendation is that it would be simple and straightforward to introduce and would not require any additional resources to implement. If the functions are carried out by the Adjudicators or the LSRA, it would not require the establishment of a new body at further cost (staff, members, etc.). The guidelines should be expressed by reference to the criteria established in Schedule 1 of the 2015 Act and the levels at which parties have either resolved or had adjudicated costs disputes. They should take into account prevailing economic conditions and refer to the need to ensure no more than a reasonable level of remuneration on a party and party basis.”

4. A reduction in state-imposed revenue on a Bill of Costs.

Approximately one-third of the Bill of Costs goes towards state revenue made up of court duty (currently 8.5% of the total cost), and VAT (at 23% on solicitors’ and barristers’ fees). By simply reducing the court duties charged or the VAT rate applied, the Government can lower the cost of legal services.

Looking at the end of 2021 Exchequer returns published by the Department of Finance,¹⁶ Government tax receipts reached a record €68.4 billion in 2021. The year-end exchequer returns show tax receipts rose by almost 20 per cent or €11 billion last year despite the negative impact of restrictions to curb the Covid 19 pandemic throughout the year. While the latest report would indicate a direct exchequer deficit of €7.4 billion for 2021, this is an improvement of nearly €5 billion on 2020.

VAT receipts for the year were €15.4 billion, 24 per cent higher than the total collected in 2020, reflecting the rebound in consumption and €3 million higher than the pre pandemic

¹⁶ <https://www.gov.ie/en/publication/bc982-end-2021-exchequer-returns-summary/>

VAT receipts of €15.1 billion in 2019. The sales tax is one of the strongest indicators of the pick-up in consumer activity. The greater than expected tax returns should reduce future Exchequer borrowing requirements and in turn could allow for the possibility of reductions in tax rates and duties.

APPENDIX 1: Terms of Reference for the Economic Evaluation of Options for Control of Litigation Costs

Background

The Department of Justice (“the Department”) is a department of the Government of Ireland. The Department's mission is to work to make Ireland a safe, fair, and inclusive place to live and work.

It has a wide range of responsibilities including, state security, the protection of life and property, the prevention and detection of crime, providing services for the buying and selling of property, managing inward migration to the State, providing a Courts Service, updating our criminal and civil laws, developing the Insolvency Service and various other regulatory services.

Following a Government Decision in 2017, it was announced that a Review Group, to be chaired by the then President of the High Court, Mr. Justice Peter Kelly, would be established to review and reform the administration of civil justice in the State. The Group was requested to report to the Minister for Justice and make recommendations for changes with a view to improving access to civil justice in the State, promoting early resolution of disputes, reducing the cost of litigation, creating a more responsive and proportionate system, and ensuring better outcomes for court users.

The Group held an open call requesting submissions from interested persons or parties in relation to its work. The Group received over 90 submissions which were considered by the Review Group and a number of specialised sub-committees. Submissions were received from Government Departments, members of the judiciary, legal professionals, academics, non-profit organisations, professional bodies, and individual members of the public.

As part of the process, researchers also reviewed caseload data for the various jurisdictional instances and considered surveys and evaluations of performance of Ireland’s civil justice system taken internationally (EU Justice Scoreboard, Doing Business Reports by World Bank, Global Competitiveness reports of the World Economic Forum etc.). Findings and conclusions of a range of reviews and reports on this topic from other jurisdictions were also examined.

As part of their report, the Review Group made a large number of recommendations in order to make the civil justice system more efficient and easier for people to access. The Group also made several recommendations to help reduce the costs and time involved in legal proceedings. A number of these related to litigation costs generally. However, the Group was unable to reach a consensus regarding recommendations on how to reduce litigation costs. A majority of the Group members recommended the drawing up of non-binding guidelines for costs levels, while a minority of Group members recommended a table of maximum costs

levels be prescribed by a new Litigation Costs Committee, which could be derogated from in exceptional circumstances. In making their recommendation the group examined the experience in other jurisdictions in particular litigation costs regimes in Canada and Australia.

Scope of Research

The study concerns the design and completion of a Cost Benefit Analysis (CBA) or Multi Criteria Analysis (MCA) in the area of litigation costs, with the focus on evaluating the economic impact of measures to control litigation costs to the State, in particular binding and non-binding controls on contentious costs. The study will also include a rapid review of any alternative models that meet the goal of reducing the litigation costs to the State and undertake a CBA /MCA of these. The CBA/ MCA will include sensitivity analysis and the potential for some 'What If' scenarios.

The project breaks down into two parts, as follows:

1. Part 1 - Recommendation by the Review Group

a) Conduct a CBA/MCA in the area of litigation costs to the State for the two models that were put forward as part of the recommendations by the Review Group. This will include the establishment of a framework to outline the parameters used in the analysis.

2. Part 2 - Alternative Model

a) Based on evidence identified in the course of the rapid review, design an alternative model that could potentially meet the goal of reducing the litigation costs to the State as in Part 1 above. Consideration should be given to how transferable this model is.

b) Design and conduct a CBA/MCA of this model.

Part 1 - Recommendation by the Review Group

In regards in the area of controlling litigation costs to the State, the Review Group recommended the following two options:

1) The creation of a table of binding maximum costs chargeable (the minority view) and.

2) A table of non-binding guidelines regarding costs (the majority view).

In relation to option 1, the Review Group noted that the guidelines should be expressed by reference to schedule 1 of the Legal Services Regulatory Authority Act 2015, and the levels at which parties have either resolved or had adjudicated costs disputes. They should take into account prevailing economic conditions and refer to the need to ensure no more than a reasonable level of remuneration on a party and party basis, and that similar guidelines for practitioner and client costs also be formulated.

In relation to option 2, a minority of the Review Group noted that the maximum table of costs concept it proposes should not preclude legal practitioners from agreeing costs lower than the levels specified. The Group noted that the table of costs could be developed with regard to principles and policies which would be applied to both legal practitioner and client costs, and party to party costs.

In the case of both options (1) and (2) above, it is envisaged that these will relate to contentious costs of litigation before the courts. The Review Group report provides information on costs arising from contentious business.

It should be noted that while the list of questions below is not an exhaustive list, these are some of the core questions to be answered in relation to both parts:

- What are the model's core characteristics?
- What are all the costs and benefits of the model in economic terms, to the State, individuals, and businesses?
- What is known about the model's effectiveness in controlling litigation costs, for the State?
- What would be the economic impact of making such a model binding in the Irish context, except where both parties agree to opt out?
- To consider the implications for the Irish context of setting legal costs.

Part 2 Alternative model

This section will involve research into any potential alternative models that meets the goal of reducing litigation costs to the State.

As with Part 1 above, while the list of questions below is not an exhaustive list, these are some of the core questions to be answered:

- What is the model's core characteristics?
- What are all the costs and benefits of the model in economic terms, to the State, individuals, and businesses?
- What is known about its effectiveness in controlling litigation costs, for the State?
- What would be the economic impact of making such a model binding in the Irish context, except where both parties agree to opt out?
- Consider the implications for the Irish context of setting legal costs.

As in Part 1, the CBA/MCA should include the following:

- Establish a framework to outline the parameters of the analysis for both options.
- Identify costs and benefits for both options.
- Calculate costs and benefits for both options.
- Compare the cost and benefits for both options.
- Analyse the results and make an informed, final recommendation on which option would be preferred.

The final outputs for this project include:

- Development of CBA/MCA's that will examine all the costs and benefits associated for all the options outlined in both Part 1 & 2.
- Clear recommendations for which is the preferred model.