

Restoration of Cuts to Professional Fees - Flexibility Provided by Prosecuting Counsel

Background

In February 2016 the Bar Council made a submission to the Office of the Director of Public Prosecutions (ODPP) in the context of seeking a restoration of cuts to professional fees which had been imposed arising from the financial emergency. Cuts imposed included two 8% cuts in March 2009 and April 2010 which mirrored cuts provided for by the Financial Emergency Measures in the Public Interest Acts (FEMPI). An additional cut of 10% from October 2011 was imposed which had no parallel in the emergency legislation. The Bar Council submission, as well as seeking a restoration of the cuts, highlighted new procedures and processes arising from developments in both legislation and Court judgements which counsel have cooperated with since the cuts were imposed. The submission emphasised the extent to which these new procedures and processes have imposed additional unremunerated burdens on barristers.

In June 2016 the ODPP wrote to the Department of Public Expenditure and Reform (DPER) advising that it considered that:

- the two 8% cuts should be dealt with in line with whatever decision is made with regard to FEMPI reductions generally;
- there was a strong case for reversing the 10% cuts imposed in October 2011 on the basis that this was in addition to the cuts imposed elsewhere under FEMPI legislation.

The ODPP also advised that it acknowledged the extent to which new procedures and processes referred to in the Bar Council submission had added to the burden on prosecutors.

It is understood that representatives of the Bar Council met with DPER officials in 2016 and 2017 and that these meetings were followed up with further written and oral communications. In April 2018 a meeting took place between officials of DPER, ODPP and the Department of Justice and Equality (DoJ) which was followed by bilateral meetings. This culminated in the ODPP agreeing to take the lead in meeting with the DoJ and the Bar Council to discuss restoration of fees. The ODPP also agreed to document flexibility measures which should be considered by Government in making a decision on reversing cuts imposed on prosecuting counsel fees and the phasing of such reversal.

Flexibility Provided by Prosecuting Counsel

The ODPP is of the opinion that any consideration of the context within which prosecuting counsel operate must acknowledge the dynamic nature of the criminal prosecution environment and the consequential need for flexibility from counsel. Because of the dynamic nature of the environment, flexibility in how counsel work is a striking feature of the system. Changes in work practices and additional burdens are introduced on an ongoing basis by national and EU legislation. Court judgements can also result in a requirement to change work practices and can add to the burden of prosecutors.

Developments in Irish and European Law

At pages 8 -10 of the Bar Council submission (Appendix 1) 12 Criminal Justice Acts from 2006 – 2012 are highlighted to demonstrate the extent to which legislative change impacts on the criminal prosecution process. At page 9, a high level description is given of some of the legislation to illustrate the additional work which new legislation can generate. Reference is made at page 10 of the submission to the impact which the establishment of a Court of Appeal will have. The Supreme Court judgement in DPP v J.C. (on the exclusion of evidence obtained as a result of a breach of constitutional rights) is referred to at page 10 to provide an example of how Court judgements can increase the complexity of future cases.

The ODPP accepts that the flexibility required from prosecuting counsel arising from changes in legislation, the establishment of the Court of Appeal and from Court judgments highlighted in the Bar Council submission has and continues to be delivered. The ODPP acknowledges the burden which these changes place on prosecutors and recognises that counsel have continued to upskill in order to be able to continue to provide a quality service.

EU Directives on Victims and Data Protection

In addition to the legislation highlighted by the Bar Council, the ODPP considers that the flexibility required from prosecuting counsel arising from recent legislative developments in relation to Victims of Crime and Data Protection is important to highlight. Legislation in these areas introduced a series of new rights for citizens and new obligations which prosecutors must deliver. The changes introduced by legislation in these areas simply could not have been delivered without the ongoing flexibility of prosecuting counsel.

Consultations with Victims

The ODPP would also acknowledge the changes which prosecuting counsel have cooperated with in moving from a somewhat rigid system of availability for consultations to readily agreeing to the organisation of consultations at times and locations which better meet the requirements of the ODPP and other parties in the criminal prosecution process, in particular victims of crime.

Disclosure in Criminal Trials

Counsel increasingly play a significant role in reviewing and advising on disclosure of data in criminal trials. Because of the changing nature of the lives of witnesses and victims, most prosecutions now involve increased volumes of disclosure data which must be reviewed and advised upon by Counsel. This data can include information from social media platforms, telephone data, CCTV footage, medical or social work data.

E-Briefs and E-Disclosure and Electronic Presentation of Evidence

The ODPP has received cooperation from prosecution counsel in the move to electronic presentation of evidence, receiving briefs electronically and dealing with disclosure electronically. This flexible use of technology was a key component in the recent financial trials. Given the volume of documentation involved in these trials it simply would not have been possible to have presented the evidence in an intelligible fashion without the extensive use of technology. Following on from experience in the financial trials the ODPP plans to

make more extensive use of electronic presentation of evidence and more generally provide briefs and disclosure electronically to counsel. These developments will have a positive impact on the efficiency of the criminal prosecution process. In addition they will, without any major financial burden to the State, greatly assist the prosecution to comply with new and onerous Data Protection obligations.

Summary

The ODPP would highlight that because of the dynamic nature of the criminal prosecution environment, flexibility in how counsel work is both a requirement and a feature of the system. The ongoing flexibility being delivered by prosecuting counsel, documented above, is considered comparable to the flexibility delivered by other groups to justify the reversing of cuts imposed during the financial emergency.

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