



THE BAR
OF IRELAND

The Law Library

BARRA NA hÉIREANN

An Leabharlann Dlí

SUBMISSION BY THE COUNCIL OF THE BAR OF
IRELAND TO THE EUROPEAN COMMISSION

2024 RULE OF LAW REPORT

TARGETED STAKEHOLDER CONSULTATION

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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 2,159 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.

Questions on horizontal developments (5,000 characters)

The Council of The Bar of Ireland 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 2,150 practising barristers. The Council has prepared these submissions at the request of the European Commission which is in the process of preparing the 2024 Annual Report on the Rule of Law. As the representative body of the barrister profession in Ireland, this submission will focus on the areas that relate to the scope of work and expertise of our members, namely the Justice System.

As regards general horizontal developments since the Council’s last report, the following justice related activities are of note:

Family Courts Bill

In April 2023, the Department of Justice published its annual Justice Plan which is the third and final instalment of annual plans outlining the actions required to deliver the goals established in the 2021-2023 Statement of Strategy. Improving access to justice and modernising the courts system remains a high priority for both the Department of Justice and The Council of The Bar of Ireland.

2022 saw the publication of the Family Courts Bill and the establishment of a Family Justice Implementation Group to roll out the Family Justice Strategy, which commits to ensuring the family court system is more accessible, easier to understand, and improves its responsiveness to users’ needs through investing in digital services. As previously stated in the 2023 Rule of Law Report, the Council of The Bar of Ireland has expressed its concerns in the proposal to expand the jurisdiction of the District Court under the Family Courts Bill as it will drastically increase and overwhelm the workload of the court. The District Court is a court of summary jurisdiction and is not set up to process complex cases nor does it have the resources to do so. Further, the summary manner in which the District Court approaches cases is not appropriate for lengthy and multi-issue substantive family law cases. The Council therefore remains very concerned that any expansion in jurisdiction proposed under the Family Courts Bill 2022 will overwhelm the District Courts and result in lengthy delays for clients in being able to access justice.

Litigation Costs

The European Commission report on the 2023 Rule of Law detailed the recommendation for Ireland to continue actions aimed at reducing litigation costs and take into account European standards while the economic analysis of litigation costs is finalised. While the Council appreciates any judicial system

of costs should be fair and equitable, the assertion that Ireland is a high legal costs jurisdiction compared to its European counterparts is not strongly supported by evidence.

It is crucial to highlight distinctions between common law jurisdictions and civil jurisdictions regarding state funding in adversarial versus inquisitorial systems. In essence, making a direct comparison of Irish litigation costs with those of European counterparts may not be accurate. An independent report commissioned by the Council of The Bar of Ireland and the Law Society of Ireland has further found that complaints in relation to litigation costs have fallen since the Legal Service Regulatory Authority (LSRA) began its role in managing complaints.

In May 2023, the National Competitiveness & Productivity Council published its annual report on the key competitiveness and productivity challenges facing the Irish economy and suggests specific policy actions to address these challenges. The Council also produces Ireland's Competitiveness Scorecard on a three-year cycle which provides a comprehensive statistical assessment of Ireland's competitiveness performance. This year, the report noted that:

'For the first time, the NCPC also sought to include indicators to benchmark Ireland's performance in key areas for Irish business, and especially SMEs, such as insurance and legal costs, and the quality and efficiency of the judicial system and the planning process (and associated time costs). However, data limitations prevented the NCPC from examining these issues in detail. For example, while the European Commission for the Efficiency of Justice (CEPEJ) collects and publishes data on clearance rates for court cases and the time taken for court cases to be resolved, 11 significant caveats apply to this data when interpreted for civil law jurisdictions, including Ireland. **Additionally, while the CSO's Services Producer Price Index (SPPI) tracks costs relating to 'Legal, Accounting, Public Relations and Business Management Consultancy', there is no specific breakdown on legal costs.**

The NCPC will consider how best to address these issues moving forward.'
(see page 13, paragraph 2.1 of Ireland's Competitiveness Scorecard 2023)

A report was commissioned by the Department of Justice in 2022 to undertake an economic evaluation on options to control litigation costs. This report has yet to be published.

Since the passage of the Legal Services Regulation Act 2015, legal practitioners are required to disclose to clients expected legal costs and inform them if they become aware of any factors that could increase anticipated costs. This promotes transparency and enables clients to assess associated financial risks before committing to a legal service. The Council stresses the importance of considering multiple factors when addressing litigation costs moving forward, including the complexity of individual cases and the need to invest in various aspects of the justice system. The Council recommends supporting greater investment in the justice system, allow the Legal Costs Adjudication System time to "bed down" as it is too early to assess its efficiency and introduce non-binding guidelines for legal cost levels, as controlling direct litigation costs should allow for flexibility to each individual circumstance.

Reform of Civil Legal Aid

The Council continues to prioritise reform of the Civil Legal Aid Scheme and in February 2023, made a submission to the Independent Review Group established by the Minister for Justice. In its current state, the Civil Legal Aid Scheme is inflexible and is serving as a barrier to access to justice for the most vulnerable sectors of society on a long-term and sustainable basis. The Council reemphasises a successful reformation of the Scheme should provide broad applicability, eligibility and accessibility in order to protect the rights of those most vulnerable while protecting the greatest number of rights for citizens. The Council looks forward to publication of the report in early 2024 from the Independent Review Group to assess next steps in addressing reform of the Civil Legal Aid Scheme.

Criminal Legal Aid

On 3 October 2023, criminal barristers in Ireland, on the recommendation of Council of The Bar of Ireland, withdrew their professional services nationwide in protest at the failure of successive Governments to adequately resource the criminal justice system, and specifically in relation to the fees payable to barristers by the Director of Public Prosecutions and under the Criminal Justice (Legal Aid) scheme. One week later, on the 10th October 2023, the Government announced an increase in funding for professional fees of criminal barristers as part of Budget 2024. The 10% increase in the budget for professional fees payable to barristers by the Director of Public Prosecutions and under the Criminal Justice (Legal Aid) Scheme was welcomed by the Council as a positive first step in reversing the fee cuts of 28.5% plus that were applied to barristers fees during the period 2008 – 2011 and have endured since that time. In addition, the Minister for Justice announced that her *'intention is to build on the strengths of the criminal legal aid scheme while addressing any issues relating to how it is structured. Engagement will now begin with the legal professions for the purpose of working together to identify reforms to the fees, including automation of payments, which will support improved efficiency and governance in the administration of the scheme, and chart a path to greater transparency and fairness in the level of fees paid under criminal legal aid.'*

The Oireachtas Joint Committee on Justice invited the Council to attend a meeting on the publication of the General Scheme of the Criminal Justice (Legal Aid) Bill following a submission to the Committee made by the Council in August 2023. In both the submission and meeting with the Committee, the Council emphasised its position that the criminal legal aid system in how it is administered is effective, economical and consistent with the efficient operation of the criminal justice system in a manner in line with interests of all parties involved. Any proposed changes to how the criminal legal aid scheme operates must take caution to avoid amending a system that is not broken which may lead to doing more harm than good in the process.

Questions for contribution: Justice System

Please provide information on measures taken to follow-up on the recommendations received in the 2023 Report regarding the justice system (if applicable) (3000 characters)

On 13 October 2023, the Judicial Appointments Commission Bill 2022 was referred by the President of Ireland, Michael D Higgins, to the Supreme Court for a decision on its constitutionality, provided for in Article 26 of the Constitution of Ireland. The Supreme Court heard the matter on the 15th and 16th November 2023 and published its judgment that the Judicial Appointments Commission Bill 2022 is

constitutional on 8th December 2023. Following the decision of the Supreme Court, Article 34.3.3 of the Constitution precludes the possibility of any further legal challenge to the constitutionality of the legislation.

Independence

Appointment and selection of judges, prosecutors and court presidents (incl. judicial review)

Judges:

The Judicial Appointments Commission Bill 2022 completed the final stages in the Oireachtas on 4 October 2023. The Bill provides for the establishment of a new, independent Judicial Appointments Commission to select and recommend persons for judicial office in Ireland and in the EU and international courts.

On 13 October 2023, the Judicial Appointments Commission Bill 2022 was referred by the President of Ireland, Michael D Higgins, to the Supreme Court for a decision on its constitutionality, provided for in Article 26 of the Constitution of Ireland. The Supreme Court heard the matter on the 15th and 16th November 2023 and published its judgment that the Judicial Appointments Commission Bill 2022 is constitutional on 8th December 2023.

Prosecutors:

There is no change in respect of the appointment of prosecutors.

Irremovability of judges, including transfers, (incl. as part of judicial map reform), dismissal and retirement regime of judges, court presidents and prosecutors (incl. judicial review):

Judges (including Court Presidents): No Change.

As per our contribution to the Rule of Law Report in 2022, the [Guidelines for Judicial Conduct and Ethics were drafted by the Judicial Conduct Committee](#) and adopted by the entire Judicial Council on 4th February 2022. The Judicial Conduct Committee's procedures relating to complaints were finalised in September 2022 with the Minister for Justice commencing the provisions of the Judicial Council Act 2019 in October 2022. This enables a person to make a complaint about the conduct of a judge in Ireland in respect of allegations of misconduct arising on or after that date.

A determination by the Judicial Conduct Committee as to whether the complaint has been substantiated must be in writing and must give the reasons for the determination and may include a recommendation for the issuing of advice to the judge, the making of a recommendation that the judge pursue a specified course of action, and/or the issuing of an admonishment to the judge.

Unsatisfactory determinations made by the Judicial Council Committee; the Committee is permitted to take further action including making a referral to the Minister for the purposes of Article 35.4 of the Constitution of Ireland (provides for the removal of a judge).

The retirement age for all judges remains unchanged at 70.

Prosecutors: No Change.

Promotion of judges and prosecutors (incl. judicial review)

Judges:

A number of reforms to the appointments process for judges, including the elevation of serving judges, is being addressed under the Judicial Appointments Commission Act 2023. The Act provides that all serving judges must participate in the same selection process for appointment to a higher court as other candidates.

Prosecutors:

No change.

Allocation of cases in courts

No change.

Independence (including composition and nomination and dismissal of its members), and powers of the body tasked with safeguarding the independence of the judiciary

No change.

Accountability of judges and prosecutors, including disciplinary regime and bodies and ethical rules, judicial immunity and criminal/civil (where applicable) liability of judges

Please refer to our response to question 2 (Irremovability of judges) above.

Remuneration/bonuses/rewards for judges and prosecutors, including observed changes (significant and targeted increase or decrease over the past year), transparency on the system and access to the information

No change.

Independence/autonomy of the prosecution service

No change.

Independence of the Bar (chamber/association of lawyers) and of lawyers

The Bar of Ireland 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 2,150 practising barristers. 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.

An independent barrister is obliged to be free from any influence, especially such as may arise from their personal interests or external pressure, in the discharge of their professional duties. They must hold themselves out as willing and obliged to appear in court on behalf of any client on the instructions of a solicitor and to give legal advice and any other legal services to clients. They have an overriding duty to the court to ensure that the proper and efficient administration of justice is achieved, and they must not deceive or knowingly mislead the court. They must promote and protect fearlessly and by all proper and lawful means their client's best interests and do so without regard to their own interest or to any consequences for themselves or to any other person including fellow members of the legal profession; and, to perform their functions with due independence and in a manner which is consistent with their duty to participate in the administration of justice. This independence is necessary in non-contentious matters as well as litigation.

Significant developments capable of affecting the perception that the general public has of the independence of the judiciary

In reference to the 2023 Rule of Law Report, The Council previously mentioned a Supreme Court Case regarding the constitutionality of [Personal Injuries Guidelines](#). The case, *Delaney v Personal Injuries Assessment Board & Ors* [2022] IEHC 321, challenged the constitutionality of the guidelines but was rejected by the High Court. A panel of three judges of the Supreme Court agreed issues of general importance were raised that necessitates the Supreme Court hearing the appeal. The panel found the appeal raises questions of significant relevance to the interpretation and construction of delegated legislation regarding the implications of the constitutional mandate of judicial independence and the separation of powers between judges and the Oireachtas (Houses of Parliament). A decision on the appeal is awaited.

Source: [The Personal Injury Guidelines - An Update - Irish Claims Board](#)

Quality of Justice

Accessibility of courts (e.g. court/legal fees, legal aid, language) 5000 characters

Access to justice and a sustainable criminal bar remains a key concern for The Bar of Ireland. As a direct consequence of the deep cuts ranging from 28.5%-69% that were applied to the professional fees paid to criminal barristers during the financial crisis of 2008–2011, a career choice for recently qualified junior barristers in crime has become unattractive when compared to opportunities in other areas of law. The evidence shows that two-thirds of barristers who commence a career in criminal law leave after only 6 years in practice and that this is as a direct consequence of the deep cuts that were applied. A skilled and experienced criminal prosecution bar can only emerge after many years of practice in the junior ranks of criminal defence law. It takes many years of practice at the Bar to acquire the necessary experience to effectively and skilfully prosecute serious cases on behalf of the State and it is imperative that newly qualified talented barristers are encouraged to practice in the area of criminal law. One significant form of such encouragement is to be fairly and reasonably rewarded for their services. The government's own [2018 spending review report on criminal legal aid](#) recognised that our 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 and recognised that 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.

As mentioned as part of the horizontal developments in this report, criminal barristers, on the recommendation of Council of The Bar of Ireland, withdrew their professional services nationwide on 3 October 2023. This was in response to the failure of successive Governments to adequately resource the criminal justice system, and specifically in relation to the fees payable to barristers by the Director of Public Prosecutions and under the Criminal Justice (Legal Aid) scheme. Later, on the 10 October 2023, the Government announced an increase in [funding](#) for professional fees of criminal barristers as part of Budget 2024. The 10% increase in the budget for professional fees payable to barristers by the Director of Public Prosecutions and under the Criminal Justice (Legal Aid) Scheme was welcomed by the Council as a positive first step in ensuring fairness in the level of fees paid under criminal legal

aid. Now, more than ever, it is crucial that the Department of Justice and the Office of the Director of Public Prosecutions ensure appropriate fee payment structures, unravel existing cuts, and restore the link to public pay agreements in order to promote fairness in the Irish legal system and sustainable access to justice.

Resources of the judiciary (human/financial/material)

The Council appreciates the EU Commission's recognition of the significant increase in judges in 2023 and for 2024. An announcement was made by the Minister for Justice in February 2023 to increase the number of judicial appointments in step with the Organisation for Economic Co-operation and Development's (OECD) recommendation. Specifically, Government approval was secured for 24 additional judges to be appointed in 2023 and for significant investment to support the establishment of Planning and Environment Court and dedicated Family Courts. In 2024, it is intended to increase the number of judicial appointments to a further 20 judges subject to assessment of the impact of the 24 initially appointed judges. Overall, it will increase the number of judges from 173 to 217. However, increasing judicial capacity alone is not sufficient to improve efficiency within the courts system, and additional supports such as courts service, IT and estate resources are crucial to manage complex caseloads effectively.

Perhaps most notably, the proposal to expand the jurisdiction of the District Court under the Family Courts Bill will drastically increase the workload of the court. The Council will continue to express its concerns on these proposed changes, as an expansion in jurisdiction will overwhelm the lower courts in terms of caseload. Although a planned increase in the number of judges is a positive development in resource expansion, the District Court is a Court of summary jurisdiction and is not set up to process complex cases such as financial relief applications in the context of judicial separation/divorce and cohabitation/civil partnership breakdown. Further, the summary manner in which the District Court approaches cases is not appropriate for lengthy and multi-issue substantive family law cases. Unless settled, such cases are regularly of long duration and the District Court is not equipped to deal with lengthy cases. Further, the District Court is not a Court that delivers regular written judgements which contribute to the development of vital case law in this area. In addition, the increase in monetary jurisdiction of the District Court of up to land with a value of €1 million, with the option to increase this to €2 million at the election of the Minister for Justice is inappropriate and indicates a significant departure from its current jurisdiction. Ultimately, the transfer of adjudication from the High and Circuit Courts to an already overburdened District Court will lead to:

1. Reduced court time for families and children in the determination of their rights.
2. The application of a more summary process for the determination of those rights.
3. Less authoritative jurisprudence in family and child law due to fewer written judgements from Circuit and High courts.
4. Limited access to the specialist input and expertise of counsel as District Court litigation is often conducted solely by solicitors.

Training of justice professionals (including judges, prosecutors, lawyers, court staff, clerks/trainees)

Barristers

On foot of recommendations made by the Legal Services Regulatory Authority (LSRA) and updated in 2020 (<https://www.lsr.ie/wp-content/uploads/2020/11/Section-34-ET-Final-Report-to-Minister.pdf>) The Bar of Ireland continues to follow its Competency Framework for Continuing Professional Development which was established in October of 2021. The framework guides members in the identification and selection of CPD activities that are relevant to their professional learning needs.

Judges

The Judicial Studies Committee (<https://judicialcouncil.ie/judicial-studies-committee/>), established on 10th February 2020 pursuant to the Judicial Council Act 2019, continues to oversee a modernised programme of judicial training and education on topics such as Judicial Conduct and Ethics, Avoiding Re-traumatisation, Unconscious Bias and Vulnerable Witnesses, Induction, Mentoring, Assisted Decision-Making and Training of Judicial Trainers.

The Committee is committed to maintaining public trust in the judiciary and the administration of justice by delivering appropriate, effective, and timely training. The training is based on the core values and principles set out in the Guidelines for the Judiciary on Conduct and Ethics, including independence, impartiality, integrity, propriety, equality, competence, and diligence.

In 2023, with the assistance of the Associate Director, the Committee developed the Judicial Studies Committee Workplan 2023-2026 to set out a strategic approach to training and ensure sustainable programmes. This plan highlights four key priority areas: developing and delivering training programmes, ensuring adequate resources and supports, establishing policies and procedures, and raising awareness of the importance of judicial education and training. This plan is underpinned by a detailed Annual Action Plan, which is a dynamic document that will be reviewed and updated as necessary.

Digitalisation (e.g. use of digital technology, particularly electronic communication tools, within the justice system and with court users, procedural rules, access to judgments online)

The Report of the Review of the Administration of Civil Justice, also known as the Kelly Report, was published by the Department of Justice in May 2022 and sets out over 90 recommendations to reform civil law in Ireland. Among the recommendations, an approach to advance the reform in the area of technology and e-litigation was established. The overall aim is to create a secure digital environment to facilitate e-litigation and to modernise the digital facilities of Irish Civil Courts. This includes equipping courtrooms across jurisdictions with Wi-Fi and evidence display hardware to enable practitioners to use e-Litigation software to present cases in court electronically. Varying levels of access to the digital court record for parties, judges, court staff and members of the public, will also be facilitated, consonant with data protection and privacy rights.

According to the Courts Service Annual Report for 2022 (published 28 September 2023), the number of video technology enabled courtrooms was increased by 14 in 2022, bringing the number of courtrooms across the country that can support remote courts and video-link appearances to 120. Further, there was a total of 23,214 Irish Prison Service video courtroom appearances. The technology

supports virtual appearances from litigants, legal professionals, expert witnesses, prisoners, and Gardaí dialling-in from remote locations to a physical courtroom with digital evidence display.

The Courts Service Annual Report for 2022 highlights the completion of the eCharge sheets project which automatically pulls charge sheet and station bail data from An Garda Síochána's system (Irish police enforcement) into the Courts Service system (up to 2021, all data was manually typed in). The new system is used to now process 95% of charge sheets and has reduced the time taken to process a charge sheet by 77%.

The report further outlines a 10-year Modernisation Programme and breaks the programme into long and short-term planning goals. The Corporate Strategic Plan 2021-2023 sets out ICT strategic goals and adopts a "digital first" approach with two priorities to develop an ICT and data strategy to define the application, infrastructure and data architecture to support a modern and digitally-enabled Courts Service and engage in collaborative digital initiatives with other agencies to drive efficiencies.

Use of assessment tools and standards (e.g. ICT systems for case management, court statistics and their transparency, monitoring, evaluation, surveys among court users or legal professionals)

As mentioned in the previous question regarding modernisation and digitisation of the justice system, the Courts Service Annual Report for 2022 details that the legacy case management systems are in the process of being replaced through virtual software (Microsoft Power Platform) with a single modern platform capable of offering online services. In 2022, the Court Service concentrated on developing a unified case management system for the Courts and in 2023 has started to replace Civil legacy systems in the High Court and the Family Law system in the Circuit Court.

Geographical distribution and number of courts/jurisdictions ("judicial map") and their specialization

On 11 December 2023, a new division of the High Court dedicated to Planning and Environment cases was formally established. The new division of the High Court aims to improve the delivery of housing by reducing planning delays and will also allow for greater efficiency and specialism in the handling of litigation relating to planning and environmental matters, particularly judicial reviews. In summary:

- The new Division will replace and expand the scope of the "Commercial, Planning and Environment List" of the High Court, which became operational on 17th April 2023. This was in line with the Government Decision of 2nd November 2022, which approved the establishment of a dedicated Planning and Environment division of the High Court including, if necessary, on an administrative basis.
- It is now to become fully operational following on from the assignment of an additional High Court judge to the area and the publication by the President of the High Court of 'Practice Direction HC 124', which is to take effect from 11 December 2023.
- The Practice Direction sets out the expanded scope of the new High Court Division and has been finalised following on from two public consultations undertaken by the Courts Service; a necessary element for compliance with the Aarhus Convention in respect of environmental law.

- The expanded scope now encompasses proceedings related to 21 identified pieces of EU environmental legislation and 16 identified areas of national legislation, which include, planning, transport, water, climate, natural heritage, built heritage, waste, mineral exploration, the marine, agriculture and pollution.
- The new Practice Direction provides that cases will be assigned different priorities. A stated objective of the Court is that capacity is retained to deal expeditiously with urgent cases such as proceedings that concern large-scale projects of strategic importance, or matters of significant environmental impact. This is to ensure that these proceedings can continue to be prioritised and afforded an early hearing date.
- The new High Court Division will therefore deal with proceedings which include strategic infrastructure and commercial planning matters and decisions involving EU and national environmental and planning legislation.
- Cases will be now be heard by the three judges assigned to the new Court Division.

Efficiency of the Justice System

Length of proceedings

The Courts Service Annual Report for 2022 provides updated data on the average length of proceedings across the various courts. District Court criminal proceedings, from issue to disposal, averaged at 369 days and 569 days in the Circuit Court. The average length of civil proceedings from the Circuit Court and District Courts weren't available. In the High Court the average length of civil proceedings, from issue to disposal, increased from 797 days in 2021 to 871 days in 2022. Personal Injury cases accounted for the lengthiest of proceedings at 1,325 days. Average length of proceedings in the Central Criminal Court, from receipt of return for trial to final order, was 738 days (an increase from 668 in 2021), and 464 days from receipt of charge sheet to final order (an increase from 423 in 2021). Civil proceedings in the Court of Appeal averaged at 527 days, from issue to disposal, and 461 days from issue of notice of appeal to final order in criminal proceedings. In regard to the Supreme Court, the average length of time for an Application of Leave Determined (issue to determination date) was 18 days in 2022 compared to 23 in 2021 and the average time for an Application of Leave Determined (from papers being ready to determination) was 5 days (unchanged from 2021). The average length of appeals is 63 days in 2022, an increase from 52 in 2021.



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