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Submission by Council of The Bar of Ireland to the Joint Committee on Justice and Equality on the General Scheme of the European Convention on Human Rights (Compensation for Delays in Court Proceedings) Bill

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SUBMISSION BY COUNCIL OF THE BAR OF IRELAND TO THE JOINT COMMITTEE ON JUSTICE AND EQUALITY ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS (COMPENSATION FOR DELAYS IN COURT PROCEEDINGS) BILL

I. INTRODUCTION:

The Council of The Bar of Ireland is the accredited representative body of the independent referral Bar in Ireland. The independent referral bar are members of the Law Library and has a current membership of approximately 2,200 practising barristers.

The Council of The Bar of Ireland ("the Council") has prepared these submissions at the request of the Joint Committee on Justice and Equality for the purposes of pre-legislative scrutiny of the General Scheme of the European Convention on Human Rights (Compensation for Delays in Court Proceedings) Bill.

II. EXECUTIVE SUMMARY:

At present, Ireland is in violation of its obligations under Article 13 of the European Convention on Human Rights because the law does not provide an effective remedy for a litigant who encounters delays in court proceedings. In order to bring Ireland back into compliance with its international obligations, steps need to be taken to introduce an effective and accessible remedy whereby a litigant can seek compensation for delays or put an end to future delays in proceedings.

The easiest and most efficient way of resolving the situation is to introduce a new provision into the European Convention on Human Rights Act 2003, expressly allowing a litigant to take a claim before the Irish courts to seek compensation for court delays which violate the Convention. This provision could be modelled on s. 3A of the 2003 Act, which was enacted to resolve a similar issue in the past. This approach would avoid the time and expense involved in establishing an entirely new body, and would ensure that the complex legal issues involved in delay claims are resolved in the fairest manner possible.

It is respectfully suggested that adopting the assessor model envisaged by the European Convention on Human Rights (Compensation for Delays in Court Proceedings) Bill does not represent the appropriate way of bringing Ireland back into compliance with Article 13. The assessor model would involve considerable time and expense in establishing a new administrative body, without any significant apparent gains. The model is also beset by a range of issues, relating to the fundamental fairness of how it decides cases, potential susceptibility to delays and judicial review proceedings, and the shortcomings of appeals and compensation provisions.

III. THE NEED FOR REFORM:

Article 6(1) of the European Convention on Human Rights provides in relevant part that:-

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public *hearing within a reasonable time* by an independent and impartial tribunal established by law." [Emphasis added]

The European Court of Human Rights has interpreted the guarantee to a "hearing within a reasonable time" as meaning that all state parties to the Convention must ensure that proceedings involving the determination of civil rights and obligations and criminal charges come to a final conclusion without unreasonable delays.[1] Whether there have been unreasonable delays in proceedings depends on the specific circumstances of the case, including matters such as the complexity of the issues arising and the conduct of the parties in contributing to delays.[2]

Article 13 of the European Convention on Human Rights provides that a person who suffers a violation of Convention rights must have "an effective remedy before a national authority". The European Court of Human Rights has held that this specifically imposes an obligation on state parties to the Convention to provide a remedy for a litigant who has suffered unreasonable

[1] See, for example, *A. v. Denmark* (App. No. 20826/92, 8th February 1996).
[2] See, for example, *Frydlender v. France* (App. No. 30979/96, 27th June 2000).

court delays in contravention of Article 6(1). The judgments of the Court, including in cases such as *Kudla v. Poland*[3], provide guidance on the exact form that the remedy must take. The Court has stressed that litigants who encounter delay during the course of civil or criminal proceedings must be able to access a remedy which is "effective in law as well as in practice". That remedy must be capable of preventing any continuation of delays with the litigation, or it must be capable of "providing adequate redress" for any delays which have already occurred. The remedy must be provided by a national authority, but this does not necessarily need to be a judicial body. Finally, the Court has held that it is not necessary to have one remedy meet all of these requirements, and that a state can meet its obligations under Article 13 through the combination of multiple different remedies to litigants.

Under Irish law as it stands, a litigant who encounters court delays can pursue various potential remedies. There are significant issues in practice with each one.

First, a litigant faced with undue delay in proceedings may attempt to bring an end to those proceedings entirely. In the criminal context, an accused person may bring judicial review proceedings in the High Court and apply for an order prohibiting a trial from taking place. This order of prohibition will be granted only if there have been blameworthy delays on the part of the State giving rise to a real risk of an unfair trial for the accused.[4] In civil proceedings, it may be possible for a plaintiff to seek judgment where there are particular kinds of delay, such as in the filing of a defence, or for a defendant to seek to strike out proceedings for want of prosecution where a plaintiff is guilty of significant delay in advancing the proceedings.[5] However, the reality is that such remedies have no applicability in many common situations of delay: for instance, where an accused person faces significant delays but cannot demonstrate the real risk of an unfair trial necessary to stop proceedings, or where the parties in a civil case who have both acted expeditiously but meet untoward delays in hearing or judgment due to overburdened lists.

[3] App. No. 30210/96, 26th October 2000.
[4] See, for example, *P.M. v. Director of Public Prosecutions* [2006] IESC 22 , [2006] 3 I.R. 172.
[5] See, for example, Order 27 of the Rules of the Superior Courts 1986.

Secondly, a litigant might make some effort to speed up his or her case through an appropriate application to the courts. As a matter of practice, it is possible to apply in various courts for priority status or early hearing dates; indeed, appellants to the Court of Appeal and Supreme Court must specify whether they are seeking a priority hearing. There are also limited legal provisions relating to the fast-tracking of particular types of cases: for instance under O. 63A of the Rules of the Superior Courts 1986, commercial cases can be moved through the High Court in a particularly expeditious manner.

Thirdly, a litigant might attempt to obtain redress for delays which have already occurred by instituting a separate set of court proceedings and seeking damages on the basis that his or her rights have been breached. There are two distinct ways in which this might be done: either through a claim for damages for breach of constitutional rights, or in a claim pursuant to s. 3(2) of the European Convention on Human Rights Act 2003.

In relation to the former, the litigant might advance a claim for damages for a breach of the constitutional right to a speedy hearing. In its recent judgment in *Nash v. Director of Public Prosecutions,* the Supreme Court directly confirmed that at the level of principle, "a potential claim for damages for breach of a right to a timely trial arises under the Constitution."[6] While the remedy is available in principle, it is unclear when a litigant will be actually be entitled to such damages as a matter of practice. The case law provides very limited guidance: in *Nash,* for instance, the Supreme Court confined itself to stating that the precise circumstances in which it may be appropriate to award damages would require very careful consideration, and declined to provide any further guidance on those circumstances. There are no cases in which a litigant has succeeded in claiming damages for breach of the constitutional right to a timely trial. Overall, the lack of certainty regarding the parameters of the remedy might reasonably deter many litigants from seeking damages under the Constitution for court delays.

Alternatively, a litigant could claim for damages under s. 3(2) of the European Convention on Human Rights Act 2003. Section 3 of the 2003 Act obliges all organs of the State to perform their functions in a manner compatible with the obligations imposed by the Convention. Under

[6] [2016] IESC 60, [2017] 3 I.R. 320 at p. 339.

s. 3(2), a person who suffers loss or damage as a result of a failure by an organ of the State to comply with this obligation may bring a claim to a court and be awarded damages "if no other remedy in damages is available". In theory at least, a s. 3(2) claim could be brought to seek damages on the basis that organs of the State have failed to comply with the Article 6(1) obligation to ensure a hearing within a reasonable time.

As a practical reality, however, there are various eccentricities in the operation of s. 3(2) which mean that section is unsuitable as a means of seeking redress for most court delays.
Significantly, a claim under s. 3(2) can only succeed where an "organ of State" has failed to comply with the Convention, but s. 1 of the Act expressly provides that the courts are not considered to be an organ of State. This means it is not possible to bring a claim under s. 3(2) in respect of delays attributable to the courts themselves. Instead, a s. 3(2) claim could only be brought in the limited situations where it is possible to point to something that a specific organ of State had done which resulted in those delays. In addition, a claim under s. 3(2) can only succeed if there is no other remedy available in law. This means that it would be necessary to claim for damages under the Constitution first, and damages under s. 3(2) would only be awarded in the event that this constitutional claim did not succeed. It is also significant that there is a limitation period of one year in place for any claim under s. 3(2) and it is not possible to sue for damages for which events which occurred prior to the Act coming into force on 31st December 2003. These temporal limitations could conceivably cause difficulties when claiming for delays which have taken place over the course of several years in court proceedings.

Beyond those considered above, there are no other remedies available at present in Irish law where there has been delay in court proceedings. It should be stressed in particular that it does not appear to be possible to sue in tort or under common law for court delay. As held by Hogan J. in *G.C. v. Director of Public Prosecutions,* there is no common law power to award damages for breach of a right to early trial.[7]

Between 2002 and 2018, the European Court of Human Rights decided approximately nine cases brought against Ireland regarding the adequacy of the remedies for court delays. In each

[7] [2012] IEHC 430, (Unreported, High Court, Hogan J., 17th October 2012) at p. 10.

case, the Court ruled that Irish law does not provide effective remedies in respect of court delays, meaning that Ireland is in violation of its obligations under Article 13.

In its initial decisions on the issue in *McMullen v. Ireland*[8] and *Doran v. Ireland*[9], the European Court of Human Rights held that the ability of a litigant to seek damages for a breach of the constitution did not amount to an effective remedy. Similar decisions were reached in *O'Reilly v. Ireland*[10] and *Barry v. Ireland*.[11] The Court delivered its definitive ruling on the remedies for delay under Irish law in 2010, in a case called *McFarlane v. Ireland.*[12] In that case, the State argued that effective remedies for court delays were provided through the possibility of taking actions for damages for constitutional rights and for damages under s. 3(2) of the 2003 Act, and the ability to apply for an order for prohibition and an early hearing dates in a criminal trial. The European Court of Human Rights held that none of these remedies could be considered to discharge the State's obligations under Article 13. Dealing in particular with the possibility of instituting legal proceedings and seeking compensation, the Court noted that:-

- An action for damages for a breach of constitutional rights could not be regarded as an effective remedy. This was because of the "significant uncertainty as to the availability of the remedy", including the lack of clarity as to whether damages could be granted where a judge had delayed in delivering a judgment. The Court further noted that to obtain damages, it would be necessary to apply to the courts in the ordinary way without the benefit of specific or streamlined procedures, and that the proposed action would be "legally and procedurally complex" with an element of legal novelty. Combined, these factors meant that there would be delays, legal costs and expenses in the making of any application for damages.

- The Court remarked that damages under s. 3(2) could only be obtained if a constitutional action for damages was unsuccessful. The Court further noted that the courts are excluded from the definition of "organs of the State" by s. 1 of the 2003 Act,

[8] App. No. 42297/98, 4th July 2002.
[9] App. No. 50389/99, 31st July 2003.
[10] App. No. 54725/00, 29th July 2004.
[11] App. No. 18273/04, 15th December 2005.
[12] App. No. 31333/06, 10th September 2010.

meaning that any delay attributable to "the courts" would not therefore be actionable under the Act. Combined, these factors meant that an application for damages under the 2003 Act was not an effective remedy.

The ruling in *McFarlane* was upheld by the European Court of Human Rights in its subsequent decisions in *T.H. v. Ireland*[13]*, O. v. Ireland*[14] and *Rooney v. Ireland.*[15] It is also significant that the Court struck out the case of *Blehein v. Ireland* following a unilateral declaration by the Irish Government on 19th January 2017 to the effect that it accepted that there was no effective remedy under Irish law to deal with court delays and that this was incompatible with Article 13 of the Convention.[16]

The European Court of Human Rights most recently considered the matter in January 2018, when it delivered judgment in the case of *Healy v. Ireland.*[17] The applicant in that case complained about the lack of an effective remedy under Irish law to provide redress for the delays which had occurred in a set of medical negligence proceedings which were commenced in May 2004 and came to a conclusion in November 2015. In delivering judgment, the Court noted that it had consistently held that Ireland does not provide an effective remedy for court delays. The Court held that it was obliged to reach the same conclusion applied in this case and concluded that Ireland was in violation of Article 13. However, the Court said that it regarded the Supreme Court's decision in *Nash* in October 2016 "with interest" and held open the possibility that this decision might lead it in future to modify its views on whether Ireland provides an effective remedy for delay. It stated however that it would not consider the impact of the *Nash* judgment in this case, as that judgment postdated the events in the case it was dealing with.

Notwithstanding these comments in *Healy,* the reality is that the European Court of Human Rights has repeatedly held Ireland to be in violation of its obligations under Article 13 of the Convention over the last 16 years. Further, in *Blehein,* the Irish Government expressly accepted

[13] App. No. 37868/06, 8th December 2011.
[14] App. No. 43838/07, 19th January 2012.
[15] App. No. 32614/10, 31st October 2013.
[16] App. No. 14704/16, 25th April 2017.
[17] App. No. 27291/16, 18th January 2018.

this finding. The myriad difficulties with the existing remedies for delay have been set out above. It is respectfully suggested that in order to comply with its obligations under the Convention and in order to ensure effective respect for the human rights of those within its jurisdiction, it is incumbent on the State to introduce reforms to provide a clear and effective remedy for litigants faced with court delays.

IV. RECOMMENDED REFORMS:

There are a number of conceivable reforms that could be introduced to bring Ireland into compliance with Article 13 of the Convention.

The most straightforward solution would be the enactment of a new statutory provision which allows a person to take a specific form of legal action before the courts, seeking damages on the basis that there has been a breach of his or her rights under Article 6(1) of the Convention by reason of court delays. Such a provision would need to be carefully framed so as to avoid the issues which currently hamper a litigant in obtaining redress. Such a provision could conveniently be added through amendment of the European Convention on Human Rights Act 2003, which already allows litigants to take a number of specific claims before the Irish courts in relation to alleged violations of Convention rights.

In fact, a similar approach was taken by the legislature in 2014 in order to deal with a similar situation in which Ireland was found to be in violation of the Convention by failing to provide appropriate remedies under law. Article 5(5) of the Convention requires that states provide an enforceable right to compensation for a person who has been held in unlawful detention. In cases such as *D.G. v. Ireland*, Ireland was held to be in violation of Article 5(5) because, under common law, a person could only sue for damages where imprisoned on foot of an unlawful judicial order if the judge acted with *mala fides.*[18] The situation was rectified through s. 54 of the Irish Human Rights and Equality Commission Act 2014, which introduced a new s. 3A into the European Convention on Human Rights Act 2003. Section 3A(1) provides as follows:-

[18] App. No. 39474/98, 16th May 2002.

> "A person (in this section referred to as an 'affected person') in respect of whom a finding has been made by the Court that he or she has been unlawfully deprived of his or her liberty as a result of a judicial act may institute proceedings in the Circuit Court to recover compensation for any loss, injury or damage suffered by him or her as a result of that judicial act and the Circuit Court may award to the person such damages (if any) as it considers appropriate."

This is similar in some respects to the solution adopted by Finland in order to provide a remedy for court delays in order to comply with Article 13. Finland's Act on Compensation for the Excessive Length of Judicial Proceedings (2010) provides that a party to civil, petitionary and criminal matters may file a claim for compensation for delay with the court considering the main issue in proceedings in which that party is involved before the consideration of the matter has ended. The amount of compensation is fixed at €1,500 to €2,000 per year of delay, with the maximum amount set at €10,000 (which may be exceeded on special grounds).

A different means of introducing an effective remedy for court delays would be to make provision under law to fast-track or prioritise certain cases. This conceivably offers a solution because, as set out above, the European Court of Human Rights has accepted that one way to provide an effective remedy for court delays within the meaning of Article 13 is to provide an effective way to ensure there are no further delays into the future. It is difficult to conceive what action could be taken in this regard. As noted above, it is usually possible for a litigant to apply to the judge presiding over a court list for priority or an early trial date, and there is specific provision for commercial cases to be fast-tracked through the High Court. In theory, it might be possible to introduce legislation which legally obliges judges to treat cases with priority or to fast-track same; however, in doing so, there is a real risk of fettering the ability of judges to properly manage court lists.

Finally, it would be possible to deal with matters by enacting legislation which establishes a statutory body or tribunal to which litigants can make claims to be compensated for delays in court proceedings. The Hepatitis C Compensation Tribunal Act 1997 provides one model for legislation providing for such a body. Another example is provided by the Personal Injuries Assessment Board, which can assess and award compensation for personal injuries if

acceptable to all parties, or authorise the taking of litigation in the event that either party if dissatisfied with the assessment process or the issues arising are too complex to deal with through assessment.

Of these options, it is respectfully suggested that the optimal way of providing an effective remedy for breaches of the Article 6 right to a hearing within reasonable time is to introduce a new provision into the European Convention on Human Rights Act 2003, modelled on the existing s. 3A. This provision would expressly permit a litigant to bring a claim for damages in the Circuit Court to compensate for delays in the course of civil and criminal proceedings which amount to a violation of Article 6(1) of the Convention. The section would carefully address the matters to be considered by a judge in determining that claim and awarding compensation. Ideally, the section (or related court rules) would provide a streamlined procedure to ensure speedy resolution of such claims in the courts, to take account of the comments of the European Court of Human Rights in *McFarlane.*

This approach would utilise the existing court structures to adjudicate on compensation claims for court delays, and would ensure that litigants are provided with a clear and specific statutory cause of action to facilitate making such claims. There are a number of advantages to taking this approach as opposed to any alternative.

In the first place, this approach allows delay claims to be considered and determined within established structures which are well-known to litigants, without the difficulties and expenses involved in setting up a new body, including renting premises; hiring and remunerating appropriate personnel; prescribing procedures; and advertising the existence of such a body to potential claimants.

Secondly, the courts provide the ideal environment for the fair and just determination of Article 6 claims, due to the legal complexity involved. It is not possible to determine whether Article 6(1) has been breached by simply considering the amount of time that court proceedings have taken. Instead, the European Court of Human Rights has indicated that it is necessary to weigh up and balance a range of competing considerations, including:-

(i) The complexity of the legal issues arising in the proceedings;

(ii) The conduct of the parties, and particularly the applicant for compensation in contributing to any delays;

(iii) The importance of what is at stake for the applicant for compensation in the proceedings.[19]

The relative weight to be afforded to each of these factors and the overall conclusion which should be reached on the delays involved are complicated matters which are open to considerable dispute between the litigant and state. In addition, there is a vast body of case law from the European Court of Human Rights where these issues have been argued which impacts on the assessment of whether Article 6(1) has been violated.

Further, there are a range of ancillary legal issues which arise in the context of court delay claims. For instance, issues may arise as to the exact sort of compensation to which a person is entitled and the sort of losses which can be compensated. There are also issues in relation to how time should be calculated when determining whether there has been delay and, in particular, whether it is appropriate to take account of matters which have occurred prior to the formal instigation of legal proceedings: see, for example, the discussion by Clarke J. in *Nash* as to the uncertainty over the extent to which it is possible to take account of periods of delay during the investigation into offences and prior to the formal commencement of a criminal process and the trial. There are even legal issues as to the types of civil proceedings which amount to "proceedings involving the determination of rights and obligations" within the meaning of Article 6. For instance, the European Court of Human Rights has held that proceedings relating to tax and deportation do not amount to civil proceedings within the meaning of Article 6.[20]

[19] See, for example, *Frydlender v. France* (App. No. 30979/96, 27th June 2000) and *A. v. Denmark* (App. No. 20826/92, 8th February 1996).
[20] See *Charalambos v. France* (App. No. 49210/99, 30th October 2003) and *Maaouia v. France* (App. No. 39652/98, 5th October 2000).

The court process is the fairest and most effective way of determining the sort of complex legal issues arising in Article 6 delay claims. The process will be presided over by a judge, who is skilled and experienced in determining rights-based claims and calculating compensation. Both the litigant and the State will be afforded a fair opportunity of putting forward competing legal arguments as to whether there has been a violation of Article 6(1), and this will benefit the judge in reaching the correct decision. A system which requires litigants to engage with such issues alone would be to their disadvantage.

Thirdly, taking the approach suggested above would ensure consistency in the law. The European Convention on Human Rights Act 2003 currently permits a variety of claims for alleged breaches of Convention rights to be litigated before the courts. It would be wholly in accordance to allow Article 6 claims to be litigated in a similar manner, rather than drastically departing from this existing model.

Overall, the proposal above would bring Ireland back into compliance with Article 13 in a manner which involves minimal public expenditure and which would ensure the fair and effective determination of delay compensation claims. It should be added, however, that the introduction of a specific statutory remedy to provide compensation should be seen as only part of the necessary solution. It is imperative that efforts are made to ensure that the court system is properly resourced, so as to minimise delays for litigants and to therefore avoid the necessity for litigants to resort to compensation proceedings altogether.

V. PROPOSAL FOR REFORM BEFORE THE COMMITTEE:

The European Convention on Human Rights (Compensation for Delays in Court Proceedings) Bill represents an effort to bring Ireland into compliance with Article 13 by establishing a statutory body to determine compensation claims outside of formal court structures. The key features of the Bill may be summarised as follows:-

- The Minister for Justice may appoint persons as “delayed proceedings compensation assessors”. Only former judges are eligible for appointment. (Head 4)

- A “party to civil proceedings in any court” or “an accused person in criminal proceedings in any court” who alleges that there has been a breach of Article 6(1) of the Convention on grounds that the proceedings concerned have not been determined within a reasonable time may make an application for compensation to an assessor. This application “shall be made in such form, and shall contain such information” and be “accompanied by documents, as the Assessor may determine”. The application may be made while proceedings are ongoing, or up to 12 months after the determination of the proceedings. (Head 7)

- Each assessor “shall determine the procedures for assessment of claims”, but is obliged to “adopt procedures which are informal” insofar as is practicable. The assessor must “make a determination on an application and on the question of any award of compensation as best he or she may based on the information available to him or her”. In doing so, the assessor is obliged to rely primarily on written reports, to be made available to the applicant at his or her request. The assessor may also seek “oral or further written information from the applicant or any other relevant person”. The assessor must be given access to all court records relevant to the application, though cannot seek information from the judge concerned or require court officers or the Courts Service to account for any matter relating to exercise of the judicial function. (Head 7)

- In deciding whether there has been a breach of Article 6(1) of the Convention and in making an award of compensation, the assessor is obliged to consider a number of factors included the complexity of the case; the length of the delay; the conduct of the parties and authorities; steps taken by the applicant to expedite matters; and any injury, loss or damage suffered by the applicant by virtue of the delay. (Head 7)

- The assessor may grant awards of compensation, but in doing so “shall have regard to the principles and practice applied by the European Court of Human Rights in relation to affording just satisfaction to an injured party” under the Convention. Further, the assessor “shall compensate the applicant only to the extent that he or she has suffered injury, loss or damage because of the breach, and only to the extent that is required by Article 13 of the ECHR”. The award must be approved by the High Court, and can be

accepted or rejected by the applicant. If accepted, the Minister must pay the compensation unless he or she decides to appeal the award. (Head 8)

- An applicant or the Minister can appeal to the High Court in respect of an award of compensation. A decision of the High Court on the award "shall be final". (Head 9)

- A person awarded compensation is not entitled to "recover damages at common law" for a breach of Article 6(1) of the Convention. However, the applicant may still recover damages for breach of the Constitution arising from that delay. A person who has recovered damages "at common law" for a breach of Article 6(1) of the Convention may not be awarded compensation by an assessor. (Head 10)

The clear aim of the Bill is to provide a system which proceeds on an informal basis and allows applications to be made for compensation with a very limited degree of interaction with the courts. There are, however, a number of concerns which arise in relation to the system envisaged by the Bill which are addressed in turn below.

Establishment of a New Body:

The Bill envisages the establishment of a new administrative body. There would be significant costs to the exchequer involved in this course of action: for instance, remuneration of a former judge as the assessor, staffing and training costs, the costs of buying and renting a premises, and publicising the existence of the new body to potential applicants. Indeed, given the limited compensation payable for court delay claims – as indicated by the jurisprudence of the European Court of Human Rights – these administrative costs would be likely to greatly exceed the amount of compensation actually paid for court delays in any given year. In addition, establishment of the body will require time investment in recruiting personnel and setting out the necessary procedures.

It is respectfully suggested that simply enacting legislation allowing the courts to handle such claims would represent a more prudent use of public resources. The courts system is already in

place and could readily deal with delay claims without the cost or time investment necessary in setting up an entirely new administrative body.

Further, the Bill represents a departure from the established legal scheme. At present, the European Convention on Human Rights Act 2003 permits a litigant to seek various remedies for a breach of Convention rights before the courts. It is unclear what justification there is for the drastic move of establishing an entirely new body to deal with one specific type of Convention claim, rather than simply permitting those claims to be processed before the courts.

Procedures for Determining Claims:

While Head 7 envisages that each assessor will adopt his or her own procedures for the assessment of claims, it provides that all assessors must aim to adopt informal procedures. The Bill further provides that assessors must make their decisions as to whether there has been a violation of Article 6(1) and the appropriate quantum of compensation on the basis of written reports, court records, and other information which may be obtained from an applicant or other parties. While the meaning of "written reports" is unclear, it would appear that there is no requirement for assessors to seek written submissions from applicants, to hold oral hearings to deal with the legal issues arising, or to allow legal representatives to play a role. Indeed, such concepts appear to run contrary to the envisaged informality of the assessment process.

This sort of streamlined claims system might appear superficially attractive based on considerations of speed and cost. However, it would be unsuited to the fair and proper determination of whether there has been a violation of Article 6(1) and the compensation which should be awarded if so. The legal complexity of such claims has been considered above: indeed, the Bill seems to recognise this complexity by requiring that an assessor be a former judge. Given that complexity, it is doubtful that such claims could be fairly or properly decided through an informal process in which an adjudicator simply considers reports and the court files, and does not allow for legal submissions. Instead, any assessment process which requires litigants to engage with such legal issues alone would be to their disadvantage and would be inherently unfair.

In addition, the Bill envisages a very limited role for the State in dealing with a delay claim. While it is conceivable that the assessor could seek information from the State or an organ of the State when determining a claim, Head 7 does not specify that there is any requirement for an assessor to consult with the State in terms of its attitude toward whether or not there has been a violation of Article 6. Instead, it appears that the State only becomes involved in the process if the assessor decides to award compensation, in which case the Minister for Justice may appeal to the High Court. This limitation of the State's role is significant. It is conceivable that the State might dispute a claim that Article 6(1) has been violated: because, for example, of delays caused by a litigant. However, under the Bill, the State does not appear to have a right to make submissions to the assessor on whether compensation should be awarded, and the assessor may well end up deciding the case based purely on the application, written reports and court records without hearing what the State has to say about liability or the explanation for any delays arising.

A hearing in court would provide for a much fairer determination of an Article 6 delay claim than under the assessor model, from the perspectives of the litigant and State alike. A judge deciding the claim would hear argument from both parties. There would be an opportunity for the parties to make written submissions and to put forward arguments in an oral hearing. Legal representatives would be on hand to deal with the legally complex issues posed by Article 6 cases. For these reasons, it is respectfully submitted that enacting legislation allowing delay claims to be brought before the courts would result in a fairer determination of such claims under the assessor model.

Potential for Delays:

The assessor model is intended to speedily resolve claims for a violation of Article 6(1). There is a potential risk, however, that the model could be beset by delays in and of itself.

The Bill appears to envisage a system where any litigant can file a claim to be compensated for delays in proceedings. There do not appear to be any potential costs implications for failing in a claim for compensation. These features pose obvious advantages, but also the potential consequence that every litigant who faces delays of any magnitude in court proceedings will

have a clear incentive to submit a claim for compensation regardless of the actual merits of that claim. As the assessor is obliged to consider all such claims, this could easily lead to an overburdened system.

It is correct to say that a courts-based model would be attended by a greater level of formality to the process and potential costs implications for unsuccessful litigants. However, these features may ensure that only litigants who are confident they possess meritorious strong claims proceed to court. As noted above, legislation allowing the courts to deal with Article 6 delay claims could also provide for streamlined procedures to ensure that there are minimal delays in processing such claims through the courts.

Prospect of Judicial Review Proceedings:

While the assessor model proposed by the Bill is clearly aimed at avoiding matters proceeding to court, it is inevitable that the courts will intervene in the assessment process to some degree. The assessor's activities and rulings would be open to judicial review, and there is a strong likelihood that judicial review proceedings might be taken: perhaps to compel the assessor to return a decision if there are delays, or to seek to quash a decision which is said to have been arrived at unreasonably. The prospect of judicial review proceedings must be weighed up when assessing the overall attractiveness of the assessor model.

Compensation:

Head 8 states in making an award of compensator, the assessor "shall compensate the applicant only to the extent that he or she has suffered injury, loss or damage because of the breach". It is respectfully suggested that this terminology risks setting the bar for compensation at too high a level. It will rarely be the case that someone can be said to have suffered an identifiable injury or loss due to delay in court proceedings. Instead, the consequences manifest in the form of anxiety, frustration and diminished enjoyment of other aspects of life. These are things that should justifiably be compensated for, but the language appearing in Head 8 runs the risk of limiting compensation to far graver cases and, by consequence, of failing to comply with Article 13.

Provision for Appeals:

Head 9 provides that "an appeal shall lie to the High Court by an applicant in respect of any award made by the Assessor". The language used would appear to suggest that while an applicant can appeal the quantum of an award made, it is not envisaged that there would be any right of appeal in respect of a refusal by an assessor to award any compensation or a finding that there was no violation of Article 6(1) in the circumstances of the case. Conversely, it would appear that the Minister for Justice is able to appeal "any award made by the assessor" and can thus challenge the decision to actually grant an award.

This situation is problematic. It is inherently unfair to provide a system where the Minister can appeal a decision to grant an award, but an unsuccessful applicant cannot appeal a decision refusing to grant an award.

In addition, the Bill envisages a situation where the Minister for Justice does not have a formal role in voicing views on whether compensation should be granted at first instance before the assessor, but can only do so on appeal before the High Court. The High Court's decision is then final and cannot be appealed. In essence, this means that an applicant for compensation is given a single opportunity to engage with objections put forward by the Minister, when the matter is before the High Court, and has no further recourse if unsuccessful in countering those objections.

Res Judicata Arguments:

Head 10 makes it clear that when a person is awarded compensation by the assessor, he or she may still seek damages for a breach of constitutional rights. It is also provided that such a person is not entitled to recover damages "at common law".

However, Head 10 does not make any provision in respect of a person who is refused compensation by the assessor or clarify whether such a person may bring a claim for compensation to the courts. Given the lack of express provision in the Bill, it is possible that a

person who is refused compensation by an assessor and subsequently attempts to bring a claim before the courts will be met by an argument that his or her claim is *"res judicata"* and cannot be maintained.

VI. CONCLUDING COMMENTS:

Action needs to be taken to bring Ireland back into compliance with its obligations under Article 13 of the European Convention on Human Rights. However, for the reasons set out above, it is respectfully suggested that adopting the assessor model envisaged by the European Convention on Human Rights (Compensation for Delays in Court Proceedings) Bill does not represent the most appropriate way to do so. The assessor model would involve considerable time and expense in establishing a new administrative body, without any significant apparent gains. The model is also beset by a range of issues, relating to the fundamental fairness of how it decides cases, potential susceptibility to delays and judicial review proceedings, and the shortcomings of appeals and compensation provisions.

A much more straightforward approach would appear to be the introduction of a new statutory provision, in line with s. 3A of the European Convention on Human Rights Act 2003, allowing a claim to be brought before the courts for compensation for court delays. This would ensure that Ireland provides an effective remedy for delays without the expense of introducing a new body, and would provide for the fairest and most effective determination of these claims.

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