



THE BAR  
OF IRELAND

*The Law Library*

Submission by Council of The Bar  
of Ireland to the Legal Services  
Regulatory Authority  
on the Admission Policies of the  
Legal Professions as required by  
Section 33 of The Legal Services  
Regulation Act 2015

6th February 2020

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## 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 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.

## 2. SCOPE OF SUBMISSION

The Council has prepared these submissions at the request of the Legal Services Regulatory Authority (“the LSRA”) who are in the process of preparing an annual report for the Minister on the admission policies of the legal professions in accordance with section 33(1) of the Legal Services Regulation Act 2015.

The submission follows the format of the information sought by the LSRA, specifically:

- The number of barristers who were called to the Bar and joined the Bar of Ireland and/or commencing "devilling" in 2019;
- The number of barristers who registered with the Bar of Ireland and were issued with a qualifying certificate for 2019 under the European Communities (Lawyers' Establishment) Regulations, 2003 and the European Communities (Lawyers' Establishment) (Amendment) Regulations, 2004;
- The number of barristers who left the Bar of Ireland in 2019;
- Any information that you may have in relation to the demand for the services of barristers in 2019, including key indicators that you may have;
- Whether or not, in the view of the Bar of Ireland, the number of persons admitted to practise as barristers in 2019, having regard to the demand for the services of practising barristers and the need to ensure an adequate standard of education and training, is consistent with the public interest in ensuring the availability of legal services at a reasonable cost;
- Any other issues that you believe are pertinent to the preparation of our report under section 33.

### 3. KEY MEMBERSHIP DATA 2019

Total number of barristers in membership of the Law Library in 2019	2,170
Number of barristers who were called to the Bar of Ireland in 2019	148 <sup>1</sup>
Number of barristers who became members of the Law Library 2019	82 (i.e. commenced devilling) <sup>2</sup>
Number of barristers who registered with The Bar of Ireland under the Lawyer's Establishment Regulations in 2019	4
Number of barristers who ceased membership of the Law Library 2019	141

### 4. DEMAND FOR BARRISTER SERVICES

Barristers, who are members of the Law Library, provide specialist advocacy and advisory services in a wide variety of areas and in many different types of forum, including the courtroom, and in other dispute resolution forums such as arbitration and mediation. Members of the Law Library are independent sole practitioners, who compete with each other on a daily basis. Barristers practice in a highly competitive market, and it usually takes many years to become established.

The Bar of Ireland does not hold or collect information which would give an indication of the level of demand for barristers' services in the **private sector**. However, reference to published data<sup>3</sup> of various **state agencies** provides some level of indication of the demand for barristers' services in the **public sector**, namely:

1. The Legal Aid Board – Civil Legal Aid Scheme
2. Department of Justice and Equality – Criminal Legal Aid Scheme
3. Office of the Attorney General/Chief State Solicitors' Office
4. State Claims Agency
5. Office of the Director of Public Prosecutions
6. Office of Government Procurement

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<sup>1</sup> In March 2019, an additional 42 barristers were called to the Bar of Ireland as part of a special call arranged for members of The Bar of Northern Ireland in advance of Brexit. This figure is not included as part of the 148 as it is a unique and unusual occurrence.

<sup>2</sup> An additional 11 barristers joined the Law Library from other jurisdictions and an additional 17 barristers re-entered membership of the Law Library following a period of absence.

<sup>3</sup> The latest data available is from 2018, unless otherwise stated.

According to a paper authored by the Irish Government Economic and Evaluation Service (IGEES), State bodies are the largest single consumer of legal services.<sup>4</sup> Barristers represent clients who have been granted civil legal aid by the Legal Aid Board, and for persons to whom certificates for free legal aid have been granted via the Department of Justice and Equality in criminal proceedings. Counsel is furthermore engaged by the Director of Public Prosecutions in trials on indictment. A panel of barristers is maintained by the Office of the Attorney General/Chief State Solicitor's Office who brief counsel to give legal advice and to appear on behalf of State parties in litigation, and by the State Claims Agency in managing claims against the State and State authorities. "Requests for Tenders" in respect of panels of barristers for the provision of legal services to public sector bodies are also frequently advertised via the Irish Government's electronic tendering platform "e-tenders" which is administered by the Office of Government Procurement.

The list of agencies above is by no means exhaustive. There are several other barrister panels which are operated by a range of other public bodies including Túsla (Child and Family Agency) and the HSE, however the agencies listed above are a good representation of the demand for barristers services in the public sector and therefore, for the purposes of this submission, reference to any published data will be confined to this list.

#### **4.1 The Legal Aid Board - Civil Legal Aid**

Established under the Civil Legal Aid Act 1995, the Legal Aid Board provides civil legal aid and advice to persons unable to afford a solicitor. 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 and ensures that a person's constitutional rights of access to the courts and to a fair hearing are given effect.

The 1995 Act provides that the Legal Aid Board may establish and maintain a panel of barristers who are willing to provide legal aid and advice. Subject to the provisions of the Act, any eligible barrister who is prepared to comply with the Board's terms and conditions shall be entitled to have their name entered on the Panel. Inclusion on the Board's Panel does not, of itself, guarantee that counsel will be briefed.

A barrister from the Panel may be retained where the Board has authorised the retention of counsel for proceedings in the District Court, the Circuit Court, the High Court, the Central Criminal Court, the Court of Appeal, the Supreme Court, the European Court of Justice, the Refugee Appeals Tribunal and such other Court or Tribunal as may be determined by the Board from time to time. The Board may also authorise counsel for the purpose of furnishing an Opinion on a matter. The Board authorises the retention of counsel on a case by case basis.

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<sup>4</sup> Irish Government Economic and Evaluation Service (IGEES) (2013). Public Expenditure on Legal Services. Available at <https://igees.gov.ie/wp-content/uploads/2014/02/Public-Expenditure-on-Legal-Services.pdf>

According to the Legal Aid Board, there are currently **1,026 Junior Counsel** and **78 Senior Counsel** on the Board's Barrister Panels. In **2019**, barristers were engaged in approximately **2,500<sup>5</sup> cases** (461 of these being Personal Insolvency Application review cases under the Abhaile Scheme).

#### 4.2 Department of Justice and Equality - Criminal Legal Aid

The Criminal Justice (Legal Aid) Act 1962 provides that free legal aid may be granted, in certain circumstances, for the defence of persons of insufficient means in criminal proceedings. The grant of legal aid entitles the applicant to the services of a solicitor and, in certain circumstances, up to two counsel, in the preparation and conduct of his/her defence or appeal. The courts, through the judiciary, are responsible for the granting of legal aid.

The Minister for Justice and Equality is legally obliged to keep a list of the names of counsel who have notified the Council of The Bar of Ireland of their willingness to provide expert advisory and advocacy services to clients whose defence is funded by the Criminal Justice Legal Aid Scheme operated by the Department of Justice and Equality. Inclusion on the Panel does not, of itself, guarantee that counsel will be briefed.

According to the Department of Justice & Equality, there were **812 members of the Law Library** on the Criminal Legal Aid panel for barristers in **2019**.

#### 4.3 Office of the Director of Public Prosecutions

The conduct of trials on indictment is handled by independent counsel practising at the Bar who are engaged to represent the Director of Public Prosecutions on a case by case basis. Counsel prosecute in accordance with the Director's instructions and in compliance with the Guidelines for Prosecutors. From time to time the Director seeks expressions of interest from barristers wishing to be considered for inclusion on the various panels of barristers. Inclusion on a Panel does not, of itself, guarantee that counsel will be briefed. Retention on any panel is at the discretion of the Director and is subject to satisfactory performance of work on her behalf, as will be determined by the Director.

At present the Director maintains panels of barristers in respect of the following work:

COUNSEL PANELS	NUMBER
1. Dublin Circuit/Junior Counsel	43
2. Senior Counsel	48

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<sup>5</sup> This figure does not include counsel "opinion only" cases and is approximate.

3. Bail	14
4. Judicial Review	13
5. Habeas Corpus	9
6. Eastern Circuit	5
7. South Eastern Circuit	6
8. Cork Circuit	10
9. Western Circuit	3
10. South Western Circuit	4
11. Midland Circuit	6
12. Northern Circuit	4

Barristers are ordinarily expected to have a minimum of four years at the Irish Bar or relevant equivalent experience in order to be considered for work in all of these areas, except for High Court Bails (three years).

Data provided by the DPP shows the number of assignments made to barristers in respect of the following Courts in 2019:

Court	Total
Circuit Court Assignments (Dublin Circuit)	1,132
Special Criminal Court Assignments	24 (12 Junior Counsel; 12 Senior Counsel)
Central Criminal Court Assignments	405 (204 Junior Counsel; 201 Senior Counsel)

#### 4.4 Office of the Attorney General/Chief State Solicitor's Office

The Attorney General briefs counsel to give legal advice and to appear on behalf of State parties in litigation. The Chief State Solicitor's Office is the instructing solicitor. Counsel are briefed on the basis of the requirements of Section 7 of the Prosecution of Offences Act, 1974 which provides that the Attorney General shall ensure that barristers briefed by him in his official capacity are chosen, from amongst those barristers who have indicated their willingness to so act or advise.

Indications of willingness are invited from counsel of upwards of two years standing and by way of application form for the nomination of counsel. An indication of willingness to be briefed does not, of itself, guarantee inclusion on an Attorney General's panel or guarantee that counsel will be briefed by the Attorney General.

In some areas of work, the public interest requires a high degree of specialisation on the part of advocates and advisers acting for the State. Accordingly, the Attorney General has established panels of counsel for some areas of State practice. They are:

<b>COUNSEL PANELS MAINTAINED BY THE OFFICE OF THE ATTORNEY GENERAL</b>	
Adoption	Irish Language
Agricultural Prosecutions	Joint Habeas Corpus
Army Post-Traumatic Stress	Judicial Review Asylum
Asylum	Mutual Legal Assistance in Criminal Matters
Cab (Constitutional Cases)	Prisoner Transfer
Employment	Rateable Valuation Cases
Extradition/EAW	Rateable Valuation Cases Dublin
Extradition/EAW - Bail	Rateable Valuation Cases Cork
Garda Compensation	Special Needs
Hepatitis C	State Property

Information on the number of barristers who may be on the Attorney General panel is unknown, as the Office of the Attorney General has advised that they are not in a position to provide the information as it is commercially sensitive.

#### **4.5 State Claims Agency**

The National Treasury Management Agency (NTMA) is designated as the State Claims Agency (SCA) when managing claims against the State and State authorities and carrying out related risk management functions in order to reduce the costs of future litigation against the State. The SCA's remit covers personal injury and third-party property damage risks and claims relating to 139 State authorities including the State itself, Government Ministers, the Attorney General, the Health Service Executive, the voluntary healthcare sector, An Garda Síochána, the Irish Prison Service, the Defence Forces and community and comprehensive schools. It also manages third-party costs arising from certain Tribunals of Inquiry and claims for legal costs by parties who have successfully sued the State in respect of personal injury and other non-personal injury related actions.

In 2014, the SCA decided to populate panels of barristers through a public procurement process in respect of Employer Liability/Public Liability/Property Damage claims and Clinical Negligence claims across three separate categories of counsel:

<b>COUNSEL PANELS</b>	<b>NUMBER</b>
1. Senior Counsel	62

2. Junior Counsel (experience in excess of five years)	91
3. Junior Counsel (up to five years' experience).	
<b>TOTAL</b>	<b>153</b>

There were **153 barristers** on the SCA panel in **2019**, **62** of whom were **Senior Counsel**, and **91 Junior Counsel**. A breakdown of the number of junior barristers on panels 2 and 3 listed above is unavailable.

The invitation to barristers with less than five years' experience to compete for work within a separate category permits the SCA to offer less complex legal work to younger and more recently qualified members of the bar enabling the fostering of young talent. Inclusion on a Panel does not, of itself, guarantee that counsel will be briefed. The SCA also has discretion to engage Counsel who are not on their panels.

The SCA publishes on its website the number and cumulative total of all payments made to the barristers it has engaged throughout 6-month periods. This data gives an indication of the number of counsel briefed by the State Claims Agency.

Payments were made to **126 barristers** for the period **1/01/19 – 30/06/19**. Data for the latter half of 2019 is currently unavailable. However available data for 2018 gives an indication of the number of counsel engaged over the course of a full year. Payments were made to **302 barristers** for the period **1/01/18 – 31/12/18**.

#### 4.6 Office of Government Procurement

The Office of Government Procurement (OGP) carries out procurement services through "e-tenders" - the Irish Government's electronic tendering platform for all public sector contracting authorities. "E-tenders" is a voluntary service that is used by the vast majority of state bodies seeking to advertise procurement opportunities. In respect of legal services, each individual tender is designated as coming within one or more of six categories of service as follows:

1. Legal services;
2. Legal advisory and representation services;
3. Legal advisory services;
4. Legal representation services;
5. Legal documentation and certification services; and,
6. Legal advisory and information services.

Since **2008** there have been upwards of **100** legal services tenders. A total of **136 "requests for tenders"** ("RFTs") designated as coming within category 1 (Legal Services) above, were published on e-Tenders **between June 2008 and July 2017**. According to latest data provided

by the OGP there were 5 legal services tenders issued by the OGP in **2018** on behalf of the following bodies:

- Mental Health Commission
- Adoption Authority of Ireland
- Department of Public Expenditure & Reform
- Office of the Regulator of the National Lottery
- Universities Sector

*“Requests for Tenders”* are frequently advertised that are expressly aimed at barristers for inclusion on panels for the provision of legal services to public sector bodies. There were **36** RFTs published between June 2008 and July 2017 under the category that is perhaps most relevant to the kind of work that barristers are likely to be willing and able to provide, being category 2 above - Legal advisory and representation services. Examples included the Commission for Communications Regulation (ComReg), the Central Bank, and the Nursing & Midwifery Board of Ireland. However, an analysis undertaken by The Bar of Ireland in 2017 of legal services tenders generally, revealed implicit and explicit barriers to barristers in tendering for work that is otherwise within their competence and expertise. Some tenders invite submissions from fully qualified solicitors only, notwithstanding the fact that barristers are suitably qualified to provide such legal advice and services. Members of the Law Library are furthermore excluded by reason of, for example, turnover and insurance requirements which, while they may not necessarily exclude all barristers, are likely to exclude a very significant portion of the Law Library membership.

The Bar of Ireland has made representations to the OGP in relation to the exclusion of barristers from tendering for work that is otherwise within their competence and expertise, and given the OGP’s commitment to making procurement competitions more accessible to smaller players in the market, the OGP is working to open up the tender process to barristers by removing certain barriers such as those mentioned above which, going forward, will help to ensure a broader and more inclusive pool of potential tenderers from which a contracting authority can choose the most experienced, most suitable and cost-effective provider.

## 5. PRO BONO AT THE BAR

For any legal system to operate at its optimum level, access to justice must be available to all. Vulnerable sections of society often encounter difficulties in accessing the legal system. While there are State-run schemes, such as civil legal aid and criminal legal aid, they are increasingly insufficient to meet growing needs, and members of the Law Library, alongside organisations such as FLAC (Free Legal Advice Centre), strive to do everything possible to support and empower people who may not otherwise have the means to access justice. A survey conducted by The Bar of Ireland in 2013 reported that 82% of barristers undertake pro bono legal services for clients where otherwise such clients would not be able to access justice.

### 5.1 The Voluntary Assistance Scheme (VAS)

The Voluntary Assistance Scheme (VAS) is the formal pro bono scheme of The Bar of Ireland and makes pro bono voluntary legal assistance available directly to charities, non-government organisations and civic society groups. Since its establishment in **2004**, the VAS has provided pro bono legal assistance in **over 650 matters** for **over 100 charities and NGOs**. Organisations to whom assistance has been provided include: Galway Traveller Movement, Rape Crisis Network Ireland, Community Law and Mediation Coolock, Ballymun Youth Action Project, National Advocacy Service for People with Disabilities, Migrant Rights Centre Ireland, St Vincent De Paul, Bunratty Child Care, Money Advice and Budgeting Service (MABS), and Citizens Information.

The VAS does not generally provide services in family law, child care law or criminal law, as these are areas where State legal aid schemes provide access to legal services, but most areas of law are covered by the Scheme including issues relating to debt; housing; landlord and tenant law; social welfare appeals; employment law; equality law; and prison-related issues. No minimum contribution is required – once a request for assistance is made, a barrister is assigned, and the service is provided free of charge. The Scheme makes available every service that barristers ordinarily provide to clients including opinion work, legal research, advice, consultations and representation in Court.

During the **legal year 2018-2019**, the Voluntary Assistance Scheme arranged for **45 barristers** to assist in **38 matters**. The legal assistance provided included opinion work, legal research, advice, consultations and representation in Court. **Legal advice was provided in 22 matters and legal representation in 16 matters**; in addition to continuing work on ongoing cases from previous years.

## 5.2 Community Outreach

Members of the Law Library also provide voluntary legal assistance through a number of community-based organisations that operate outside of the Bar, including the law clinics run by FLAC and Community Law and Mediation (CLM), an independent law centre, through their clinics in Dublin and Limerick. Reference to published data<sup>6</sup> of these organisations gives some level of indication of the level of demand for barristers' services in the **voluntary sector**.

During **2018** the demand for the services of FLAC remained as strong as ever. 25,164 requests for legal information and advice were received through FLAC's telephone information and referral line and through its network of legal advice clinics at 71 locations around the country. Data published by FLAC, which also operates the Public Interest Law Alliance (PILA), a pro bono referral scheme that provides social justice organisations with access to legal assistance from private practitioners acting pro bono, reported that **350 barristers** provided services to PILA in **2018**.

Law Centres operated by CLM provide legal advice on all areas of law through free advice clinics. The Law Centres also offer legal representation and advocacy, including Court and Tribunal Representation, in areas of law not covered by the State funded civil legal aid scheme i.e. Social Welfare, Debt, Housing, Access to Education & Health Services, Employment and Equality Law.

In **2018**, CLM ran **44 free legal advice clinics** with the assistance of a panel of **28 volunteer barristers** enabling **735 clients** to receive free legal advice. A further **47 free legal advice clinics** were run with the assistance of **18 volunteer barristers** in **2019**. Assistance was provided in relation to **715 legal matters** in that time, the majority of which related to family law and employment law.

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<sup>6</sup> Latest data available is 2018, unless otherwise stated.

## 6. AVAILABILITY OF BARRISTERS TO SATISFY DEMAND

This section gives an overview of the trends of membership of the Law Library over the last 10 years. Despite a high population of barristers by international standards, retention issues at the independent referral Bar exist and attrition rates are relatively high in certain areas of law. Cuts applied to professional fee levels within State-funded schemes such as the Civil and Criminal Legal Aid Schemes, for example, point towards a notable decline in the retention of barristers owing to their inability to sustain a reasonable income in legally aided areas such as crime and family law.

### 6.1 Membership Trends

As evidenced in the table below, Ireland has the highest number of barristers per 100,000 population in comparison to other jurisdictions where there is an independent referral bar in existence.

COUNTRY	ASSOCIATION	TOTAL NO. BARRISTERS	POPULATION	PER 100,000
Ireland	The Bar of Ireland	2,158 <sup>7</sup>	4 792 500 <sup>8</sup>	45
N Ireland	The Bar of Northern Ireland	640 <sup>9</sup>	1 862 100 <sup>10</sup>	34
New Zealand	The New Zealand Law Society	1,379 <sup>11</sup>	4,793,700 <sup>12</sup>	29
Australia	The Australian Bar Association	6,000 <sup>13</sup>	24,511,800 <sup>14</sup>	24
England & Wales	The Bar Council of England & Wales	13,500 <sup>15</sup>	58 381 300 <sup>16</sup>	23
Hong Kong	The Hong Kong Bar Association	1,400 <sup>17</sup>	7,387,562 <sup>18</sup>	19

<sup>7</sup> Membership Stats May 2018

<sup>8</sup> Central Statistics Office (2017)

<sup>9</sup> Direct Contact (2017/2018)

<sup>10</sup> Office for National Statistics (2016)

<sup>11</sup> Direct Contact (NZLS Figure as of 17 January 2018)

<sup>12</sup> Stats NZ (2017)

<sup>13</sup> Australian Bar Association website (2017)

<sup>14</sup> Australian Bureau of Statistics (2017)

<sup>15</sup> Direct Contact (2017/2018)

<sup>16</sup> Office for National Statistics (2016)

<sup>17</sup> HKBA website (number of members as at September 2017)

<sup>18</sup> Worldometers (2017)

<b>Scotland</b>	Faculty of Advocates	445 <sup>19</sup>	5,404,700 <sup>20</sup>	8
<b>South Africa</b>	General Council of the Bar of South Africa	2,824 <sup>21</sup>	56,958,294 <sup>22</sup>	5

Despite a high population of barristers, an overview of the trends of membership of the Law Library over the last 10 years demonstrates retention issues at the independent referral Bar. During the period 2008 – 2018, 1,325 barristers left membership of the Law Library (**Table 1**). The Council of The Bar of Ireland is not aware of any other profession where the attrition rate is at such a level.

*Table 1: Member Attrition Rate 2008-2018*

Legal Year	Total Number of Members Leaving Law Library
2008/09	47
2009/10	72
2010/11	107
2011/12	135
2012/13	152
2013/14	150
2014/15	141
2015/16	105
2016/17	179
2017/18	128
2018/19	109
<b>TOTAL</b>	<b>1,325</b>

Over the past 10 years, membership of the Law Library rose to a high of 2,354 in 2011 but has since retreated to 2,120 as of September 2019 (**Table 2**). The context for this retreat in membership numbers arises from a steady decline in the number of new entrants to membership of the Law Library, (coinciding with the economic downturn) and which hit a new low in October 2019 with 82 new entrants (**Table 3**).

At the same time, the numbers leaving membership has been steadily rising and is expected to remain in the region of 120 per annum (**Table 4**). **Table 4** also provides a breakdown of the

<sup>19</sup> Direct Contact (2017/2018)

<sup>20</sup> National Records of Scotland (2016)

<sup>21</sup> Law Society of South Africa, Statistics for Legal Profession - General Council of The Bar of South Africa, Membership Statistics as at 30 April 2016 p. 47 (2016)

<sup>22</sup> Worldometers (2017)

reasons why 109 members left the Law Library over the course of the 2018-2019 legal year, which includes judicial appointment, retirement, and pursuit of other work opportunities.

An analysis of member attrition by year of practice illustrates clear challenges in sustaining a long-term career at the Bar. As **Table 5** demonstrates, there is a steady decline in the numbers of members that remain at the Bar after five years of practice. Just two-thirds of members who commenced devilling remain in practice five years later. Even more stark is that just 27% of members who commenced devilling in 2008 remained 10 years later. There are a number of factors which explain why members leave, as evidenced by **Table 4**, however given Ireland’s high population of barristers (by international standards), an over-supply and insufficient demand are key considerations.

*Table 2: Membership Trends 2008 - 2018*

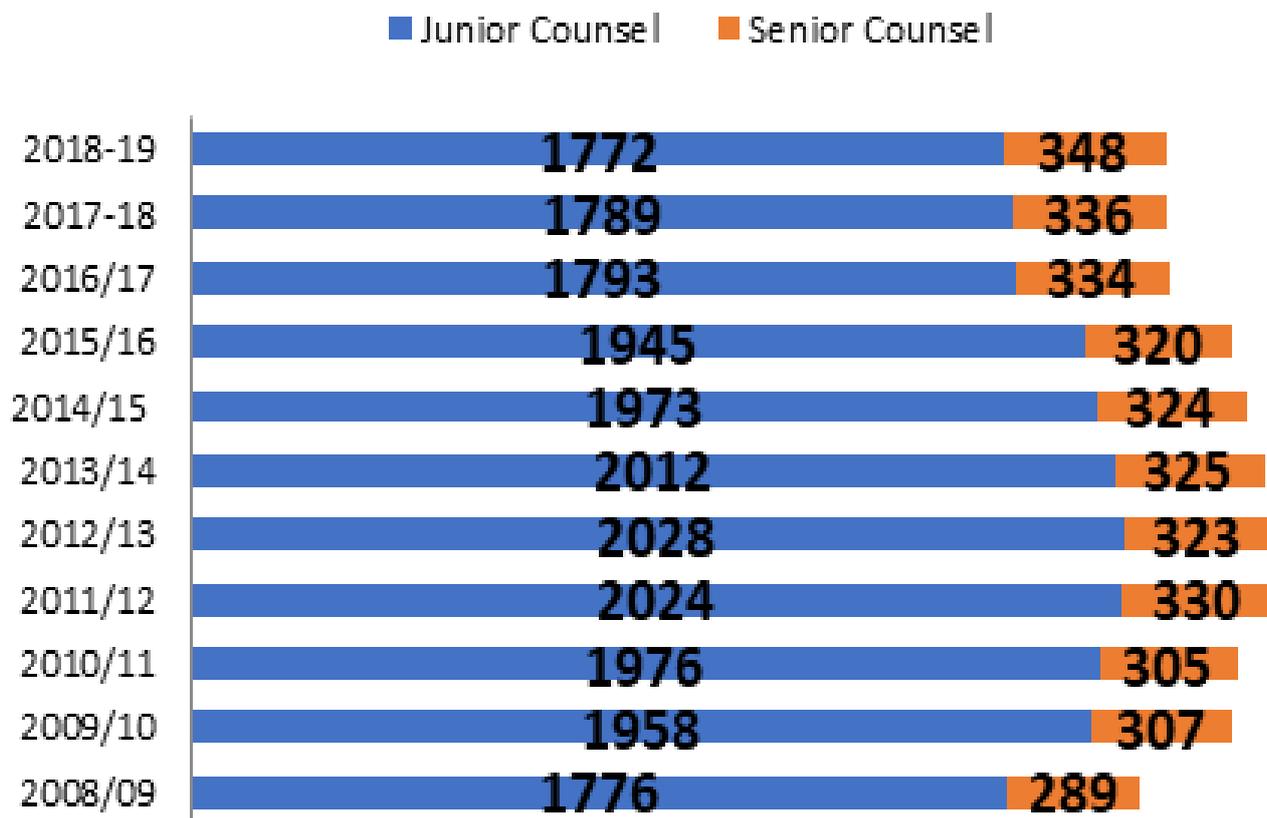


Table 3: New Entrants 2008 - 2019

Legal Year	Number of New Entrants to Law Library 2008 - 2019
2008/09	194
2008/10	146
2010/11	149
2011/12	141
2012/13	153
2013/14	135
2014/15	105
2015/16	96
2016/17	92
2017/18	89
2018/19	82
2019/20	82

Table 4: Leaving Trends 2008 - 2018

Legal Year	Excluded from membership (PII/Arrears/Other)	Retired/Left*	Judicial Appointment	Deceased	Total Number Leaving Law Library
2008/09	14	28	0	5	47
2009/10	17	45	4	6	72
2010/11	46	57	1	3	107
2011/12	51	69	11	4	135
2012/13	47	99	4	2	152
2013/14	37	104	8	1	150
2014/15	38	90	9	4	141
2015/16	16	75	9	5	105
2016/17	35	132	7	5	179
2017/18	27	92	7	2	128
2018/19	21	80	4	4	109

\*This category includes members who have retired or who have left for other work opportunities, health, family, and/or personal circumstances etc.

Table 5: Level of attrition by year of practice

<i>Year joined the Law Library</i>	<i>Total No. New Entrants to Law Library</i>	<i>No. remaining as of Sept 2018</i>	<i>Year of Practice</i>	<i>% REMAIN</i>	<i>% LEFT</i>
2007/08	191	64	12 <sup>th</sup>	34%	66%
2008/09	194	53	11 <sup>th</sup>	27%	73%
2009/10	146	67	10 <sup>th</sup>	46%	54%
2010/11	149	73	9 <sup>th</sup>	49%	51%
2011/12	141	80	8 <sup>th</sup>	57%	43%
2012/13	153	94	7 <sup>th</sup>	61%	39%
2013/14	135	89	6 <sup>th</sup>	66%	34%
2014/15	105	89	5 <sup>th</sup>	85%	15%
2015/16	96	85	4 <sup>th</sup>	89%	11%
2016/17	92	84	3 <sup>rd</sup>	91%	9%
2017/18	89	90	2 <sup>nd</sup>	101%	-1%
2018/19	82	80	1 <sup>st</sup>	98%	2%

Reference should also be made to the newly established Roll of Practising Barristers maintained by the Legal Services Regulatory Authority since December 2018. As of 4<sup>th</sup> November 2019, there were 2,737 barristers on the LSRA Roll of Practising Barristers, suggesting that there are an additional 567 practising barristers providing legal services outside of membership of the Law Library. 198 of the 567 are in the full-time employ of the State. The remaining 369 ‘non-members of the Law Library’, include barristers in the employ of the private sector, those who may primarily practice in other jurisdictions, in-house barristers and retired barristers who are volunteering their services but are still required to be on the Roll.

## 6.2 Impact of Public Sector Fee Cuts

Given the number of members leaving as a result of exclusion and pursuit of other work opportunities, it can be deduced that the primary challenge that confronts a member’s ability to maintain their practice at the independent referral bar is generating income. This challenge, and the resulting consequences, are evidenced in the severe cuts that were applied to barristers’ professional fees for work undertaken in the public sector during the economic downturn.

Since 2008, cuts to professional fee levels have ranged in the order of 28.5% to 69%. For many practitioners, these cuts have made it unviable to continue to participate in State-funded schemes such as the Civil and Criminal Legal Aid Schemes, and many new entrants to the Law Library are voting with their feet and choosing not to practice in legally aided areas such as crime and family law. These areas of law involve long hours of work which is either poorly paid or for which there is no payment whatsoever and new entrants to the profession are often not

able to sustain a career working on complex cases where professional fee levels remain at such low levels.

Whilst cuts to the salaries and allowances of public and civil servants were imposed on some form of systemic basis, this was not practicable in the area of fees to barristers. Therefore, barristers experienced severe income reduction irrespective of what their income actually was. The harshness of the cuts is magnified where barristers carry the entirety of the cost of their practice and the fee level is a gross fee from which the barrister must pay all practice and related costs, including VAT at 23%, income tax, secretarial support, professional indemnity insurance, Law Library fees, office rental, LSRA levy etc.

Such a blunt and all-encompassing reduction has been particularly difficult for average or low earning practitioners at the Bar and is pointing towards an emerging dearth of experienced junior barristers to undertake legal aid work, in particular in the area of criminal law, in the near future, which is most certainly not in the public interest. The Government’s own Spending Review report on Criminal Legal Aid<sup>23</sup> 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. The report recognises 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.

### 6.3 Concerns about Retention at the Criminal Bar

An analysis of barristers practising in criminal law was conducted by The Bar of Ireland in October 2019. During the period **2011/12 - 2018/19**, a total of 197 new barristers commenced practice in the area of criminal law, however less than half (88) of those who commenced a practice in criminal law now remain. While this statistic alone is quite stark, the below analysis of retention at the criminal bar indicates a much more serious and worrying concern for the future administration of criminal justice.

Table A

Year of Entry	Year of Practice	Total no. devilling in crime	Total no. criminal devils who have left Criminal Practice	% of criminal devils who have left Criminal Practice	Total no. criminal devils remaining in crime	% of criminal devils remaining in crime
2018-2019	1	17	6	35%	11	65%
2017-2018	2	25	9	36%	16	64%

<sup>23</sup> Spending Review 2018 Criminal Legal Aid: Overview of current system and potential lessons from an international comparison <https://igees.gov.ie/wp-content/uploads/2018/07/10.-Review-of-Criminal-Legal-Aid-Department-of-Justice-Equality.pdf>

Table A sets out the number of newly qualified barristers who opted to devil in crime in 2017/2018 and 2018/2019. The retention rates following years 1 and 2 are in the region of 65%, with 35% exiting criminal practice. This statistic is not surprising as it is often the case that those who opt out of crime in the early years do so arising from a decision not to practice in that area for a variety of reasons, including suitability for that area of practice. It is notable that the intake of criminal devils between 2017/2018 and 2018/2019 has dropped by 32%.

Table B

Year of Entry	Year of Practice	Total no. devilling in crime	Total no. criminal devils who have left Criminal Practice	% of criminal devils who have left Criminal Practice	Total no. criminal devils remaining in crime	% of criminal devils remaining in crime
2016-2017	3	22	9	41%	13	59%
2015-2016	4	17	9	53%	8	47%
2014-2015	5	29	15	52%	14	48%

Table B sets out the number of barristers who are practising in criminal law for 3-5 years. What is of significant concern is that there is a notable decline (less than 50%) in the retention of barristers practising in crime after the third year of practice owing to their inability to sustain a reasonable income following what is now commonly a two-year period of devilling.

Table C

Year of Entry	Year of Practice	Total no. devilling in crime	Total no. criminal devils who have left Criminal Practice	% of criminal devils who have left Criminal Practice	Total no. criminal devils remaining in crime	% of criminal devils remaining in crime
2013-2014	6	23	16	70%	7	30%
2012-2013	7	38	27	71%	11	29%
2011-2012	8	26	18	69%	8	31%

Table C captures the number of barristers who are practising in criminal law for 6-8 years. This is where the real and detrimental impact of reduced numbers maintaining a criminal law practice is evidenced arising from poor retention rates following six years of criminal practice. 70% of those who commence a career at the criminal bar opt out by their sixth year of practice. Retention rates drop to **less than a third** of those who set out to pursue a career in criminal law and this points to a real and developing concern within the criminal bar as the numbers of junior barristers with experience in crime are simply too low to replenish the loss of senior barristers who retire from the profession.

There are a number of serious consequences arising from this developing situation within the criminal bar:

1. There is **an emerging dearth of experienced junior barristers** who can survive the early years of poor income from a criminal practice and survive long enough to then go on to maintain a career at the criminal bar;
2. A further consequence arising from the reduction of experienced junior barristers is that as the pool of experience and talent shrinks there are **less Masters** (*experienced senior junior barristers who provide vocational training for newly qualified barristers*) **available** to take on first year devils;
3. There is a **loss of valuable experience and talent that cannot be easily replicated or replaced** – this is a loss to both the individual, the State and the administration of justice;
4. If the situation is not addressed, it will undoubtedly have a **profound effect on the administration of criminal justice and the public good**. In the Strategic Plan of the Director of Public Prosecutions 2019-2021, it noted that the number of prosecution files submitted to the Office continued to increase over the preceding three-year period 2016-2018. The Strategic Plan also notes that the increasing complexity of criminal investigation files, advancements in technology, increased criminal sittings outside of Dublin and the appointment of additional judges (which will impact on the throughput of cases), all place additional demand on resources. The expertise and skills required to advise and advocate in criminal trials is of a specialised nature and there is a strong public interest in ensuring that the best advocates are attracted to practice at the criminal bar. While there are very experienced and talented barristers available to act on behalf of the Director of Public Prosecutions at present, the diminishing numbers practising in criminal law, will in the near future impact on the ability of the State to enforce criminal law in the courts on behalf of the people of Ireland.

It is imperative that newly qualified talented barristers are encouraged to practice in the area of criminal law as it takes many years of practice to acquire the necessary experience to effectively and skilfully prosecute serious cases on behalf of the State. One significant form of such encouragement is to be fairly and reasonably rewarded for their services.

#### 6.4 Availability of Legal Services at a Reasonable Cost

In addition to the ongoing lobbying efforts of the Council to call on Government to increase the funding available for legal aid to ensure that all citizens have fair and equal access to justice, the Council also supported and welcomed the recently commenced provisions of the Legal Services Regulation Act 2015 dealing with legal costs.

It is a longstanding requirement that, on receiving instructions from a client, a barrister must on request provide the client with a written fee estimate. This requirement is set out in the Code of Conduct of The Bar of Ireland and the obligation is now reinforced under the new costs provisions of the 2015 Act which demand a certain level of detail to enhance clarity and transparency for the client. This obligation empowers the client to shop around so as to ensure they obtain the best representation and the best value for money.

Increased transparency in legal costs will have the inevitable effect of generating more competition amongst legal service providers. By increasing the amount of information available to clients about the price of legal services it enables clients to make informed decisions about which lawyer to choose and at what rates. If clients are able to compare the prices for legal services, this creates an additional incentive for lawyers to compete on price. Anecdotally speaking, it is common practice for solicitors, particularly those acting on behalf of large businesses, to approach up to 8 barristers seeking fee estimates for a particular piece of work. This equips the client with a range of options from which they can choose the most cost-effective service provider.

The *Doing Business* survey of the World Bank Group for 2020 offers a useful benchmark for the comparison of legal costs. According to the survey, of the eight common law jurisdictions compared, Ireland, contrary to popular belief, is not found to be a high-cost jurisdiction for legal costs. Ireland has the fourth lowest lawyers' fees at 18.8% the value of the claim which is almost identical to Australia's figure of 18.5%, the third lowest rate of lawyers' fees across the common law jurisdictions surveyed.

The market for barristers' services is more competitive than it has ever been. This has led to very considerable reductions in fees paid to most barristers, particularly by private clients where there is no set scale of fees and the fee and manner of payment is usually negotiated by the solicitor on behalf of the client. On the other hand, barristers who undertake work on behalf of the State are, in the main, working to a set schedule or scale of fees. As such there is little or no negotiation, and in many cases, this involves barristers appearing for a client at less than the normal commercial rate and at no cost to the client. As mentioned above, the Government's own Spending Review report on Criminal Legal Aid, published in July 2018, recognised that our cost effective and robust Criminal Legal Aid system facilitates a high standard but low-cost representation of defendants through skilled advocates on the Criminal Legal Aid Panel.

## 6.5 Getting Paid is an Ongoing Problem for the Profession

For many years past, a frequent complaint raised by members of the Law Library is the ability to get paid for work undertaken, normally upon the instruction of a solicitor. Difficulties in getting paid is a significant factor in a barrister being able to sustain and develop a career at

the independent referral bar. Like any self-employed profession, overheads are still incurred and the ability of an independent sole practitioner to access debt facilities at the early part of their career is challenging.

In an attempt to assist members with this perennial problem, the Council entered an arrangement with a third-party provider, LawServ in October 2014 to provide a service to assist members having trouble collecting fees from solicitors along with a billing and accounts receivable service. Since October 2014, in excess of 335 members (15% of members of the Law Library) have availed of the service to assist them in collecting their unpaid fees totalling €4m in fees. In this time, a total of €1.1m was recovered, representing a recovery rate of 28%.

Data provided by legal account services LawServ categorises the reasons for non-payment under 14 headings. As demonstrated in Table 6 below, approximately 42% (see 1 and 2 in the table below) of the cases for non-payment of counsel fees arise from a lack of cooperation by the solicitor to discharge the fees owed that may result in a complaint being made to the Law Society (and since 7<sup>th</sup> October 2019, the Legal Services Regulatory Authority).

*Table 6: LawServ Analysis of Reasons for Non-Payment of Counsel Fees*

NO.	REASON	EXPLAINER	% OF CASES
1	Solicitor not cooperating	No engagement from solicitor with LawServ after repeated attempts.	21.19%
2	Law Society Referral	The case has been referred under the instruction of the barrister, to the Law Society for further investigation.	20.60%
3	Client not in funds	Client does not have funds to repay fee note (for various reasons such as insolvency/illness etc).	16.70%
4	Counsel withdrew complaint	Counsel did not pursue the case any further.	10.75%
5	Solicitor Firm Dissolved/File Transfer	This occurs when a firm who previously assumed responsibility for a file, has shut down and a new solicitor takes hold of the case - the file is transferred.	8.95%
6	Administrative delay	Delays can occur either with the Solicitors office investigating the claim, or a State Agency processing the claim.	5.67%
7	Taxation	Costs are being calculated via taxation process, which can take several months.	5.67%
8	Matter Ongoing	The case in question has not concluded, and costs have not been calculated.	3.28%

9	Probate	This is the process that governs the distribution of a client's assets/ estate in order to finalise costs.	3.28%
10	Client in another jurisdiction	When the client has moved jurisdiction, it can be difficult to source his new address/ issue proceedings against him.	2.39%
11	Client uncontactable	This occurs when the client has changed address and no party can locate him / her	0.60%
12	Client not engaging	Client is refusing to respond to correspondence.	0.30%
13	No party paid	The matter has concluded and no party to the case has been paid	0.30%
14	Proceedings issued against client	This occurs when the debtor refuses to discharge payment to solicitor's office, consequently as a last resort the solicitor is forced to take court proceedings against the debtor.	0.30%

While there have been many attempts over the years to address the ongoing frustration at the Bar in relation to solicitors failing to discharge fees properly due to counsel directly with the Law Society, to date, the onerous burden of having the matter addressed has been placed on the individual barrister to pursue. This issue was raised by the Joint Oireachtas Committee on Justice & Equality at a meeting with the Legal Services Regulatory Authority of 4<sup>th</sup> July 2018. The Council is hopeful that the Legal Services Regulatory Authority will investigate the issue further and consider the steps it could take in order to bring an end to the high rate of failure by solicitors to discharge fees properly due to counsel for work undertaken.

## 7. ANY OTHER ISSUES

### 7.1 Supporting Access to the Profession and a Career at the Bar

#### **Improving support for devils**

Completion of training at Kings Inns gives rise to what is known as the Barrister-at-Law (BL) degree and once a student has received their BL degree they are eligible to be 'called to the Bar of Ireland' where they will be admitted to practice by the Chief Justice of Ireland and will be eligible to become a member of the Law Library and undertake a one-year period of pupillage, commonly referred to as 'devilling'.

Rules of Membership of the Law Library set out the obligations imposed upon a pupil not less than 10 days before the date of admission to the Law Library. Such obligations include establishing evidence of the payment of the relevant entrance fee and annual subscription, evidence of an acceptable policy of professional indemnity insurance, evidence of registration with the Legal Services Regulatory Authority, confirmation that a Master whose name is on the approved list of Masters has committed to taking on the relevant pupil, and attendance at a prescribed pre-admission interview.

A newly qualified barrister must undertake devilling for a period of one year with an approved practitioner, commonly referred to as a 'Master', during which, under the Master's tutelage the pupil has a valuable, practical opportunity to learn about the nature of professional practice and to become acquainted with court work, preparation of cases, legal documents and so on. The focus of the relationship is one of education and training. Traditionally, the pupil/devil does not receive formal financial compensation although informal measures are commonplace. On 22<sup>nd</sup> July 2019, a motion was passed by the members of the Law Library at its Annual General Meeting which seeks to introduce an obligation on Masters to ensure that pupils/devils under their supervision receive a sum of no less than the amount required to pay for the pupil's Law Library entry fee, annual subscription fee and professional indemnity insurance. This motion, planned to commence in October 2021 pending implementation of the necessary procedural steps, should have the positive effect of improving access to the profession and support for a new practitioner in the commencement of their professional career.

#### **Promoting Diversity at the Bar**

While there are a number of programmes operating across universities and Higher Education Institutions which support access to third level education in Ireland by individuals from socio-economically disadvantaged backgrounds, concerns remain that on graduating with a law degree, some individuals may experience further obstacles and barriers when it comes to

accessing professional practice as a barrister or a solicitor. A lack of financial means is often cited as one of the main barriers to entry to the legal profession. As the representative body for barristers in Ireland, The Bar of Ireland acknowledges that it has an important part to play in encouraging more diversity at the Bar and has introduced, in recent years, initiatives which seek to bridge the gap, where it exists, between higher education and access to professional practice.

In 2017, The Bar of Ireland, in association with The Honorable Society of King's Inns, launched **The Denham Fellowship**. The Denham Fellowship, named after The Hon. Mrs. Justice Susan Denham, former Chief Justice, assists two aspiring barristers annually who come from socio-economically disadvantaged backgrounds to gain access to professional legal education at the King's Inns and professional practice at the Law Library. The Fellowship is open to law graduates who accessed a higher education institution for the first time through an access programme as a school leaver or a mature years' student due to socio-economic disadvantage, or graduates of the Diploma in Legal Studies at The King's Inns who come from a socio-economically disadvantaged background.

Recipients of the Fellowship, known as Denham Fellows (of which there are currently six) are provided with financial, educational and professional support from point of entry to the Barrister-at-Law degree programme at the King's Inns all the way through their first four years of practice at the Law Library culminating in a five-year programme and ultimately in what is going to be a successful and rewarding career at the Bar.

The supports include:

- Remission of fees to the Barrister-at-Law Degree Programme at the Kings Inns, including the Entrance Examination Fee and repeat assessments;
- Waived Law Library Fees for the first four years of practice at The Bar of Ireland, including the Entrance Fee;
- An annual stipend of €6,000 for a period of minimum 5 years (6 years for part-time students), commencing at the start of the Barrister-at-Law degree programme, to go towards accommodation and living expenses;
- Three mentors to be assigned to each Denham Fellow for the duration of the fellowship; one from the judiciary; one senior member of The Bar of Ireland; one junior member of The Bar of Ireland;
- Support in locating a Master for each year of devilling.

The Fellowship is the latest in a line of initiatives from The Bar of Ireland to encourage more diversity in the legal profession. The Bar of Ireland's '**Look into Law' Transition Year Programme** is an exciting initiative aimed at increasing students' awareness of the work of The Bar of Ireland and to encourage students from all backgrounds to consider a career as a barrister. Some 100 students from all over the country and from a wide cross-section of society take part

in the programme every year, with a minimum of 20% of places reserved for students from DEIS schools. Members continue to offer to allow transition year students to shadow them on an informal basis, however the official 'Look into Law' programme has helped to broaden the breadth and diversity of students who would like to learn about life as a barrister.

## 8. CONCLUSION

The Council of The Bar of Ireland welcomes the opportunity to respond to this consultation on the admission policies of the legal professions in accordance with section 33(1) of the Legal Services Regulation Act 2015.

As is evidenced throughout this submission, despite a high population of barristers by international standards, retention issues at the independent referral Bar exist and attrition rates are relatively high in certain areas of law.

There are a number of factors that explain the high rates of attrition including:

- an over-supply of barristers and insufficient demand for their services;
- the consequences of severe cuts applied to professional fee levels in legally aided areas such as crime and family law giving rise to a real pressure on a barrister's ability to sustain a reasonable income;
- difficulties in getting paid is a significant factor in a barrister being able to sustain and develop a career at the independent referral bar.

These factors are all key considerations that may warrant further analysis by the Legal Services Regulatory Authority in order to ensure that the impediments to the sustainability of a career at the Bar are addressed.



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