



THE BAR
OF IRELAND

The Law Library

BARRA NA hÉIREANN

An Leabharlann Dlí

SUBMISSION TO THE
GOVERNMENT OF IRELAND

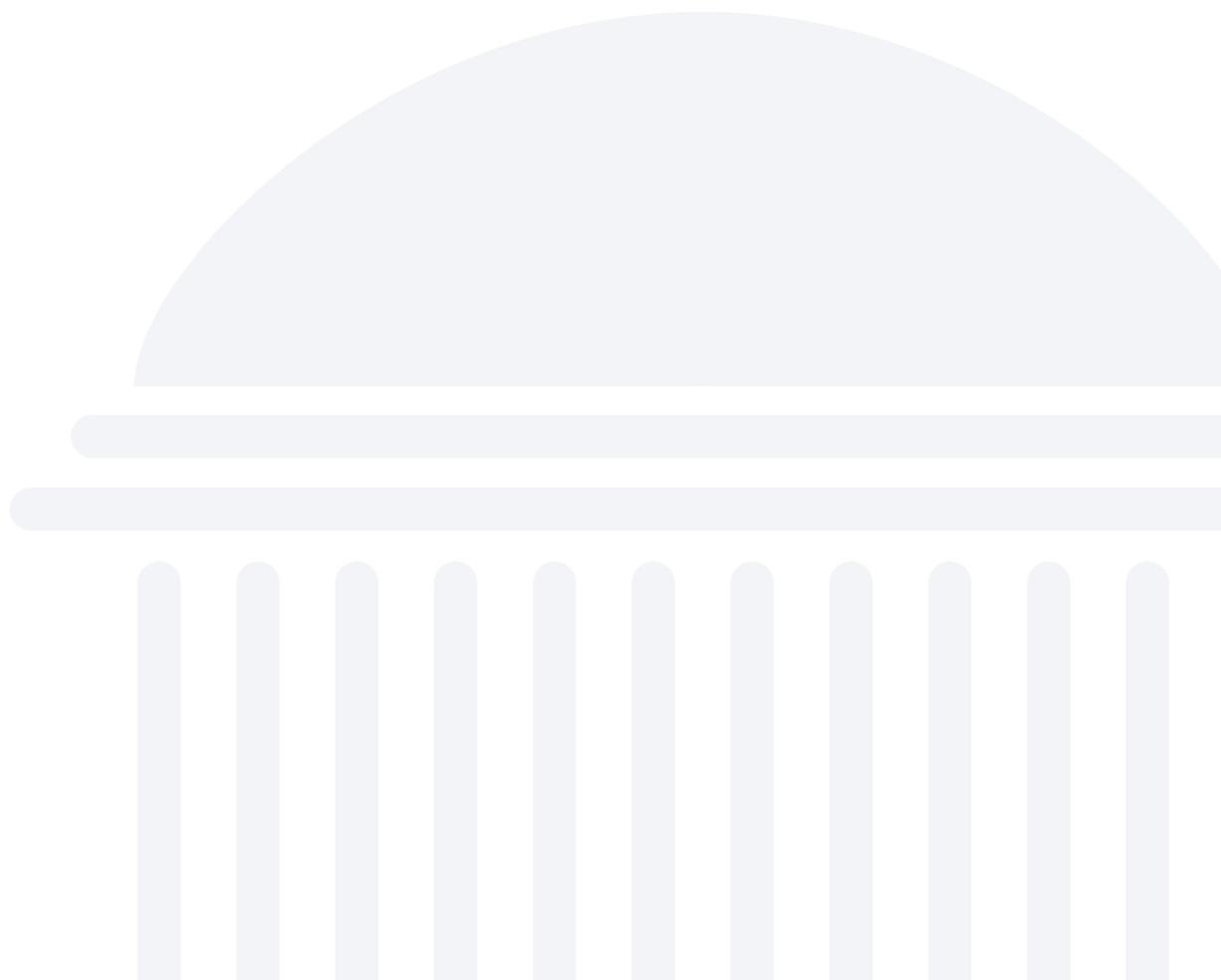
BUDGET 2024

INVESTING IN THE FRONTLINE CRIMINAL JUSTICE SYSTEM

June 2023

About The Bar of Ireland

The Council of The Bar of Ireland is the accredited representative body of the independent referral Bar in Ireland, which consists of members of the Law Library and has a current membership of approximately 2,170 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.



BACKGROUND

Since the financial crisis of 2008 – 2011, barristers who conduct criminal cases in the higher courts both for the prosecution (instructed by Director of Public Prosecutions) and on behalf of accused persons (paid under the Department of Justice, Criminal Justice Legal Aid Scheme) have remained committed to the delivery of vital court services and to cooperation with the implementation of a continuous process of improvement of the delivery of those services.

The cuts applied in the period 2008-2011, ranging in the order of 28.5% - 69%, mean that the current professional fee rates reflect 2002 levels in nominal terms. In real terms, having regard to the inflationary impact, particularly in recent times, they are in fact much lower:

September 2008	Non-payment of 2.5% increase (per public service pay agreement)
March 2009	Reduction of 8% in fee levels (at the same time as FEMPI cuts imposed)
April 2010	Reduction of 8% in fee levels (at the same time as FEMPI cuts imposed)
October 2011	Reduction of 10% (no equivalent cut was imposed on the public sector)

Further, up until 2008, the fees paid to barristers were linked to the increases applied under public sector pay agreements and the Government unilaterally broke this link in 2008. This means that barristers are paid a flat rate, with no provision for inflation or cost of living increases, in marked contrast to those employed in the public sector.

STORING UP A MANPOWER CRISIS

As a direct consequence of the deep cuts that were applied to criminal fee rates during the financial crisis of 2008-2011, a career choice for recently qualified junior barristers in crime has become unattractive when compared to opportunities in other areas of law.

The evidence shows that two-thirds of criminal barristers leave practice after just six years at the Criminal Bar, due to the remuneration and conditions that currently exist in criminal 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 take silk or leave the profession through retirement, judicial appointment etc. Because barristers in criminal practice cannot make a sustainable living after a few short years in criminal practice, they leave criminal practice and their experience and expertise gained up to that point is lost to the administration of criminal justice.

The effects of this exodus are felt on both sides of the criminal justice system. A skilled and experienced criminal prosecution bar can only emerge after many years of practice in the junior ranks of criminal defence law. It takes many years of practice at the Bar to acquire the necessary experience to effectively and skilfully prosecute serious cases on behalf of the State and it is imperative that newly-qualified, talented barristers are encouraged to practice in the area of criminal law. An essential form of such encouragement is to be fairly and reasonably rewarded for their services.

A continued exodus of criminal practitioners has created the conditions for a grave and serious man-power crisis in respect of frontline advocacy services and there are a number of serious consequences arising from this developing situation within the criminal bar:

- a) There is an emerging dearth of experienced junior barristers who can survive the early years of low income from criminal practice and survive long enough to then go on to maintain a career at the criminal bar;
- b) A further consequence arising from the reduction of experienced junior barristers is that, as the pool of experience and talent shrinks, there are fewer Masters (experienced barristers who provide vocational training for newly qualified barristers) available to take on first-year devils, which has a knock-on effect on the professional formation and development of barristers;
- c) In due course, the reduction in numbers of junior barristers engaged in criminal practice, will inevitably result in a reduced pool of barristers with the experience and skill required to prosecute the most serious offences and, indeed, to ensure the proper defence of persons charged with those offences. There are recent reports which indicate that this issue has already begun to manifest itself in the DPP having difficulty securing the services of experienced senior counsel to prosecute serious offences against the person in the Central Criminal Court;
- d) 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;
- e) If the situation is not addressed, it will undoubtedly have a profound effect on the administration of criminal justice and the public good. The expertise and skills required to advise and advocate in criminal trials is of a specialised nature, only capable of being

acquired over long years of practice, 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 have a growing adverse impact on the ability of the State to enforce criminal law in the courts on behalf of the people of Ireland. A reduced number of barristers practising in criminal law will have a knock on effect on the availability of counsel to prosecute cases, thereby affecting the rights of victims to have their complaints prosecuted expeditiously, and the rights of accused persons (who remain innocent until proven guilty) to have their innocence or guilt determined.

OUTCOME OF JULY 2018 REVIEW PROCESS REMAINS UNIMPLEMENTED

In July 2018, following a detailed review process led by the Office of the Director of Public Prosecutions (ODPP) in conjunction with the Department of Justice and sanctioned by the Department of Public Expenditure & Reform, the review concluded as follows:

‘That all parties are in unequivocal agreement that the ongoing flexibility being delivered by prosecuting counsel, documented above, is considered comparable to the flexibility delivered by other groups to justify the reversing of cuts imposed during the financial emergency’.

It should be understood that “ongoing flexibility” refers to cooperation with important improvements in the quality of the administration of criminal justice in the State, including the implementation of the latest developments in Irish and European law, new protections for the rights of victims of crime, additional data protection obligations of the DPP, and the increasingly onerous work associated with ensuring full disclosure of relevant material in an age of rapidly changing technology.

The conclusion of this process clearly demonstrated that the front-line departments involved in the administration of justice accepted unanimously and unequivocally the case made to justify the reversal of cuts imposed during the financial crisis of 2008 – 2011.

Despite numerous requests of Government since July 2018 to have the cuts to professional fees of barristers reversed, five years on from the conclusion of the 2018 review, there have been no specific measures or timeframe set out on how and when fee restoration is to be applied to

barristers who are engaged to provide services for the ODPP and under the Criminal Legal Aid Scheme. Nor has any justification been offered to treat barristers differently from other sectors involved in the administration of criminal justice.

Arising from the lack of any Government decision on fee restoration, the Office of the Director of Public Prosecutions wrote to the Department of Public Expenditure & Reform on 30 March 2021 to re-state their support for the reversal of the cuts imposed on barristers noting that:

“The arguments have been well rehearsed regarding the fact that counsel have been treated differently to other groups in the criminal justice process and, indeed, the economy at large.

All other groups have seen a restoration of cuts.

This Office has highlighted on a number of occasions the very significant flexibility delivered by counsel and their ongoing co-operation with change initiatives – flexibilities and co-operation which is comparable with that accepted as justification for pay restoration to staff employed in the criminal justice system and to restoration for State Solicitors.

Rather than there being a need for further detailed examination by officials in our two organisations, this Office considers that we are now at a point where a political decision is required.”

The failure of the Government to implement a process of fee restoration to barristers in itself reflects a political decision – a decision not to adequately fund the criminal justice system and, in particular, not to support the improvements in the criminal justice system (to support and protect victims, vulnerable witnesses and accused persons) – which have to date been achieved only with the cooperation and flexibility of practising barristers.

ONGOING CONTRIBUTION OF THE BAR TO EFFICIENCIES IN THE ADMINISTRATION OF CRIMINAL JUSTICE

Since the imposition of the professional fee cuts of 2008-2011, the Bar has continued to cooperate with efficiencies and changes in work practices to improve the administration of criminal justice. Some examples of this cooperation include:

1. Review of Disclosure - the proliferation of digital data has increased exponentially in respect of evidential matters. A fee is only paid for review of 'significant' disclosure and where prior sanction has been granted, but the vast majority of cases contain a much greater level of disclosure for review when compared to 2008 and this review is unremunerated. Counsel have effectively adopted this additional workload in the absence of adequate compensation.
2. Preliminary Trial Hearings - the introduction of preliminary trial hearings to address legal issues in advance of the commencement of a trial means that barristers have to prepare the case twice and assign additional dates to the case. Pre-trial hearings facilitate case management and the expeditious and efficient conduct of proceedings and give rise to the least disruption to the jury, complainants/injured parties, witnesses and court staff involved with the trial. The remuneration level for preliminary trial hearings is not reflective of the work required.
3. Adoption of Paperless Briefs – Barristers have accommodated the Office of Director of Public Prosecutions in accepting electronic briefs, which have administrative, financial and regulatory data protection benefits for the State, without any cost to the State. In circumstances where the extent and availability of technological supports in the courts is not uniform or where a barrister is relying on paper (as advocacy and case preparation lends itself to), they assume that task and cost of printing and collating the electronic briefs, which may result in a significant additional time imposition, and confer those benefits on the State, entirely at their own expense.
4. Cooperation with the implementation of the 2020 O'Malley Report (Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences). Arising from this review, barristers now have an additional obligation placed on them by the State to undertake specialised training. They have to undertake this training on a regular basis, in their own time and at their own expense.

5. Consultations with victims of crime and prosecution witnesses pursuant to the Criminal Justice (Victims of Crime) Act 2017.
6. Provision of information to juries, including preparation of schedules and summaries of evidence, pursuant to Section 12 of the Criminal Procedure Act 2021, again leading to a significant additional time imposition.
7. Applications for leave to call expert witnesses, pursuant to the Criminal Procedure Act 2010, as amended.
8. Applications and hearings in respect of suspended sentence hearings, pursuant to Section 99 of the Criminal Justice Act 2006 and the Criminal Justice (Suspended Sentences of Imprisonment) Act 2017.
9. Applications for special protective measures during criminal proceedings, pursuant to Section 19 of the Criminal Justice (Victims of Crime) Act 2017.

The overall impact of the cooperation of the Bar with these reforms include:

1. Facilitating the expeditious and efficient conduct of proceedings giving rise to the least disruption to the jury, complainants/injured parties witnesses and court staff involved with the trial, and enhancing their experience of this vital public service.
2. Assisting the Judiciary and Court Service in case management, list management and overall output.
3. Giving rise to significant savings in time and resources of other state bodies including the ODPP, CSSO, Garda Síochána, Probation Services, Prison Services etc.

As noted above, the Office of Director of Public Prosecutions in March 2021, acknowledged:

'This Office has highlighted on a number of occasions the very significant flexibility delivered by counsel and their ongoing co-operation with change initiatives – flexibilities and co-operation which is comparable with that accepted as justification for pay restoration to staff employed in the criminal justice system and to restoration of State Solicitors'.

UNFAIRNESS AND INEQUALITY IN THE GOVERNMENT'S APPROACH TO PAY IN RESPECT OF BARRISTERS

The approach being taken by Government in relation to the unwinding of cuts applied to the professional fees of barristers is at odds with the approach taken in relation to other groupings:

- a) Barristers who conduct criminal cases on indictment for the prosecution work closely alongside State Solicitors engaged by the DPP who work on the same cases. State Solicitors, who are independent contractors, have already had fee restoration applied in respect of payments to them. In stark contrast to the stated objective in Section 42 (10) of the Public Service Pay and Pensions Act 2017 '*to be fair and reasonable*', there is an inherent and unjustifiable unfairness in the approach being taken by the State towards the case for fee restoration for Counsel. The fact that State Solicitors who are also independent contractors have already received an uplift in their fees, demonstrates a lack of consistency in the application of Government policy in relation to pay.
- b) The Judiciary, who preside over criminal trials, have had their pay restored in recent years.
- c) Other professions who are self-employed workers have had their professional fees increased by the State, i.e. General Medical Practitioners who achieved restoration of their fee cuts in April 2019.

The government's own 2018 spending review report on criminal legal aid - *Criminal Legal Aid: Overview of current system and potential lessons from an international comparison* - recognised that our cost effective and robust criminal legal aid system facilitates a high standard but low-cost representation of defendants through skilled advocates engaged by the State and recognised that the fee structure and the incentives of this fee structure must be monitored on an ongoing basis to ensure a fair, effective and efficient criminal justice system.

Each of these examples demonstrates obvious anomalies and an unfairness in the approach of Government in its pay policy in respect of barristers. All other groups of workers who were subjected to the emergency FEMPI cuts throughout the justice system have since had their cuts reversed and no other group of workers in the State is having to endure a pay level that was in place 21 years ago.

LEGISLATIVE BASIS TO REVIEW AND INCREASE PROFESSIONAL FEES

Part 5 of the Public Service Pay and Pensions Act 2017 provides for the regulation of fees and other payments made to 'service providers'. Section 42 (10) provides that:

'A regulation made under subsection (1) shall fix amounts or rates that the Minister of the Government concerned considers to be fair and reasonable, having regard to the matters which that Minister considers appropriate, including any or all of the following:

- (a) the terms of any existing contractual arrangements or understandings with the service provider concerned;*
- (b) the terms of any circular, instrument, or document which apply to the service providers concerned;*
- (c) any submissions made and views expressed during the consultations under subsection (9);*
- (d) the nature of the services rendered by different classes of service providers and the general nature of expenses and commitments of the service providers providing those services;*
- (e) the obligation on the part of the State to have a prudent fiscal policy under the Stability and Growth Pact and the Fiscal Compact.'*

Section 42 (14) of the Public Service Pay and Pensions Act 2017 provides that:

'A Minister of the Government may from time to time and shall, before 30 June in 2020 and every third year after 2020, carry out a review of the operation, effectiveness and impact of the amounts and rates fixed by regulation made by that Minister under this section and consider the appropriateness of those amounts and rates, having regard to any change of circumstances and in particular any alteration of any of the matters mentioned in subsection (10).'

The outcome of the July 2018 review, conducted under the 2017 Act concluded that there was unequivocal agreement by both the Office of the Director of Public Prosecutions and the Department of Justice that the ongoing flexibility being delivered by barristers is considered comparable to the flexibility delivered by other groups to justify the reversing of cuts imposed during the financial emergency, and this reversal remains outstanding.

The Bar of Ireland is asking Government to:

- (1) immediately restore the link with public sector pay agreements and
- (2) engage in a process to unwind the cuts applied to the professional fees of criminal barristers.

The Bar of Ireland is simply asking that the profession be treated fairly and reasonably, consistent with the approach taken in relation to other groups of workers and independent contractors where the State is the paymaster.



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