

Ms Helen McEntee TD,
Minister for Justice and Equality,
Dept of Justice and Equality,
51 St. Stephen's Green,
Dublin 2.

Dear Ms McEntee,

I am writing to you following the recent publication of a report by EY on legal costs¹ which was commissioned by the Bar Council and the Law Society. This report took an exceptionally small data set of 256 cases, mostly in the High Court, and analysed them over three arbitrarily chosen periods to suggest that legal costs were falling here, and that legal costs should be subject to non-binding guidelines only. 61 (24%) of these cases were medical negligence cases- notoriously complex, and of long duration.

Not alone does this report misrepresent the issue of legal costs, but in doing so it queries the reliability of the (exhaustive) Report on the Review of the Administration of Civil Justice;² specifically mentioning that both it and the (then) National Competitiveness Council (now NCPC) referenced the World Bank “Doing Business” reports in coming to their conclusions. The EY Report states on page 9:

*“The World Bank have [sic] noted concerns they have with the data and integrity of the World Bank “Doing Business” reports. These were cited by both the NCC Annual Competitiveness reports and other documents, including the Kelly Report. **The reliance that can be placed on these is consequently reduced.**”* [Highlighting by ISME]

However, analysis of why the World Bank discontinued this data series is to be found in this Review: “Investigation of Data Irregularities in Doing Business 2018 and Doing Business 2020 – Investigation Findings and Report to the Board of Executive Directors.”³ This review referenced issues with the quality of data collected in China, Saudi Arabia, the United Arab Emirates, and Azerbaijan, and pressure applied to the World Bank audit team regarding the survey rankings of those respective countries. The “Legal Rights” impact of this review mentioned China alone. Ireland is not mentioned once in this World Bank investigation.

The fact that a report commissioned by the bodies representing Ireland’s two legal professions should so misleadingly and fundamentally misrepresent a World Bank investigation, thereby seeking to undermine both the Kelly report and the credibility of the NCPC, should be a matter of the utmost concern to the Department of Justice. To be strictly

¹ <https://www.lawsociety.ie/globalassets/documents/news/2022/assessment-of-legal-costs-in-ireland.pdf>

² <http://www.civiljusticereview.ie/en/CJRG/04112020%20FINAL%20REPORT%20WEB1.pdf/Files/04112020%20FINAL%20REPORT%20WEB1.pdf>

³ <https://thedocs.worldbank.org/en/doc/84a922cc9273b7b120d49ad3b9e9d3f9-0090012021/original/DB-Investigation-Findings-and-Report-to-the-Board-of-Executive-Directors-September-15-2021.pdf>

fair to EY, their report makes clear they relied upon data supplied by the legal bodies, and is accompanied by one of the strongest disclaimers on data accuracy we have ever seen.

It is further noteworthy that the claim on page 49 of the report *“that complaints about exceeding costs have fallen steadily, both in absolute terms and as a proportion of total complaints, since the LSRA commenced its role in reporting on complaints...”* is fundamentally contradicted by a report in the Law Society’s own Gazette⁴ on 29th July, which states: *“The Office of the Legal Costs Adjudicators (OLCA) received a record 874 applications last year, according to its annual report. This represented a 5% increase from 830 cases in 2020, which was the body’s first full year of operation.”*

Regarding those reforms ISME views as necessary to address the legal costs regime:

1. The courts service must produce much more granular analysis of costs incurred by all parties as they progress through the courts system. Such credibility as can be imparted to the EY report relies totally on the absence of independent costs data from the Courts Service.
2. Perhaps via a properly constituted Masters’ service, costs of cases initiated but settled outside the courtroom must also be captured.
3. The processes required by winning parties to recover costs must be greatly simplified. These must become administrative rather than adversarial in nature. Despite the judicial maxim that “costs follow the event,” this is a rarity in the Irish civil justice system. Prior to cases being admitted to court, parties should be required to declare costs incurred to that date, and the daily cost for appearance in court.
4. Your Department must not be swayed by small-sample arbitrary exercises from interested bodies, and must use large data sets (such as Central Bank NCID⁵ data).
5. The Central Bank NCID data (grabbed below) also show that legal costs in litigated EL and PL cases amount to 51% and 63% respectively of compensation. Given the added length of time it takes for litigated cases to settle, the notion that EL or PL cases are litigated for the benefit of claimants appears to us to be completely bogus, and we consider it indicative of unethical behaviour by some members of the legal profession in pursuit of fee income. Regarding the implications of this for the PIRB, we will make separate submissions to the Department of Enterprise.

⁴ <https://www.lawsociety.ie/gazette/top-stories/2022/busiest-year-yet-for-legal-costs-adjudicator>

⁵ <https://www.centralbank.ie/statistics/data-and-analysis/national-claims-information-database>

Table 22: Breakdown of the average EL injury settlement costs in each settlement channel across years 2015-2020.

Settlement Cost	Direct	PIAB	Litigated	Total
Compensation Cost (€)	25,290	36,037	70,687	53,100
Legal Cost (€)	2,859	901	35,965	21,903
Other Cost (€)	1,145	875	3,336	2,387
Total Cost (€)	29,293	37,813	109,988	77,391
Legal Cost as % of Compensation	11%	3%	51%	41%
Legal Cost as % of Total Costs	10%	2%	33%	28%

For 2015-2020, the average compensation cost of EL settlements in the litigated channel (€70,687) is considerably higher than the overall average in the direct channel (€25,290) and the PIAB channel (€36,037).

For EL injury claims, legal costs are most significant for litigated settlements averaging 51% of the compensation cost (or 33% of total cost) for the period 2015-2020. This compares with the direct channel where legal costs averaged 11% of the compensation cost (or 10% of total cost) and PIAB where legal costs averaged 3% of the compensation cost (or 2% of total cost). It should be noted that the legal costs shown here are those paid by the insurer, there may be additional legal costs incurred by the claimant that the insurer was not required to pay (across all settlement channels).

Table 23: Breakdown of the average PL injury settlement costs in each settlement channel in the years across 2015-2020.

Settlement Cost	Direct	PIAB	Litigated	Total
Compensation Cost (€)	16,973	27,364	38,736	30,995
Legal Cost (€)	2,767	1,606	24,567	15,054
Other Cost (€)	864	712	1,096	974
Total Cost (€)	20,603	29,682	64,399	47,022
Legal Cost as % of Compensation	16%	6%	63%	49%
Legal Cost as % of Total Costs	13%	5%	38%	32%

6. The pandemic has conclusively demonstrated the amount of legal work that can be satisfactorily completed outside a court setting, and the amount of documentation which can be handled electronically. The changes introduced under the Companies Act in 2020⁶ provide a useful template.
7. Cost is not the only issue. The length of time to resolution is also a matter commented upon in the EU Commission’s Rule of Law report⁷ and its Semester Report Ireland.⁸ We concur with the views of Ms Justice Irvine in the Kelly report⁹ (p111) that the conduct of proceedings is “leisurely.” We do not believe that this is the case for the benefit of the parties.
8. Beyond legal costs themselves, the complexity of our planning and judicial review processes¹⁰ is also a material factor in commercial decision-making.

⁶ <https://www.irishstatutebook.ie/eli/2020/act/9/enacted/en/html>

⁷ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021SC0715&from=EN>

⁸ [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022SC0615R\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022SC0615R(01)&from=EN)

⁹ https://www.justice.ie/en/JLR/Review_of_the_Administration_of_Civil_Justice_-_Review_Group_Report.pdf/Files/Review_of_the_Administration_of_Civil_Justice_-_Review_Group_Report.pdf

¹⁰ <https://www.irishtimes.com/business/technology/intel-commits-to-further-12bn-spend-in-ireland-1.4827476>

9. It is unlikely we will tackle the cost of insurance without tackling the reform of tort in Ireland, along the lines of that which has enjoyed success in Australia.¹¹
10. While Principles of Common Law¹² are adhered to closely in the Commercial Court, we find a deficit of discipline in that regard in the handling of personal injuries litigation. At least a sizable minority of judges seem to broadly interpret their latitude to depart from the precedents set by higher courts on a regular basis and in a capricious manner. This induces defendants with solid cases to settle, even where settlement may not be warranted by the evidence. This point was effectively conceded by Mr Justice Nicholas Kearns in his address to the PIAB conference on 10th April 2019 (page 7- attached). It was also conceded by Ms Justice Mary Irvine on her recent retirement.¹³ If we do not see a greater adherence by the lower courts to both the decisions of superior courts, and to the enforcement of the new personal injuries guidelines, we will seek to have damages codified into civil law (as we have previously sought with our “Fair Book of Quantum”¹⁴).
11. Per my note to you of December 2020, we remain concerned that the costs of some actions in large commercial cases allow defendants of means to drag cases out to the point where plaintiffs can no longer prosecute them. Notwithstanding the need to address legal costs on their own, there remains the need to repeal and replace the Maintenance and Embracery Act 1634.

While we were delighted to welcome the enactment of the Criminal Justice (Perjury and Related Offences) Bill, we have yet to see it used in the courts. We have also noted the apparent willingness of judges to disregard material inaccuracies in affidavits of verification, and to attach more weight to sworn evidence in court. The law is the law, and makes no distinction between perjury committed as a sworn witness or on affidavit. The citizens are entitled to the protection of the courts from false prosecution in civil actions in this regard.

It is important to recognise that what your Department and our members would identify as “cost” constitutes income, and the ability to earn a livelihood, for members of the legal profession. There is an understandable mismatch in expectation, opinion and comprehension between those who provide legal services and those who avail of them. It is therefore very difficult for members of the legal profession, be they judge, barrister or solicitor, to be genuinely objective when it comes to the issue of legal costs.

It is very evident that the senior counsel who allegedly accused Ms Justice Mary Irvine of “treason”¹⁵ following the publication of the judicial guidelines on damages did so on the basis of impact to legal incomes rather than reduction to awards. Justice Irvine explicitly conceded this point on her retirement in the same article just referenced, where she said “*everyone on*

¹¹ <https://www.aer.gov.au/system/files/Australian%20Government%20-%20Available%20and%20Affordable%20-%20Improvements%20in%20Liability%20Insurance%20following%20tort%20law%20reform%20in%20Australia%20-%20December%202006%20-%28Appendix%2012.06%20to%20AAD%20revised%20proposal%29.pdf>

¹² <https://mcmahonsolicitors.ie/common-law/>

¹³ <https://www.irishtimes.com/crime-law/2022/08/06/retired-high-court-president-mary-irvine-i-have-left-the-job-that-i-have-loved-most/>

¹⁴ <https://www.isme.ie/isme-fair-book-of-quantum/>

¹⁵ <https://www.irishtimes.com/news/crime-and-law/legal-world-divided-on-legacy-of-retiring-high-court-president-1.4865270>

the committee was well aware of the effect that any reduction in the level of awards of general damages would have on the income of both branches of the profession..."

On this basis, while applauding the great work of all the members of the Kelly review, it is unfortunately noticeable that the minority report emanated from those members whose careers were not based upon fee income. Even in the case of the judicial members, they were being asked to make recommendations regarding issues that would profoundly affect the incomes of spouses, siblings and children. The ability of the Kelly review to produce a genuinely objective and disinterested report on costs was compromised, in the way an independent report such as that produced by Martyn Evans on the free legal aid system in Scotland,¹⁶ was not. ISME therefore concurs with the minority report on litigation costs in the Kelly review.

We would welcome the opportunity to discuss these issues with you ahead of the commencement of the next Dáil term.

Yours sincerely,



Neil McDonnell
Chief Executive

CC Tánaiste Leo Varadkar TD, DETE
Minister of State Robert Troy TD, DETE
Ms Oonagh McPhillips, Secretary General, Department of Justice
Ms Oonagh Buckley, Deputy Secretary General, Department of Justice

¹⁶ <https://www.gov.scot/publications/rethinking-legal-aid-an-independent-strategic-review/>