

THE LAW LIBRARY
P.O. BOX 4460
158/159 CHURCH STREET
DUBLIN 7
IRELAND

TEL: +353 1 8172877
MOBILE: 087 9874487
E-MAIL: Ciara.Murphy@lawlibrary.ie
www.lawlibrary.ie



THE
GENERAL COUNCIL
OF THE BAR OF IRELAND

Director: Ciara Murphy

Ms Eileen Creedon
Chief State Solicitor
Chief State Solicitor's Office
Osmond House
Ship Street Little
Dublin 8

24th September 2015

REF: EMK/2014/04188/

Dear Ms Creedon

I refer to your letter of 10th September 2015.

Please find enclosed a copy of the response prepared for the CSSO to the Aarhus Convention Compliance Committee concerning compliance by Ireland with the provisions of the convention in relation to the cost of access to justice.

If you have any further queries, please do not hesitate to contact me.

Yours sincerely



Ciara Murphy
DIRECTOR

BAR COUNCIL RESPONSE PREPARED FOR THE CSSO TO THE AARHUS CONVENTION COMPLIANCE COMMITTEE CONCERNING COMPLIANCE BY IRELAND WITH THE PROVISIONS OF THE CONVENTION IN RELATION TO THE COST OF ACCESS TO JUSTICE

1. INTRODUCTION

1.1 The purpose of the within document is to provide comments to the CSSO on the communication by Kieran Fitzpatrick to the Aarhus Convention Compliance Committee concerning compliance by Ireland with the Provisions of the Convention in relation to the cost of access to justice (“the Correspondence”). This document is prepared in response to the Communication furnished to the Aarhus Convention Compliance Committee invoking a compliance mechanism before the Committee. The Communication comprises:

1.1.1 Communication (“the Original Communication”) from Kieran Fitzpatrick dated 5th June 2014/ revised on 5th August 2014 to the Aarhus Convention’s Compliance Committee with Annex 1 (a summary of the complaint) and Annex 2 (relevant legislation).

1.1.2 Letter 21st November 2014 Fiona Marshall, Secretary of the Aarhus Convention Compliance Committee to Kieran Fitzpatrick enclosing a set of questions.

1.1.3 Response (“the Clarification”) from Kieran Fitzpatrick dated 17th December 2014 to the set of questions sent by Fiona Marshall on 21st November 2014.

1.2 It is noted in the covering letter from the CSSO, of 10 September 2015, that the Communication concerns an allegation that various aspects of the legal costs regime in Ireland for environmental litigation are prohibitively expensive contrary to Article 9 of the Aarhus Convention. The Bar Council is responding specifically to Part 2 of the allegation as described in the covering letter and specifically to the following issues identified:

1.2.1 The complaint that the complaints procedure against barristers infringes Article 3(1) of the Convention due to lack of publication of the results (page 5 of the Original Communication).

1.2.2 The alleged prohibition on advertisement by barristers and its impact on newly qualified barristers (Clarification, page 17)

1.2.3 The non-advertisement by barristers of fees to the public and the alleged effects as a result stated to be (i) detriment to the taxation process (Clarification p. 18) and (ii) price inflation (Clarification p. 20 – 22).

1.3 The response is structured as follows: section 2 summarises the portions of the Communication relevant to the Bar Council and section 3 sets out the Bar Council’s comments on the Communication.

2. RELEVANT SECTIONS OF THE COMMUNICATION

The portions of the Communication relating to rules and procedures applied by the Bar Council are found at pages 5 subsection (a) of the Original Communication, and pages 17 – 18 subsections 1, 2 and 6, and pages 20 -22 of the Clarification Document.

3. BAR COUNCIL RESPONSE TO THE COMMUNICATION

Complaints Procedure

- 3.1 The Original Communication states that there is a lack of transparency in the complaints procedure for bringing a complaint against a Barrister. It states that: *“A litigant who hires a lawyer to represent her is often in a “tricky” position when she comes to deal with the legal bill issued by that lawyer, at the end of proceedings. If she receives a surprisingly high legal bill she is left with 2 choices: Complain to the Law Society [or the Bar Council, in the case of Barrister’s fees] that she is being overcharged. However, the outcome of this process is generally not known to the public, so it is unclear to anyone considering such a complaint procedure, how effective the complaint procedure is. [It may operate in an entirely fair manner, but this is not subject to transparency] So this process fails to comply with the demands of Article 3(1). [Each Party shall take the necessary legislative, regulatory and other measures ...to **establish and maintain a clear, transparent** and consistent framework to implement the provisions of this Convention.]”*
- 3.2 By way of background, the current procedure for initiating the complaints procedure against a Barrister is provided for in the Disciplinary Code of the Bar of Ireland and set out on the Law Library website for litigants. A Barrister must act in compliance with the Code of Conduct of the Bar of Ireland (“Code of Conduct”) at all times and, simultaneously, the Disciplinary Code of the Bar of Ireland (“Disciplinary Code”). Where a complaint of misconduct by a Barrister is made, the complaint is to be considered by the Barristers’ Professional Conduct Tribunal. The Tribunal is an independent Tribunal comprising both legal and non-legal professionals with a lay (non-lawyer majority). The aim of the Tribunal to ensure the existence of consistent, effective, fair and transparent complaint and appeal procedures and shall act in accordance with natural and constitutional justice.
- 3.3 The transparency of the Disciplinary Tribunal is set out in the Disciplinary Code. In particular, to the contrary to paragraph (a) of page 5 of the Original Communication, the outcome of the disciplinary processes are published in accordance with C3 of the Disciplinary Code. C3 states that: *“Any Decision of the Tribunal imposing one or more of the disciplinary measures provided in paragraphs D3 (e), (f), (g), (h), and (i) shall be published by the Tribunal on the Bar Council Website and in such other manner as it may think fit. The Decision shall remain confidential if it is the subject of any appeal to the Appeals Board, and may not be published before the expiry of the time for lodging an appeal. Notwithstanding any other provision of this Code, the Tribunal shall be entitled to make disclosure any of its Decisions, or any part thereof, in such manner as it may think fit. A Decision of any Tribunal shall state whether such Decision, or any part thereof, is to be disclosed and if so, in what manner it is to be disclosed”*. It is the view of the Bar Council that this process is both transparent and fair.

3.4 The Legal Services Regulation Bill, 2011 ("the Bill") sets out proposed amendments to the current complaints procedure. Part 6 of the most recent amended Bill sets out provisions relating to Complaints and Disciplinary Hearings in Respect of Legal Practitioners. Part 6 Chapter 2 relates to the creation of a Complaints Committee which will address complaints made about legal practitioners. Part 6 Chapter 3 addresses the creation of a Legal Practitioners Disciplinary Tribunal which deals with complaints of misconduct. Chapter 2 requires regular reporting of the complaints made to the committee including a description of the nature of the complaints and the outcome of the complaint process. The proposed amendments will enhance the existing structure.

Advertising

4 At page 17 point 1 of the Clarification Document Mr. Fitzpatrick states that "*Barristers are not allowed to advertise fees, or to advertise at all, except by publication of their details on the Bar Councils' website.*"

4.1 The above submission is factually incorrect in a number of material respects. The Bar Council's response to this submission is twofold – first, we address advertising generally and second, we address the advertising of fees.

1. Advertising Generally

4.2 The Guidelines on Advertising for Barristers in Ireland were reformed in 2008. Subject to Article 1.3 of the Code of Conduct, Barristers may engage in advertising which is lawful in connection with their practice in an appropriate forum. Barristers may advertise by placing prescribed information concerning themselves on the website of the Bar Council which is accessible to the public and solicitors alike. At present, barristers can carry business cards and do media work in their area of expertise. Further, barristers can write legal articles and speak at conferences to demonstrate their expertise in a particular area of law.

4.3 As noted, Barristers are entitled to have their practice information published on the website of the Bar of Ireland (www.lawlibrary.ie) pursuant to the Guidelines on Advertising. The Guidelines set out a detailed list of information which can be provided by a Barrister which previously was not possible. The Guidelines permits the publication of details such as areas of practice, areas of expertise, publications *etc.* The publication of this material is permitted on the website of the Bar Council or an appropriate forum provided the information consistent with these Bar Council of Ireland's Guidelines and the Code of Conduct.

4.4 While it is beneficial for Barristers to have certain information published publically large scale advertising to the public would not increase competition amongst the members of the independent referral bar and would bear the risk of a "race to the bottom". Barristers are generally not retained directly by members of the public, but through a solicitor. Barristers are visible to solicitors through their work in open court, opinions, submissions and other legal work such as mediations and arbitrations. In such contexts, a solicitor sees first-hand the capabilities and skills of a particular advocate and can decide to instruct them on that basis The present Guidelines makes publically available specific information pertaining to a Barristers skills, expertise and practice areas that can enhance a solicitor's decision to retain a Barrister in addition to their first-hand knowledge of the Barrister's skill. The type of direct advertising to the

public engaged in by other professions would not increase competition between barristers, nor benefit consumers. Unrestrained advertising would not provide a suitable foundation for selecting a barrister for a particular case.

II. Advertising of Fees

4.5 Barristers do not publically advertise their fees. The present restrictions on advertising of fees are proportionate and do not result in a deficit of information to the consumer. As well as being able to view a barrister's expertise on the Bar Council website, barristers are required by the Bar Council to give an estimate of fees to solicitors so that comparisons can be made on price before the barrister is engaged to do a case or provide advice. Rather than unrestricted advertising, the public is best served by the present system of talking to their solicitor, who is informed about the legal market and has access to information, such as seeing a barrister perform in court, who can get a range of costs and quality criteria in relation to a number of different barristers, and assist the client in choosing a barrister. Wide scale public advertising of a barrister's fee structure would not provide a suitable foundation for selecting a barrister for a particular case. A barrister is not precluded from providing details of his or her fee structure and, as noted above, is obliged to provide an estimate of fees in advance and at various stages of the litigation.

Anti-Competitive Effects of Prohibition on Advertising

5.1 At page 17 point 2 the submission is made that a Barristers alleged inability to advertise and / or advertise their fees has anti-competitive effects. It states that: *"It makes it very difficult for new entrants to establish themselves, and up to or over half of newly qualified Barristers drop out of the profession, within 4 years, as many cannot afford to pay the fees payable to the Bar Council and also support themselves. This inevitably pushes up legal costs for everyone who hires a Barrister, including those engaging in Aarhus related cases."*

5.2 There is no material to support the contention that there is a link between the prohibition on advertising of a fee structure and a reduction in the number of Barristers practising. It is noteworthy that the Competition Authority was engaged while the amendments to the Guidelines on Advertising for Barristers were introduced in 2007. Contrary to the argument submitted in the Clarification Document, the inability to advertise has not had an anti-competitive effect for junior members due to their inability to support themselves which is perceived as arising from a ban of advertising fee structures. Rather it is the severe reduction in fees that has played a major role an increase in the number of barristers exiting the profession. This is based on an inability of many young barristers to compete for work at a severely reduced fee level while maintaining normal practice overheads. Fees for barristers for publicly funded work have fallen from between 30% and 60% since 2008.

5.3 Whereas in the year 2007 / 2008 61 people left the bar, this number has increased to 136 in 2011/ 2012 and to 157 in 2012 / 2013. Over the same period from 2008 to present date legal fees obtained by Barristers has reduced dramatically. The reduction in fees has resulted in, and is evidenced by, a very obvious market correction. The number of barristers exiting the profession has increased significantly due to inability of many to compete for work at a reduced fee level. Over 49 per cent of this membership are members of 10 years or less at the Bar of Ireland. It is not denied that competition exists between barristers. Competition amongst

barristers is a significant feature of the Irish system and leads to constant downward pressure on legal costs which is intense in and of itself without any publication of a fee structure.

5.4 As such there is no correlation between the prohibition on publicly advertising fee estimates and the reduction in practising junior members.

Challenges to Fees

6.1 At point 6 of page 18 of the Clarification it notes that *“the prevention of advertisement of Barristers fees makes it very difficult to challenge the fees claimed by Solicitors on behalf of Barristers at Taxation hearings.”*

6.2 Further, it notes that *“This hampers the ability of any challenger in establishing whether the rate sought by a particular barrister, reflects the market rate that might be obtainable by that barrister in an open competitive market.”*

6.3 The Clarification Document further comments on the challenging of fees at page 21 – 22 reiterating the submission that lifting the prohibition on advertising fee structures would enable litigations to challenge fees claimed in a more effective manner.

6.4 These submissions are at odds with the principles governing the taxation of costs which are based on a fair and subjective assessment of the costs of the case. The proposed assessment would involve an objective assessment of the standard fees across the board without having regard to the nature or complexity of the case.

6.5 Taxation of costs requires an assessment and measurement of legal costs by an independent arbitrator known as a Taxing Master. The party claiming must demonstrate to the satisfaction of the Taxing Master that such costs as are incurred were proper and reasonable in all the circumstances. The current principles governing the decision of the Taxing Master are based on the nature of the case and the extent of the work as well as factors such as complexity, magnitude, etc. The Taxing Master will allow what he considers to be fair and reasonable costs as is set out in the Courts and Court Officers Act, 1995. The Taxing Master is guided by wide experience, gained by a professional background as a solicitor and in taxing costs. Either party may object to certain allowances and an appeal procedure is initiated whereby the Taxing Master will reconsider the amounts allowed. The objecting party is required to deliver a list of his specific objections giving his grounds of objection and reasons therefor. The opposite party is given an opportunity to reply.

6.6 The Taxing Master has the required knowledge and expertise in their fields to obtain the position of adjudicator and therefore the adjudication of the Taxing Master is not hampered or rendered objectively unfair based on the prohibition on advertising costs. At page 21 of the Clarification Document it is claimed that publication of rates could be used to challenge a fee claimed. To base the adjudication on this mechanism would be to render the role of the Taxing Master as ineffective as they are using their expertise and knowledge coupled with the information provided to reach the conclusion. Further, it would again give rise for a potentially open ended market whereby practitioners are constantly fighting a race to the bottom in terms of fee earned notwithstanding their expertise or skill.

6.7 Notwithstanding the current procedure of the Taxing Master, the Bill sets out amendments the role of the Taxing Master. The role of Taxing Master will be subsumed by the Office of the Legal Costs Adjudicators. The duties are expanded upon including principles applied when adjudicating upon costs, however, the amendments maintain a subjective view and takes into consideration the nature of the case and the factors involved in bringing the case to completion. There will be a register of determinations, similar to that which exists presently, that will provide for more detailed reporting on cost adjudicated cases.

Prohibition on Advertising has an Inflationary Effect on Fees

7.1 At page 20 of the clarification *"the prohibition of advertising of fees by barristers has price-inflationary effects on the fees that barristers can impose on their own clients, due to the reduction in price competition, and the prohibition of direct access to the public, which hampers a clients ability to negotiate lower fees."*

7.2 The above submission is not supported by any empirical data or material evidence.

7.3 As in all other sectors of the economy, there has been severe downward pressure on barristers' fees in the past number of years. It is untenable to state that the prohibition of advertising of fees by barristers has price-inflationary effects on the fees when barristers are practising in a climate where legal costs have reduced dramatically arising from the economic downturn. The legal services costs have adjusted downwards rather than inflating, since the onset of the financial crisis. Fees paid by private clients have been severely reduced. Barristers providing services funded by criminal legal aid have seen a reduction of 33.3 per cent in the rates payable since 2008 and a similar percentage in the case of civil legal aid fees. In addition, the fees paid by the State to barristers in civil cases have been reduced by similar, if not greater, amounts. Cuts of more than 50 per cent have been imposed on a unilateral basis in some cases. Barristers are price takers in this scenario.

7.4 The most obvious example of this is in respect of the fees paid by the State, the largest consumer of legal services in Ireland. Barristers are now routinely required to complete full public tender processes in order to be briefed by State and Semi-State enterprises. The initiative, designed to reduce costs, invites Barristers to tender competitively to provide services for the State that gives rise to the formation of a panel from which they are then appointed and paid on the basis of the competitive fee tendered.

7.5 Furthermore, the Bar of Ireland operates in a system of estimates and tenders. It is open for any litigant, be it an insurer or an individual, to select a barrister on the basis of price. Barristers operate as sole traders in a highly competitive environment and are required to provide fee estimates when asked to provide services. As noted herein, several barristers are asked to estimate their professional fees and the client selects whichever advocate represents the best value, taking into account the experience and speciality of the barrister in question. The very act of providing estimates enters Barristers into a reduction in price competition. It is, at all times, open to any litigant to negotiate on price. The prohibition on advertising of legal fees structure has neither imposed a reduction in price competition nor does it prevent a client from negotiating a lower fee.

7.6 As is evidenced by the dramatic reduction in legal fees for barristers over the past number of years, the publication of a fee structure would serve no purpose other than causing a shift in the focus of the provision of legal services to that of cost alone. This would inevitably have the opposite effect to healthy competition, as exists with fee estimates, and would instead encourage a race to the bottom, driving legal costs to an unsustainably low level whilst having no regard for the skill or expertise of a Barrister.