Gníomhaireacht Bainistíochta an Chisteáin Náisiúnta
National Treasury Management Agency

An Ghníomhaireacht um Éilimh ar an Stát
State Claims Agency

31 July 2018

Legal Services Regulatory Authority
Section 6 Consultation
PO Box 12906
Dublin 2
By Email to S6Consultation@lsra.ie

Our Ref: DM/EH
Please quote our reference number on all correspondence

Dear Sirs,

Re: Section 6 Review - Public Consultation Notice

Thank you for your invitation to make submissions in respect of the general application of the Legal Services Regulation Act 2015.

The legal costs unit is, primarily interested, in the provisions of Part 10 (Legal Costs) and the foregoing submissions, which are short and concise in nature, are limited to the taxation of costs/adjudication of costs matters. We wish to draw to your attention the fact that we have also recently made submissions to the Administration of Civil Justice Review Group who are tasked with providing recommendations for improving access to justice, a copy of which is enclosed for ease of reference.

The following matters occur to us:

1. Time Costs
2. Proportionality
3. Section 5 Courts Act 1988
4. HC 71 Payments on Account

Time Records

Legal Practitioner time records, or the absence thereof, present a particular difficulty in the taxation of costs system at present. These fall into three categories of records, being actual or contemporaneous time records, ex post facto reconstructed records, time estimates and or a combination of one or other system. Other than stipulating that

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time records should be exhibited to a bill of costs where time is a substantial factor in the calculation of a professional fee, Part 10 does not provide for any system of verification. Recent jurisprudence, including the Supreme Court Decision in re *Sheehan -v- Corr* [2017] IESC 44 provides some examples of problems that may arise with anything less than actual contemporaneous time records. All relevant jurisprudence emphasises that the benefit of the doubt in such cases should fall in favour of the paying party; however this needs to be underpinned and directions for affidavits of verification and or other guidance would be helpful.

Proportionality

The de minimis nature of party and party indemnification is important. There are lots of steps taken in litigation over which the losing party has no control and it would be unfair to expect full indemnification for all items of costs incurred without limit. Proportionality is a key tool in the maintaining of affordability of legal costs, particularly for smaller litigation. The interim report of the Civil Courts Structure Review UK recognised this need (per Briggs LJ at Paragraph 5.23) *An imperfect system that reopens the doors to a greater number results in better justice than where many cannot afford the entry fee to ring the doorbell, which is no system at all.*

Lord Justice Jackson in his review of the Civil Justice Rules in the UK also concluded that *Access to Justice* is only practical if the costs of litigation are proportionate.

The concept of proportionality also provides safeguards for vulnerable litigants who may be at the mercy of opponents more abundant in resources with an ability to rack up large legal outlays. In short, there is a very strong case for the codification of the concept of proportionate costs

Regulation of Number of Counsel

The Taxing Master has recently confirmed that he does not have jurisdiction to enforce or supervise the Bar Council Undertaking provided in or about December 1997 restricting or limiting the number of counsel in personal injury claims to a maximum of two. The undertaking was provided in contemplation of Section 5 of the Courts Act 1988. The act was introduced coinciding with the abolition of jury trials in personal injury cases. In particular, Section 5 mandated the Minister for Industry and Commerce to regulate the number of counsel appearing in certain actions. An undertaking was provided by the Bar Council that no more than 1 Senior Counsel and 1 Junior Counsel would charge brief fees in all personal injuries actions. These events gave rise to arrangements whereby two Senior Counsel and one Junior Counsel pooled resources and which became colloquially known as the "three eights, three eights, two eights rule". It is submitted that the Legal Costs Adjudicator should be provided with enhanced powers to determine the number of Counsel briefed in respect of any

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particular action. The Authority might consider whether the aims and objectives of Section 5 might be usefully introduced to strengthen the voluntary undertaking of the Bar Council of December 1987. Such provision might, for example, provide that a maximum of two Counsel may be allowed in respect of all High Court actions save where otherwise certified by the Trial Judge on grounds to be stated in any such certificate.

HC 71 Practice Direction for Payments on Account

R99 O5 (1) provides, inter alia, that costs may be awarded at any stage of the proceedings. This particular provision has given rise to the system of payments on account of costs (HC 71 Practice Direction). The introduction to the practice direction recites that it is a measure required to overcome delays in the taxation of costs. This particular issue of delay in the Taxing Master's list has passed and early return dates are now the norm. It would save on valuable court resources, without taking away from the spirit or efficacy of the direction, if the Taxing Master was empowered to assess a reasonable payment on account immediately upon the filing of a bill of costs. This might be achieved by way of a case management hearing to be held in close proximity to the lodgement of the bill of costs. An application to the Taxing Master for a payment on account is not presently provided for in the rules and if this was rectified it might carry an additional benefit of focusing the parties, with the assistance of the Taxing Master, on resolving the issue of costs at an early stage. The Taxing Master also possesses particular expertise as to what amounts to a reasonable and meaningful payment on account. Further consideration should be given as to whether a payment on account actually made should act as a tender for the purpose of the costs of taxation and that is to say that the current provision whereby any surplus payment is required to be repaid does not go far enough as a deterrent for overcharged bills and the costs of taxation should also be dependent on successfully overcoming the amount paid on account.

The foregoing concludes our submissions in respect of legal costs provisions and we will be happy to elaborate or supplement these in any way deemed necessary by the LSRA.

With renewed thanks for your invitation to make submissions.

Yours faithfully

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The State Claims Agency has identified the following Less Costly Outcomes' issues which, it is submitted, deserve consideration:

The Legal Costs Unit at the State Claims Agency was formed in February 2013 and currently manages third party legal costs claims under a delegated authority on behalf of a large and diverse cohort of Government Agencies, pursuant to the NTMA Amendment Act 2014 and SI 505/2015. We note that the aim of the review is to examine the current administration of civil justice in the State with a view to, inter alia, improving access to justice and reducing costs of litigation The invitation to submit observations is welcomed and, in response to which, we respectfully submit the following recommendations solely in connection with the particular goal of improving access to justice and reducing costs of litigation. At this juncture, it should be pointed out that references to the report of the legal costs working group of November 2005 and the subsequent report of the legal costs implementation group of November 2006 are hereinafter referred to as the "Haran Report" and "Miller Report" respectively. It is not necessary to recite these reports in anything like chapter and verse format and references supplied are abstract in nature.

(a) The Rules of the Superior Courts

The present position is that Order 99 RSC 1986, provides the machinery for taxation of costs and is at the heart of the issue of access to justice and the aim of achieving less costly outcomes. First and foremost, Order 99 requires updating to give effect to the changed landscape which includes the taxing masters sweeping new powers created by Section 27 of the Court and Court Officers Act 1995 and also facilitating the relevant provisions of the Legal Services Regulation Act 2015 upon commencement of the relevant costs provisions contained in part 10 thereof.

(b) Order 99 R1 (3)

This gives legal effect to the principle that costs follow the event. The question as to what happens when there are many or multiple events has been addressed in ***Re Veolia Water UK plc –v- Fingal County Council (No2) [2006] IEHC 240***. Anomalies also arise when a party loses several substantive headings of claim but recoups full costs by virtue of the fact that such party succeeded on one element of the claim. There are other examples where, for instance, a party does not prove or withdraws a loss of earnings claim leaving a paying party to pick up the costs of accountancy and or actuarial fees on the "costs follow the event" basis. This imbalance was taken up in the Miller Report which advocated a more discerning approach including, inter alia, consideration as to the extent to which the successful party had been successful. The Legal Services Regulation Act 2015 (Sections 168 & 169) confirms the move away from the general "costs follow the event" model. Formalisation of the concept of non-party costs orders should also be addressed. For example, recent cases such as ***Moorview Developments Limited –v- First Active [2011] IEHC 117*** recognise a feature of modern litigation that the real plaintiff and the person identified as such in any set of proceedings may be two entirely different persons or entities. In short, the simple *costs follows the event* formula lacks flexibility and is not fit for purpose in the context of modern litigation. Order 99R1(3) requires updating to reflect the much wider criteria applicable when carving out Costs Orders that do justice as between the parties.

(c) Order 99R5 (1)

This provides, inter alia, that costs may be awarded at any stage of the proceedings. This particular provision has given rise to the system of payments on account of costs. The High Court (HC 71) practice direction for payment on account of costs is commendable for redressing any inequalities caused by late payment of costs. However, the introduction to the practice direction recites that it is a measure required to overcome delays in the taxation of costs. This particular issue of delay in the Taxing Master's list has passed and early return dates are now the norm. It would save on valuable court resources without taking away from the spirit or efficacy of the direction if the Taxing Master was empowered to assess a reasonable payment on account immediately upon filing of a bill of costs. This might be achieved by way of a case management hearing to be held in close proximity to the lodgement of the bill of costs. An application to the Taxing Master for a payment on account is not presently provided for in the rules and if this was rectified it might carry an additional benefit of focusing the parties with the assistance of the Taxing Master on resolving the issue of costs at an early stage. The Taxing Master also possesses particular expertise as to what amounts to a reasonable and meaningful payment on account. Our Experience to date suggests that parties who receive a payment on account are slow to proceed with the formality of producing, agreeing or taxing a bill of costs against which the paying party has made a payment. It is also proposed, that any payment on account actually made should act as a de facto tender for the purpose of the costs of taxation and that is to say that the current provision whereby any surplus payment is required to be repaid does not go far enough as a deterrent for overcharged bills and the costs of taxation should also be dependent on successfully overcoming the amount paid on account. The best solution appears to be to empower the taxing master to manage and direct payments on account.

(d) Order 99 R10 (2)

This rule underpins the party and party paradigm providing for the allowance of *all such costs as were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed.* The de minimis nature of party and party rules is important. There are lots of significant steps taken in litigation over which the losing party has no control and it would be inequitable to expect full indemnity. The escalation of legal costs levels in respect of smaller litigation is a concern. Proportionality is an important tool in maintaining affordability and or containment of legal costs at reasonable levels for smaller litigation. The interim report of the Civil Courts Structure Review UK recognised that this is the case (per Briggs LJ at paragraph 5.23) *An imperfect system that reopens the doors to a greater number results in better justice than where many cannot afford the entry fee to ring the doorbell, which is no system at all.*

In his review of the Civil Justice Rules in the UK, Jackson LJ dedicated one whole chapter to the issue of proportionality concluding *Access to Justice is only practical if the costs of litigation are proportionate.*

It would enhance access to justice if the importance of proportionality was acknowledged. As a minimum, this would provide some safeguards for vulnerable litigants who are at the mercy of opponents more abundant in resources with ability to rack up large legal expenses.

Furthermore, there is a real danger that the original dispute may become moot or irrelevant in circumstances whereby one or other of the parties simply cannot afford to lose the case. There is a compelling case for codification of the concept of proportionality which should be added in conjunction with the current provisions of Order 99 R10 (2) or on a separate stand-alone basis.

(e) Order 99 R14.

A large proportion of litigation claims settle outside of a court hearing and very often prior to the closure of pleadings. In these instances where one of the parties agrees to pay party and party costs there is no mechanism to tax the costs in the event that agreement as to quantum cannot be reached. The party awarded such costs pursuant to the settlement must then make a formal application to the High Court for an order directing taxation. To overcome this additional expense and delays caused by the necessity to take up an order before proceeding to taxation it is proposed that the Taxing Master do have power to tax, without any order for the purpose, costs as between party and party in litigation matters on foot of an open letter of consent from the solicitor for the paying party to taxation of costs in default of agreement. Legal Costs of Investigations under Section 466 of the Merchant Shipping Act 1894 should also be added pursuant to Section11 of the Court and Court Officers Act 1995

(f) Order 99 R28 & R 37 (17)

It is remarkable that there is currently no provision on a party and party basis for a paying party in receipt of a bill of costs from a solicitor or legal practitioner to set down such bill for taxation before the Taxing Master. In comparison to a notice of trial which may be served by either party there is no authority in the current rules for setting down of a bill of costs by a defendant or paying party. The rules do provide for a paying party to do so where the relationship is one of solicitor/client (Order 99 Rule 33). This does not extend to party and party bills. Naturally, such a party would have to be in possession of a bill of costs in the first instance and where the party for the costs delays or refuses to proceed then the paying party should be in a position to set down subject to the Taxing Masters entitlement to hear arguments as to why any such taxation at the request of the paying party might not proceed.

(g) Order 99 R29 (5)

Ireland is currently home to some of the world's biggest and best technology companies and there is an abundance of IT expertise and resources to justify a proactive move away from the hard back copy bill of costs. The digital bill of costs is being piloted and introduced in other jurisdictions including the UK from April 2018. Many legal offices have invested in quality IT Systems and a provision to proceed with digital bills as an alternative to the paper system has many benefits. Further research in the area of digital bills of costs is warranted however the rules should facilitate the concept of the digital bill of costs as and when the office of the Legal Costs Adjudicator has capacity to take in

bills in this format. Steps should be taken to expedite management of digital transactions in the legal costs adjudicator's office.

(h) Order 99 R29 (6)

The use of folios as a charging model is outdated and the rate should be set per page. For example, the Law Society services at the main Four Courts Building currently charges 0.17C per page for photocopying and a similar per page rate would be more relevant.

(i) Orders 27 R9 (3) and Order 99 R37 (33)

The 7 day costs of a notice of motion for judgment in default of defence and also the fixed *costs of the day* under the above two rules are in need of updating in monetary terms. These rules are well drafted however the fixed amounts are hopelessly inadequate and out of date. The miniscule allowances have led both rules to fall into disuse. It should also be clarified that the allowances are exclusive of vat, if applicable.

(j) Motion to transfer/Motion to adopt

The current practice is to make application to the Circuit Court to remit an action to the High Court which is followed up by a second and totally overlapping application in the High Court to adopt the proceedings. This gives rise to two separate motions and unnecessary additional charges of at least €1,500.00 by reason of the second application. It would appear that seldom, if ever, has, the High Court refused to adopt an application for transfer and the issuance of two separate motion papers only serves to cause delays as the plaintiff's claim cannot take its place in the list until the two separate return dates have passed and the second application is costly and superfluous. One application to transfer should be sufficient. This is in fact what happens when cases are transferred from the District to the Circuit court, where there is no motion to adopt.

(k) Order 36 R48.

Special damages claims have become more and more sophisticated and it is common to encounter a claim for the legal costs of representation of a pre litigation matter or phase included as an item of special damages for determination by the Court. The costs of legal representation at an inquest is one relevant example. Order 36 R48 might usefully be expanded or an additional rule be added to on a stand-alone basis to include express reference to allow claims for costs contained in a claim for special damages to be referred to the Taxing Master for quantification.

(l) ADR

The legal costs unit at the State Claims Agency commenced a legal costs mediation project in July 2014 since which time over 100 costs mediations have taken place with a high rate of success equivalent or in excess of ratios experienced in commercial mediations generally. An added bonus has been the level of positive feedback received from plaintiff party legal representatives. Mediators are drawn from the ranks of experienced litigation solicitors and counsel The Legal Services Regulation Act 2015 paves the way for referral to ADR systems by the Legal Costs Adjudicator and the concept should be underpinned by the amended rules of the Superior Courts.

(m) Counsels Brief Fees

It has already been mentioned that the Court and Court Officers Act 1995 was introduced subsequent to the drafting of the 1986 RSC and a lesser known piece of legislation, namely, the Courts Act 1988, which should also be highlighted for consideration in any amended rules. The 1988 Act was introduced coinciding with the abolition of jury trials in personal injury cases. In particular, Section 5 mandates the Minister for Industry and Commerce to regulate the number of counsel appearing in certain actions. Following a resolution of the Bar of the 5th December 1987, an undertaking was provided by the Bar Council that no more than two Counsel would seek to recover fees on taxation of party and party costs in personal injuries actions in the High Court tried without a jury. These events gave rise to arrangements whereby two senior counsel and one junior counsel pooled resources and which became colloquially known as the three eights, three eights, two eights rule. This fee sharing arrangement has worked well for the past 30 years and merits formalisation. It is submitted that the spirit of Section 5 should be included in the rules thus providing for a maximum of two Counsel in respect of personal injuries actions save where otherwise certified by the Trial Judge on grounds to be stated in any such certificate.

(n) Tendering

The absence of a facility for tendering or lodgement of monies in the Superior Courts in respect of legal costs represents a major obstacle for defendant or paying parties in resolving legal costs disputes. There does not appear to be any logical reason why the practice of tendering in respect of legal costs is authorised under the Circuit Court Rules but not under the Rules of the Superior Courts. The Haran Reports recommended a facility for tendering or lodgement in satisfaction of party and party costs claims (Haran Report at 7.20). This should be given effect. The Miller Report supported the use of tenders made within 21 days of receipt of a bill of costs. Draft bills, interim bills, and incomplete bills are likely to present difficulties in the application of tendering rules absent a flexible formula to capture such eventualities.

(o) Section 68 Solicitors Act 1994.

The importance on up to date information to clients by way of report on the costs implications of litigation cannot be over emphasised. The client should at all times be in control and to prevent unnecessary escalation of costs. The Haran Report recommended inter alia that a failure on the part of a solicitor to issue a costs agreement letter should be subject to a meaningful penalty. This is a reasonable requirement and in cases where no terms and conditions are in existence it might be appropriate to impose recovery of stamp duty and other outlays incurred.

The Miller report proposed penalties ranging from censure to non-recoverability of costs or part thereof in the case of legal practitioners who fail to adhere to the legislative requirements in relation to costs information (at Para 4).

Some meaningful penalty is required as the current position as set out in the very comprehensive judgment of Peart, J. in Re Coulhurst makes clear that the section creates little or no entitlements in respect of third parties.

Prospective costs management is an important feature of other jurisdictions and has given rise to costs budgeting concepts. This is particularly relevant to high value litigation where case management hearings include an exchange of costs budgets for discreet steps required in prosecuting a claim. The Haran Report recommended that the Court should be empowered by rule of court to require the parties to produce to the Court and to exchange with each other reasonable costs estimates. This is an important step in prospective costs management.

(p) Reserved Costs

There is a tendency by Irish Courts to generally reserve costs of interim and interlocutory motions. In most instances, the winning party will uplift all general reservations under the costs follows the event model and this creates harsh and unintended consequences for paying parties when faced with bills of costs which include motions in respect of which the winning party was in default. For example, these may and often do include motions to compel replies to particulars where the successful plaintiff may have delayed in furnishing information and or motions for discovery for records that the successful plaintiff was not willing to furnish voluntarily. The point is that the uplift of a general reservation has the potential to reward the party in default under the rules. A more satisfactory result would be achieved if costs were reserved in favour of one party or the other. The effect of an up-lift under the final order made would catch all orders in whose favour a reservation is placed. The attention of the Committee on this point is also drawn to the Haran Report (at Paragraph 8.37)

(q) Economic Conditions

The Supreme Court in Re ***Sheehan –v- Corr*** held inter alia that general economic conditions are relevant to the proper assessment of a solicitors general instructions fee or a counsel's brief fee. The impact of a change in the economic climate on such fees is to be assessed by reference to appropriate evidence. Regard should be had as to how this provision might be implemented in a practical way. The costs of instructing economists in individual cases to give evidence before the Legal Costs Adjuster represents a further layer of outlays and will inevitably increase costs. Forfas/the National Competitiveness Council produce an annual report on the costs of services and some benchmarking against this standard may be relevant in cases of dispute on the question of economic conditions.

(r) Use of Comparators

Comparator evidence is routinely used on the adjudication of legal costs. The President in Re ***Sheehan –v- Corr*** succinctly described the practice as a *hall of mirrors* reflecting allowances made in similar categories of claims. Vigilance is required as to management of comparator evidence. The expense of taxation particularly in large cases often results in commercial paying parties paying over the odds to avoid incurring the stamp duty. Reduction of the rate of applicable stamp duty and or the introduction of tender procedures should alleviate this particular difficulty. Otherwise, there is a definite risk

that the reliance upon comparator evidence compounds rising legal costs on the basis that *today's maximum is tomorrow's minimum*.

(s) The Global Instructions Fee

The Court of Appeal in *Sheehan* (Citation [2016] IECA 168) made some legitimate criticisms concerning the prolix and impenetrable nature of the global instructions fee. Similar complaints have been made by other critics. Detailed bills of costs in their current format (107 pages in Sheehan) are professionally drawn in accordance with Order 99 and Appendix W. The rules are the cause of the problem and therein lies the answer to achieving more clarity. The idea of breaking down the general instructions fee in to four distinct phases originated with the Miller report and represents significant inroads towards the goal of achieving more transparency in the assessment of legal practitioner professional fees. The template designed by the Miller committee is well designed to capture legal activities pre proceedings, post issuance to commencement of the hearing, the costs of the hearing proper and post hearing work. There is no reason why this template should not be adopted and utilised day to day on an assessment of costs before the legal costs adjuster. Formal recognition of the four instructions fee phases should be incorporated into the rules or any new schedule replacing appendix W.

(t) The Rule in Cronin and Astra Business Park

Section 14 of the Courts Act 1991 provides for statutory limitation of costs in respect of which proceedings are instituted in a Court higher than is necessary to obtain the relevant relief ultimately awarded. The receiving party is entitled to the costs applicable in the court below. The 1986 Rules incorporate this principle at O99 Rule 8 (4). The plaintiff party is effectively penalised for proceeding in the wrong court. The limitation has fallen almost totally redundant following the Supreme Court decision in Re Cronin –v- Astra Business Services [2004] IESC 30. The effect of the decision is to dis-apply the limitation where a lodgement or tender is taken up and by extension settlements of claims in which the rationale is that the onus falls back on the paying party to incorporate such a limitation. The Haran Report (Para 8.15) recommends that steps be taken to remedy the difficulties caused by the fact that lodgements and settlements are not captured by any limitation on costs notwithstanding that the amounts involved fall into a lower jurisdiction.

In conclusion, the costs provisions of Order 99 RSC 1986 are due an overhaul. Furthermore, the solicitors professional fee items comprised in Appendix W of the Rules have not seen an increase since 1972. The Supreme Court in Sheehan [2017] IESC 44 commented on the need for an update in this area. Other areas in which rules on costs present shortcomings are identified above. Further elaboration on these submissions can be provided, if required.