

# **Multi-Criteria Impact Evaluation of Options for the Control of Litigation Costs**

Submitted to

**Department of Justice**

Prepared by

**Indecon International Consultants**

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## Executive Summary

### Introduction, Background and Data Availability

This report represents an independent examination by Indecon for the Department of Justice of possible models to control litigation costs in Ireland. Following a Government Decision in 2017, a Review Group was established, chaired by the then President of the High Court, Mr. Justice Peter Kelly, to review and reform the administration of civil justice in the State. The Group was requested to report to the Minister for Justice and make recommendations for changes with a view to improving access to civil justice in the State, promoting early resolution of disputes, reducing the cost of litigation, creating a more responsive and proportionate system, and ensuring better outcomes for court users.

The Review Group made detailed recommendations on many areas of civil justice but was not able to reach a unanimous agreement as to how effective change measures might be introduced to reduce litigation costs. The majority of the Group comprising representatives of the Supreme Court, Court of Appeal, High Court, Circuit Court, District Court, Bar Council, and Law Society were in favour of creating non-binding guidelines in relation to cost levels to assist parties and their representatives. A minority of members recommended a table of maximum cost levels to be prescribed by a new Litigation Costs Committee, which would only be derogated from in exceptional circumstances. Also of note is that the Hon. Mr. Justice Peter Kelly, stated in his introductory letter to the Minister for Justice that: “Having chaired the sub-group on litigation costs and carefully considered the issues, I am of the opinion that the recommendations of the minority are more likely to achieve much needed costs reductions than those of the majority. More radical measures than the introduction of guidelines will be needed to achieve the desired results in my view.”

This current independent study by Indecon concerns the design and completion of a Multi-Criteria Analysis (MCA) to evaluate the likely impact of alternative measures to control litigation costs in the State. The reforms considered will have fundamental implications not just for savings to the Exchequer, but equally for both businesses and individuals involved in legal disputes. This report is designed to help inform policymakers of the likely impact of different options for overall reform. These reforms would build on the significant steps already taken by the Irish Government to provide alternative options to litigation and hence reduce the legal costs of disputes.

An important finding of Indecon’s review is that despite the progress made in recent years in collating and publishing data on certain legal costs, major gaps in information on the costs of litigation still exists. In particular, there is no comprehensive information available on what are the detailed components of legal costs for most cases which proceed to litigation or how these costs have changed over time. There is also an absence of comprehensive data on how the costs vary between different providers of legal services. The resultant lack of transparency exasperates the challenges faced by consumers of litigation services. This also hinders evidence-based policy development. As a result of the lack of comprehensive information, Indecon had to undertake much more detailed research than would otherwise have been required to complete this study. This included analysis of individual micro case data provided by Institute of Cost Accountants (ILCA). It also involved new survey evidence and significant stakeholder consultations. Despite the extensive work undertaken, significant data gaps remain. This has influenced the development of two innovative new options for consideration. Both of these would enhance policymakers access to evidence to inform the need for any additional reforms.

## **Outline of Work Undertaken**

To assist readers, it is useful to outline the extensive work undertaken by the Indecon team and our advisers in Ireland and internationally. This included a review of the evidence on the scale and components of legal costs in Ireland. This was useful as context for considering potential areas of reform. We also completed an examination of the experience in other countries of attempts to reduce litigation costs. It was also necessary to identify the potential options for reducing legal costs. These included options considered by the Kelly Review Group and in addition we identified a number of innovative new options. These were informed by the international experience and by Indecon analysis of the specific Irish context. To assist with the assessment of the options and to complete the multi criteria we consulted widely with stakeholders and reviewed a number of valuable submissions received. In addition we completed new primary survey research with both large corporate customers of legal services and with the legal profession. This was helpful in identifying both a customer perspective and a supplier perspective on aspects of legal costs and the options for reform.

In line with the terms of reference we also examined a multi criteria analysis. This is a formal approach which can be used to evaluate how different policy options compare to each other on the basis of different criteria. For example which option would have the highest ranking in terms of enhancing competition or providing certainty on litigation costs or reducing costs or on other criteria. The multi-criteria analysis (MCA) therefore involves the scoring of different options, based on their performance in achieving policy objectives. As such the MCA captured impacts that may not be quantifiable for inclusion in other appraisal techniques. The steps in the process of completing an MCA include identifying the options and the criteria for assessing the options. Following this, a scoring system is identified. Indecon used a scoring method of 0-5 with each option scored between 0 (lowest) and 5 (highest) based on how well the option would meet each objective. Indecon ranked each objective in terms of its importance against each of the other objectives. This technical process is called a pairwise analysis, however we also evaluated the impact if each of the policy options was given equal weight.

## **Legal Costs in Ireland**

Information on the average costs for the main components of legal costs including Senior and Junior Counsel fees, and Solicitors' fees, is presented in our main report. In understanding how the costs of litigation are structured, it is useful, however, to first consider the overall significance of legal costs. These, not surprisingly, vary by whether cases are settled directly or litigated. While comprehensive data is not available on many aspects of litigation costs as discussed later in this report, it is useful to consider an illustrative example of how significant legal costs are in motor insurance claims. The evidence shows legal costs in the years 2015 to 2021 amounted to 8% - 14% where a direct settlement was made, and a lower level of between 2% - 4% applied in cases dealt with via PIAB. However, where these cases were subject to litigation, the average legal costs ranged from 31% - 34% of the cost of settlement. The legal costs involved in employer liability injury settlement cases also varied by settlement channel and where cases were litigated, average legal costs accounted for 33% of the total settlement costs.



| Proportion of Costs in each Settlement Channel (Motor Insurance) |                     |                    |             |             |
|--|---------------------|--------------------|-------------|-------------|
| Settled Year   | Number of Claimants | Compensation Costs | Legal Costs | Other Costs |
| <b>Direct</b>  |                     |                    |             |             |
| 2015   | 5,985               | 89%                | 8%          | 3%          |
| 2016   | 5,973               | 89%                | 8%          | 3%          |
| 2017   | 5,460               | 88%                | 9%          | 4%          |
| 2018   | 5,478               | 87%                | 9%          | 4%          |
| 2019   | 5,948               | 85%                | 11%         | 4%          |
| 2020   | 5,116               | 84%                | 12%         | 4%          |
| 2021   | 4,367               | 83%                | 14%         | 4%          |
| <b>PIAB</b>  |                     |                    |             |             |
| 2015   | 2,343               | 94%                | 2%          | 4%          |
| 2016   | 2,368               | 94%                | 2%          | 4%          |
| 2017   | 2,124               | 93%                | 3%          | 4%          |
| 2018   | 1,828               | 93%                | 3%          | 4%          |
| 2019   | 1,905               | 93%                | 4%          | 4%          |
| 2020   | 1,562               | 93%                | 3%          | 4%          |
| 2021   | 1,335               | 91%                | 4%          | 4%          |
| <b>Litigated</b>   |                     |                    |             |             |
| 2015   | 4,097               | 64%                | 33%         | 3%          |
| 2016   | 3,976               | 64%                | 34%         | 3%          |
| 2017   | 4,214               | 66%                | 32%         | 2%          |
| 2018   | 4,200               | 64%                | 33%         | 3%          |
| 2019   | 4,023               | 65%                | 34%         | 0%          |
| 2020   | 3,370               | 65%                | 33%         | 2%          |
| 2021   | 3,107               | 67%                | 31%         | 2%          |

**Source: Indecon Analysis of Central Bank of Ireland, NCID Private Motor Insurance Report 4 2022**

A helpful submission by The Bar of Ireland/Law Society of Ireland used data provided by the Institute of Legal Cost Accountants (ILCA) and noted that for certain cases, the median professional legal fees had decreased by 10% between the periods 2011 – 2013 and 2017 – 2019. A detailed examination of the micro data on these cases completed by Indecon shows the extent of variance in costs and the very small number of cases in the ILCA database for any given year. This highlights the challenge in attempting to identify any trends in costs. For example, in a sub-set of data provided to Indecon by ILCA, legal costs in the sample cases reviewed in one year ranged from €12,915 to €107,281. The analysis undertaken by Indecon of the total overall aggregate cost of litigation for cases included in the ILCA database showed great annual variance and no overall trend in costs can be identified. Because of the small sample and diversity of cases in any year there is no clear explanation for yearly variation in the data. This again highlights the need to collate additional evidence on litigation costs on an ongoing basis.

| Legal Costs as Percentage of Award for Personal Injury Cases             |                               |                                  |                                    |
|--|-------------------------------|----------------------------------|------------------------------------|
| Year of Settlement   | Total Overall Legal Costs (€) | Total Overall Level of Award (€) | Legal Costs as Percentage of Award |
| 2011   | 363,868                       | 355,500                          | 102%                               |
| 2012   | 197,857                       | 396,000                          | 50%                                |
| 2013   | 275,295                       | 630,000                          | 44%                                |
| 2014   | 428,464                       | 1,507,000                        | 28%                                |
| 2015   | 237,637                       | 510,011                          | 47%                                |
| 2016   | 452,166                       | 674,000                          | 67%                                |
| 2017   | 486,221                       | 1,716,950                        | 28%                                |
| 2018   | 347,702                       | 643,000                          | 54%                                |
| 2019   | 905,106                       | 2,163,248                        | 42%                                |
| <i>Source: Indecon Analysis of 96 ILCA Cases. All data includes VAT.</i> |                               |                                  |                                    |

In understanding the impact of either binding or non-binding guidelines, it is important to note the diversity of cases and the variance in legal costs. To take a very simple example based on new Indecon analysis of a sample of 16 personal injury cases settled in 2019, the evidence shows the diversity of litigation costs.

| Analysis of ILCA Data on Legal Costs for Personal Injury Cases Settled in 2019                          |           |                |            |                          |                  |   |                                |
|---|-----------|----------------|------------|--------------------------|------------------|---|--------------------------------|
| Background Details  |           |                |            | Legal Costs              |                  |   |                                |
| Case  | Duration  | Level of Award | Trial Days | Total Professional Costs | Solicitors Costs | Combined Junior and Senior Counsel Fees | Expert Witness and Other Costs |
| 1   | 40        | 38,280         | N/A        | 9,838                    | 8,300            | 1,538                                   | 406                            |
| 2   | 34        | 53,968         | N/A        | 11,457                   | 9,366            | 2,091                                   | 1,056                          |
| 3   | 45        | 85,000         | N/A        | 23,964                   | 20,520           | 3,444                                   | 2,333                          |
| 4   | 44        | 30,000         | 1          | 17,677                   | 11,835           | 5,843                                   | 4,880                          |
| 5   | 84        | 96,000         | N/A        | 39,637                   | 34,763           | 4,874                                   | 7,851                          |
| 6   | 43        | 100,000        | 1          | 41,252                   | 31,842           | 9,410                                   | 10,126                         |
| 7   | 20        | 30,000         | N/A        | 11,993                   | 9,840            | 2,153                                   | 725                            |
| 8   | 27        | 65,000         | 14         | 126,702                  | 68,880           | 57,822                                  | 12,510                         |
| 9   | 51        | 60,000         | N/A        | 17,087                   | 15,611           | 1,476                                   | 1,592                          |
| 10  | 45        | 65,000         | N/A        | 45,085                   | 36,168           | 8,918                                   | 7,258                          |
| 11  | 24        | 67,500         | N/A        | 16,232                   | 13,680           | 2,552                                   | 3,029                          |
| 12  | 53        | 900,000        | N/A        | 211,965                  | 147,870          | 64,095                                  | 24,210                         |
| 13  | 79        | 225,000        | N/A        | 110,362                  | 74,846           | 35,516                                  | 25,987                         |
| 14  | 43        | 85,000         | N/A        | 12,072                   | 9,840            | 2,232                                   | 2,882                          |
| 15  | 18        | 37,500         | N/A        | 10,394                   | 9,225            | 1,169                                   | 850                            |
| 16  | 31        | 225,000        | N/A        | 39,750                   | 35,000           | 4,750                                   | 6,091                          |
| <b>Max</b>  | <b>84</b> | <b>900,000</b> | <b>14</b>  | <b>211,965</b>           | <b>147,870</b>   | <b>64,095</b>                           | <b>25,987</b>                  |
| <b>Min</b>  | <b>18</b> | <b>30,000</b>  | <b>1</b>   | <b>9,838</b>             | <b>8,300</b>     | <b>1,169</b>                            | <b>406</b>                     |
| <b>Median</b>   | <b>43</b> | <b>66,250</b>  | <b>1</b>   | <b>20,820</b>            | <b>18,065</b>    | <b>4,097</b>                            | <b>3,955</b>                   |
| <b>Mean</b>   | <b>43</b> | <b>135,203</b> | <b>5</b>   | <b>46,592</b>            | <b>33,599</b>    | <b>12,993</b>                           | <b>6,987</b>                   |
| <i>Source: Indecon Analysis of 129 ILCA Cases</i>   |           |                |            |                          |                  |   |                                |
| <i>Note: Counsel Fees include aggregation of Junior and Senior Counsel Fees. All data includes VAT.</i> |           |                |            |                          |                  |   |                                |

## Review of International Experience

Different approaches have been followed internationally which determine the costs of litigation. The analysis completed by Indecon shows that other countries have introduced measures aimed at reducing litigation costs. While there are limitations in the evidence available to date of the impact of measures implemented, it is clear that some countries have lower legal costs than those in Ireland. There is also evidence that some of the measures introduced in the UK reduced costs by 8% for personal injury (PI) cases and just under 10% for clinical negligence cases. While these reductions may be less than some advocates had hoped, any cost reductions are welcome and in aggregate could represent significant savings for the Exchequer and for businesses and individuals. Other countries' experience indicates that reforms have been introduced on an incremental basis with policymakers learning from the experience of applying reforms to certain types of litigation costs. This could also be said to apply to Ireland whereby the State has undertaken significant steps to reduce litigation in areas such as personal injury cases. Indecon's analysis of international experience has informed the identification of the options considered in this report. Overall, it is clear that many countries have introduced many different measures to address litigation costs but there is a lack of clear evidence of what has been successful in terms of reducing litigation costs or improving service quality. The next table contains a summary of the key findings from our international review.

| Summary of findings – International Review |   |
|--|---|
| <b>England and Wales:</b>                  | <ul style="list-style-type: none"> <li>Fixed Recoverable Costs (FRCs) for non-complex Personal Injury cases up to an award value of £25,000 have been in operation since 2013. There are plans to extend this to cases with an award value of £100,000.</li> <li>The key perceived benefit of fixed recoverable costs is controlled legal costs. This can potentially result in a reduction in the time/cost involved in adjudicating costs as well as a possible increase in early settlements.</li> <li>There are a number of risks involved with the fixed recoverable costs including that legal practitioners may potentially be less likely to take on complex cases.</li> </ul>  |
| <b>Scotland:</b>                           | <ul style="list-style-type: none"> <li>The Scottish Court of Session adopted rules in 2019 relating to a schedule of detailed recoverable charges allowable for the full range of specific services provided by counsel. The schedule consists of allowable "units" for each of the services provided and currently engages a £16.40 value per unit.</li> <li>Scotland has adopted Qualified One-Way Cost Shifting in most personal injury actions with the intention of improving access to the justice system for claimants by removing risk of substantial costs in the event of an unsuccessful claim.</li> <li>Scottish law places limits on the portion of awards that can be designated as success fees.</li> </ul>  |
| <b>Australia:</b>                          | <ul style="list-style-type: none"> <li>At the national level, the Federal Court of Australia publishes a National Guide to Counsel Fees. Amounts range according to level of experience required and complexity of the case. Lawyers are required by law to charge for the "most inexpensive and efficient practices available".</li> <li>On the state level, scales or tables of cost amounts recoverable are applicable in all states except NSW.</li> <li>Court retains discretion in applying recoverable costs when awarding damages. The guidelines have not been updated since 2013 and a proposal has been made to apply formula to allowable fee increases according to inflation and current costs of doing business.</li> <li>Case management procedures can be applied by the court including application of cost principles.</li> <li>Recent decision to move away from cost scales in Victoria Courts.</li> </ul> |
| <b>Canada:</b>                             | <ul style="list-style-type: none"> <li>Counsel fees and recoverable costs in Canada vary by province.</li> </ul>  |

|   |
|---|
| <ul style="list-style-type: none"> <li>Recoverable costs are awarded on partial indemnity basis; court has broad discretion on assignment of costs.</li> </ul>  |
| <p><b>New Zealand:</b></p> <ul style="list-style-type: none"> <li>There is a cap for maximum recoverable daily rates. Schedule 3 of the High Court Rules 2016 maintains a list of allowable time allocations for lawyers' services, i.e., days or fractions of days that are appropriate for fee determination purposes.</li> <li>These allocations are based on three levels of expertise required. Recoverable costs are limited to the formula in the High Court Rules.</li> </ul> |
| <p><b>Germany:</b></p> <ul style="list-style-type: none"> <li>Lawyers' fees are explicitly set in the Lawyers' Remuneration Act (Rechtsanwaltsvergütungsgesetz) (RVG).</li> <li>The losing party in a dispute is liable for the court fees and the other party's statutory legal fees.</li> </ul>   |
| <p><b>Source: Indecon Analysis</b></p>  |

### Identification of Potential Options Aimed at Reducing Legal Costs in Ireland

In evaluating options for the multi-criteria analysis in addition to the two main Kelly Report options, we have taken account of the need for any new measures to be as efficient and incentive compatible as possible. We have also considered the reality that there are significant differences in the legal work required across different types of cases. In addition, we believe it is important to ensure that any options, where possible, would not restrict competitive market forces from providing lower-cost services. The lack of transparency on legal costs and information asymmetry has been identified as important factors influencing the intensity of competition in the legal profession. These are key drivers of whether any reforms will reduce costs and improve efficiency. Our review of potential models suggests that in addition to the table of non-binding controls and a table of binding maximum costs, there is merit in considering two additional options. These have been informed by alternatives considered in other countries, as well as innovative adjustments to take account of the Irish context and the factors influencing the levels of competition. The two new options include a revised non-binding guidelines option but with significantly enhanced transparency measures. This is a radically different option to the option considered by the Kelly Review Group. This innovative new option involves structural transparency measures and strong incentives for the guidelines to be implemented. It also would facilitate competition among legal practitioners. A summary of the options examined in the multi-criteria analysis is presented in the following table.

| Overview of Options for Consideration |   |
|---------------------------------------|---|
| 1.                                    | Non-binding guidelines on maximum litigation costs (Majority Justice Kelly Review Option).  |
| 2.                                    | Binding guidelines on maximum litigation costs (Minority Justice Kelly Review Option).  |
| 3.                                    | Non-binding guidelines on litigation costs but with significantly enhanced transparency measures. These to include information provided to clients and notification to OLCA (cost adjudicator) of deviation from guidelines and other incentives to reduce costs. |
| 4.                                    | Binding maximum litigation costs but only for non-complex personal injury cases below a €30,000 settlement level.   |
| <b>Source: Indecon Analysis</b>       |   |

One issue which was considered by Indecon is what any table of costs or any guidelines on costs might look like. Indecon believes that under each of the four options significant work will be required by the Department in consultation with stakeholders. An important aspect of any table of costs concerns the level of granularity in costs which would be set. While the detailed design of any table of costs or any guidelines is outside the scope of this assignment, we believe this should set levels for individual cost components. It is also necessary to recognise that from a consumer perspective what matters is the overall costs which are incurred. A useful starting point in considering the level of granularity in costs is the model currently used in determining costs in the District Court. We would, however, advise that the breakdown in costs used for the District Court is likely to require amendment when applied to cases in higher courts. In terms of achieving market efficiency, Indecon would also advise that a range in costs would be desirable rather than a precise single figure for any cost element. This would facilitate competition and would provide some flexibility to reflect differences in circumstances.

**Option 1 (Kelly Review)**

| Summary of Kelly Option 1 – Non-Binding Guidelines   |
|--|
| An analysis of this option was presented in the Kelly Report and this option was supported by the majority of members. The main concern of the minority of the Group was whether this would be effective in reducing legal costs. This remains a valid concern. Details were presented in the Kelly Report of international experience relevant to this option. This option largely represents the status quo with the addition of non-binding guidelines. |
| <b>Source: Indecon Analysis</b>  |

**Model Characteristics**

Non-binding guidelines could be potentially used to inform the adjudication of contentious claims for costs which are considered by the Office of Legal Cost Adjudicators of the High Court (OLCA). We understand that this has some similarities to the situation which existed in England before fixed recoverable costs (FRC) were introduced in 2013. However, as the OLCA may already implicitly use certain guidelines from their caseload on appropriate costs, this may not have any significant impact on the outcome of OLCA or other cases.

**Option 2 (Kelly Review)**

| Summary of Kelly Option 2 – Table of maximum costs prescribed by a new Litigation Court Committee which could be derogated from in exceptional circumstances   |
|--|
| An analysis of this option was presented in the Kelly Report. The merits of this option were identified in the Kelly Report by minority group members. A key issue would be to ensure that any maximum level set did not result in all costs rising to the maximum level or that the binding cost table did not result in tacit collusion or the restriction of competition. |
| <b>Source: Indecon Analysis</b>  |

**Model Characteristics**

A mechanism for prescribing the maximum levels of litigation costs chargeable, in the form of a table of costs, could be introduced similar to Option 1. The key difference would be that the cost parameters would be binding. This would effectively extend the model used in the Irish District Court to be applicable to Circuit and Higher Court cases. The District Court currently has a schedule of costs which is used to determine solicitors' costs in each case. Costs are determined by claim amounts, the type of cost, and the type of case. For example, there is a schedule of solicitor's costs for civil debt cases with costs being determined by the claim amount. Additionally, there is a schedule for counsel's fees with costs determined by the claim amount. The full range of District Court schedule of costs is discussed in more detail in Annex 3.

### Option 3

#### Summary of Option 3 - Non-binding guidelines on costs but with significantly enhanced transparency measures and other incentives to reduce costs.

This option would be very different from simply setting a table of non-binding costs which could potentially be ignored by the legal profession. Critically, a requirement would be that all clients would be informed, in writing prior to appointment, of these costs **and** the factors, if any, which could lead to any divergence from the guidelines. There would also, under this option, be a requirement for legal professionals to submit details to the OLCA of any divergence in costs from the guidelines and an annual publication of such cases would enhance transparency of the impact of the implementation of the guidelines. This would also provide an evidence base subsequently to consider other measures if it was deemed appropriate.

#### Model Characteristics

Non-binding guidelines on costs would be set as per Option 1. This revised option identified would, however, include very significantly enhanced transparency measures and other strong incentives to reduce costs. Under this alternative option, all clients would be informed in writing of these detailed costs prior to appointment,<sup>1</sup> and the factors which could lead to any divergence from the guidelines. A written explanation of the reasons why any divergence from the guidelines would also be provided at the earliest possible date and prior to the invoicing of costs if the guidelines were not applied. In addition, legal practices would provide details of cases where costs diverged from the guidelines to the Office of the Legal Costs Adjudicator (OLCA). The OLCA would publish an annual report documenting all such cases. The increased transparency would help consumers make more informed decisions when choosing a legal practitioner. It could also potentially facilitate practitioners who wished to gain a competitive advantage by offering costs below the guidelines or by providing certainty that there would be no exceptions to the guideline costs.

The new option involving the development of guidelines on costs but with significant additional measures on transparency and incentive mechanisms would help address the information gaps faced by both consumers and policymakers. It would be important that the information which is gathered would include the following:

- Detailed data on the extent to which costs elements varied from the guidelines;
- Reasons for any variance;
- What percentage of cases had costs which varied from the guidelines;
- Distribution of cost variance from the guidelines. For example, for what percentage of costs where guidelines were not followed were costs in excess of 5%, 10%, 20% or higher?

The published information would greatly enhance consumer awareness of the cost of litigation and provide a basis for policymakers to decide on the need for any additional reforms. The publication of this information would also act as an incentive for the legal profession to apply the guidelines where feasible.

<sup>1</sup> Clients should also be informed during the case of any cost changes that diverge from the guidelines and a rationale for these

## Option 4

### Summary of Option 4 - Binding Maximum Costs but only for Non-Complex Personal Injury Cases below a €30,000 Settlement Level

This option would involve prescribed binding maximum costs for non-complex personal injury cases below a €30,000 settlement level. This would be similar to the FRC option that has been in operation in England for non-complex personal injury (PI) cases up to an award value of £25,000.

*Source: Indecon Analysis*

#### Model Characteristics

This is similar to Option 2 but would only be applied to the large volume, non-complex PI cases. This could be a first step in any reform process and would provide the evidence to inform policymakers of whether any further extension was warranted. There is likely to be greater data availability in terms of statistically reliable estimates of mean costs for non-complex PI cases than if binding controls were applied to all services. Data reliability to set binding guidelines becomes more difficult with high value, complex claims because of a reduction in sample sizes and differences in the levels and nature of the work involved. This is similar to the model that has been implemented in England and preliminary evidence indicates that it has had some impact on reducing legal costs. An issue is that it would only apply to personal injury cases of a certain size. The UK Government analysis of fixed recoverable costs was published in 2021. The report suggested that research by Fenn and Rickman (2019) showed that the Jackson Reforms (including fixed recoverable costs for personal injury cases up to £25,000) had reduced costs. However, Fenn and Rickman explicitly excluded cases subject to FRC and their findings therefore related to other elements of reform.

#### Criteria used in MCA

As part of our analytical framework, we have examined the four different options under 10 different key policy objectives. These include an assessment of how the options would be likely to impact on each of the following objectives:

- **Objective 1:** Enhance competition
- **Objective 2:** Reduce the cost of litigation
- **Objective 3:** Provide certainty on litigation costs
- **Objective 4:** Increase the transparency of litigation costs
- **Objective 5:** Improve access to justice for all citizens
- **Objective 6:** Maintain and improve quality of services
- **Objective 7:** Reduce the time involved in litigation
- **Objective 8:** Improve the effectiveness/efficiency of the legal system
- **Objective 9:** Reduce pressure on the courts system
- **Objective 10:** Ease of implementation of reform



Each of the options are evaluated in the multi-criteria assessment (MCA) by allocating scores of how the options rate against the objectives. This enables the underlying judgements to be explicit. A weighting system has been utilised to take account of assumptions on the relative importance of the different objectives. We have also considered the impact of assuming each of the criteria are of equal weight.

The scoring for the options are based on a rating of 0-5 and represents the independent opinion of the Indecon Review Team. This, where feasible, has been informed by the empirical analysis of legal costs in Ireland, as well as the review of international experience. It has also been informed by new empirical survey evidence and by the extensive stakeholder submissions made to the Indecon Review Team. There is, however, inevitably a judgement required in determining the appropriate scores and the estimates are based on the balance of evidence provided. In our analysis we also model the impact on alternative scoring of the cost-related objectives as it was evident from stakeholder consultations that there were different views expressed on this issue. These differences of views may, in part, have led to differences in the conclusions of the members of the Kelly Review Group. The following section outlines our rationale for the different scores for the different options. Further evidence for these scores is included in Section 6 of the main report.

### Impact of Options on Enhancing Competition

A very insightful submission was made to the Indecon Review Team by the Competition and Consumer Protection Commission (CCPC) on the different options from a competition perspective. The full submission merits careful consideration by policymakers and, *inter alia*, highlights the importance of how the implementation of different options is managed and the potential impacts from a competition perspective. While stakeholder comments are considered in detail in the main report, in view of the statutory role of the CCPC it is useful to highlight certain aspects of the assessment by the CCPC. The CCPC views reinforce Indecon's opinions on the importance of transparency of costs in any reform options and the importance of considering the impact on competition.

| Extracts from CCPC Submission  |
|--|
| <i>"The CCPC strongly recommends that the impact of the proposed options on competition should be key criteria of the analysis."</i>   |
| <i>"The CCPC is of the view that any option will have to address the information asymmetry which will be present in almost all client – lawyer interactions."</i>  |
| <i>"Transparency in legal fees can bring many benefits to recipients of legal services including facilitating shopping around and reducing the information gap ...both of which promote competition. Price transparency also enables parties to make more informed decisions."</i>   |
| <i>"Collusive behaviour including tactic collusion where service providers charge the same price ... is usually easier where participants can pick a simple and clear focal point as the price"... The CCPC cautions that binding maximum costs tables present a greater risk of detriment caused by collusive behaviour than non-binding guidelines."</i> |
| <i>"Option 1 (non-binding guidelines) ... does not constitute a significant change in the existing process regarding cost disputes."</i>   |
| <i>"Option 1 because of its non-binding nature, may mislead and confuse customers."</i>  |
| <i>"The additional transparency measures in Option 3 significantly enhance Option 1 and should be adopted in preference to Option 1" (Subject to 'other CCPC observations')."</i>  |
| <b>Source: CCPC Submission to the Indecon Review Team</b>  |

In our analysis of the options in terms of their impact on enhancing competition, Indecon's assessment is that binding maximum costs, Option 2, would be the least beneficial from a competition perspective. This is because of the risk of tacit collusive behaviour whereby some providers would charge the same prices, i.e., prices in line with the binding table of charges. In Indecon's opinion this judgement is aligned with the assessment of the Competition Consumer Protection Commission who cautioned that binding maximum tables present a greater risk of detriment caused by collective behaviour than by non-binding guidelines. Hence a zero score is provided for binding maximum charges on this criteria. A very low rating on competition grounds is also given to binding maximum charges for non-complex PI cases (Option 4). However, as this would only be confined to certain cases, a slightly higher rating of 1 is provided. For Option 1, i.e., non-binding table of charges, we allocated a score of 1 on competition grounds. This relatively low rating is because we believe there would be a danger that such non-binding charges would not impact pricing behaviour and would not constitute a significant change and could mislead consumers. This is particularly the case given the level of information asymmetry which exists in client- lawyer interactions. A score of 5 has been provided for Option 3. The high rating for non-binding guidelines with additional transparency measures is, however, dependent on ensuring that effective transparency measures are implemented in a way which reduces information asymmetry.

### **Impact of Options on the Cost of Litigation**

The research completed for this review has indicated that there is no one database that provides a robust evidence base to assess the current levels of litigation costs in Ireland. However, there are a number of different sources that provide various insights into levels of costs, and important research has been completed by the Central Bank (National Claims Information Database), which would not have been available to the Kelly Review Group. Indecon would also point out that the costs of litigation will be influenced by whether the measures enhance competition as discussed above. In considering the impact on the cost of litigation, it is useful to analyse the potential costs under the various options using a number of different assumptions. This shows that the impact on litigation costs will depend on the levels at which any guidelines are set. For example, if guidelines are set at the current average or mean costs, there would be a significant reduction in litigation costs for cases where costs are above the mean but costs would rise to the mean for an even higher number of cases. This highlights the complexity involved in setting price guidelines. In our base case analysis of the options in terms of their impact on the cost of litigation, Indecon believes that Option 2, namely binding maximum costs, may be the most beneficial and is given the highest score. The potential high rating on costs may have influenced the minority members of the Kelly Group to favour this option. This would be critically determined by the level at which any guidelines would be set. There is therefore a risk that binding maximum guidelines will not reduce costs if all legal practitioners decide to charge at this maximum level, or if the guidelines are set at too high a level. The other Kelly option (non-binding guidelines) would not be likely to significantly change the current position and is therefore allocated a low score. A higher score of 4 has been provided for Option 3. The higher rating for non-binding guidelines with additional transparency measures is dependent on ensuring that effective transparency measures are implemented in a way which reduces information asymmetry and promotes competition. The Indecon Review Team believes that the additional transparency measures would incentivise legal practitioners to offer reduced costs.

### **Impact on Certainty of Legal Costs**

An important policy objective of any reform relates to its impact on the certainty of litigation costs. This is needed to better inform consumers. The option which would likely have the greatest impact on certainty is binding guidelines. We believe that Option 2 is likely to have the largest relative impact on the certainty of litigation costs. We believe that non-binding guidelines will partially improve the certainty of litigation costs.

However, as identified in our stakeholder consultation, there is a significant risk that non-binding guidelines will have little impact on the current market.

### **Impact on Transparency of Litigation Costs**

A policy consideration of any reform in relation to litigation costs is how the reform impacts on the transparency of litigation costs. The asymmetry of information between the consumer and providers of legal services is a potential market failure. Consumers are typically not well informed of the likely final costs associated with contentious litigation. Various stakeholders have highlighted the lack of transparency in relation to litigation costs as a concern for businesses and individuals involved with legal issues. All of the options identified would enhance transparency, but binding guidelines would potentially be one of the strongest reforms on this criteria. Option 3 which would incorporate specific additional transparency measures would also increase the transparency of litigation costs. Indecon's assessment of the impact of the options on transparency is that Options 2 and 3 are likely to have the largest relative impact on the transparency of litigation costs.

### **Impact of Options on Quality of Services**

An important policy criteria relevant to any reform option is how it might affect the quality of service provided to consumers. The legal profession in Ireland offers a high-quality service to clients and it is important that this is maintained or ideally strengthened. This is reflected in the relatively low number of complaints that are made annually to the Legal Services Regulatory Authority (LSRA). There may be a possible trade-off between quality of service and reduction in the cost of litigation, particularly if binding guidelines were introduced and set at too low a level. If, however, measures enhanced competition, it could lead to service innovation. Options 1 and 4 also could potentially have an impact on quality of service. The Indecon Review Team believes that Option 3 is likely to be the best performing option in relation to quality of service. This relates to the fact that legal professionals would be free to charge in excess of the guidelines if they are able to provide justification to client for the additional work. This additional work would be undertaken with the agreement of the client.

### **Impact on Access to Justice**

Another policy objective of any reforms relates to its impact on access to justice. This is not easily amenable to quantitative modelling or other analysis. Indecon believes that the stakeholder consultation and survey analysis are therefore helpful in the assessment of the impact of the various options on this policy objective. The Indecon Review Team believes that Option 3 may offer the best choice of the options in terms of access to justice but only marginally. This is because of the additional measures around reporting requirements and the publication of an annual report which would improve consumer awareness of the cost of litigation and may, combined with more competition and lower costs, enhance access to justice. Indecon would, however, caution against assuming any of the options would fundamentally change access to justice.

### **Impact of Options on Time involved in Litigation Cases**

One of the clear findings of the recent Central Bank's National Claims Information database (NCID) in relation to cases that are litigated is how long these cases take. Similar conclusions can be drawn from the latest Courts Service annual report. These figures show that a typical litigation case before the High Court or Circuit Court can take over two years from when proceedings are initiated. The latest data from the NCID indicates that injury cases that are litigated take, on average, 4.5 years to reach final settlement. This compares with an average period of 1.7 years for claims that do not involve litigation. Also of note is that cases are likely to involve legal advice prior to litigation and this impacts on overall timelines.

In designing any reform option it is useful to consider the distribution rather than just the average of time involved in litigation. The NCID data, for example, indicates that personal injury cases take on average around

4.5 years to settle when litigation is involved. Around 50% of cases take three years to settle. The data indicates that around 20% of cases take at least five years to reach a settlement when they involve litigation.

There is significant uncertainty involved in the impact of options on the timing of settlement of cases and a judgement is required. The main impact would arise because with some options the greater certainty on costs would mean that one contentious issue would be off the table. Each of the reform options would also require time to design the implementation of the reforms. Once implementation issues are resolved, the Indecon Review team believes that Option 4 could potentially be the best performing option in relation to time taken to resolve cases. This relates to the fact that these types of cases should be less complicated and there will be less contention over various aspects of the case. Options 2 and 3 are also likely to improve behaviour as they offer greater certainty on the typical costs involved in different type of cases. Option 1 is given a lower score as this non-binding option may not influence current practices.

### **Impact of Options on Effectiveness/Efficiency of the Legal System**

Another important policy consideration is whether the reform options could impact on the efficiency and effectiveness of the civil legal system. Indecon believes that there is likely to be only marginal differences between the options on the effectiveness/efficiency of the system. However, greater certainty on costs of binding controls and non-binding controls with enhanced transparency measures could facilitate efficiency gains. Indecon notes that effectiveness/efficiency may overlap with some of the other objectives such as access to justice, quality of service and time taken to resolve cases.

### **Impact of Options on the Courts System**

An issue of relevance is the impact of the options on the levels of litigation and on capacity issues in the courts systems. Recent analysis by the OECD suggests that Ireland, historically, spent less on its court systems than other OECD countries and a lower ratio of judges per capita. Indecon notes that recent Government decisions may impact on this, but capacity remains an issue. We believe that Options 2 and 4 are likely to have a slightly greater impact on (reducing) the number of cases or the timing of cases before the courts. Similarly, we believe that non-binding guidelines with enhanced transparency measures will reduce some litigation cases before the courts or reduce disputes on costs. A lower score is given to non-binding guidelines.

### **Ease of Implementation of Reform**

The final policy objective considered as part of this multi-criteria analysis relates to the ease with which each proposed reform option could be implemented. Although this is not a core policy objective, it is important that this is considered to ensure that the analysis reflects any potential implementation issues involved with the different options. In our analysis of the options in terms of their ease of implementation, we believe that Option 2, namely binding maximum costs, would be the most difficult to implement. This is because of the complexity involved in setting these maximum costs across a large variety of litigation cases. There are also significant challenges around data availability to make informed decisions on binding guidelines. A score of 4 has been provided for Option 3. The rating for non-binding guidelines with additional transparency measures is, however, dependent on the complexity involved in implementing the additional reporting requirements. This will require resources for the OLCA to facilitate their annual report process. In relative terms, the introduction of non-binding guidelines would be the most straightforward in terms of implementation. However, there is still the complexity around how these guidelines are set and the underlying data that they are based on. A score of 5 has been allocated to this option. A score of 3 is given to binding maximum charges for non-complex PI cases.

### Results of the Multi-Criteria Analysis

The next table presents the scoring of each criteria for the policy options examined. These scores have been assigned in line with the metrics outlined previously. The results show that Option 2 (binding guidelines) scores highly on providing certainty on litigation costs and we have also allowed a very high score to reducing the costs of litigation. This however is the subject to the caveat that this depends on the level of which the maximum guidelines are set and there is a potential for this option to actually increase costs for many litigants. Option 1 (non binding) guidelines scores poorly on enhancing competition or reducing the cost of litigation. While this Option is the easiest in terms of implementation it is not significantly different than the current position. Option 3 which is non binding guidelines but with greatly enhanced transparency measures scores highest on the impact of enhancing competition and also scores highly on other criteria including the cost of reducing litigation.

| Multi-Criteria Analysis – Scoring  |                     |          |          |          |
|--|---------------------|----------|----------|----------|
| Policy Objectives  | Option Scores (0-5) |          |          |          |
|  | Option 1            | Option 2 | Option 3 | Option 4 |
| <b>Objective 1:</b> Enhancing competition                                    | 1                   | 0        | 5        | 1        |
| <b>Objective 2:</b> Reduce the cost of litigation                            | 2                   | 5        | 4        | 4        |
| <b>Objective 3:</b> Provide certainty on litigation costs                    | 3                   | 5        | 4        | 4        |
| <b>Objective 4:</b> Increase the transparency of litigation costs            | 4                   | 5        | 5        | 4        |
| <b>Objective 5:</b> Maintain or improve quality of service                   | 1                   | 0        | 3        | 1        |
| <b>Objective 6:</b> Improve access to justice for all citizens               | 2                   | 2        | 3        | 2        |
| <b>Objective 7:</b> Reduce the time involved in litigation                   | 3                   | 4        | 4        | 5        |
| <b>Objective 8:</b> Improve the effectiveness/efficiency of the legal system | 3                   | 4        | 4        | 3        |
| <b>Objective 9:</b> Reduce pressure on the courts system                     | 3                   | 5        | 4        | 5        |
| <b>Objective 10:</b> Ease of implementation of reform                        | 5                   | 1        | 4        | 3        |
| <i>Source: Indecon</i>   |                     |          |          |          |

The following table shows the results of combining the individual scores with a pairwise weighting analysis. These results show that Option 3 (Non-binding guidelines with additional transparency measures) is the strongest performing option. Options 2 (binding maximum guidelines) and Option 4 (binding maximum guidelines for non-complex PI cases) are the next best options. Both of these options are giving a higher rating than Option 1 (non-binding guidelines).

| Multi-Criteria Analysis – Scoring (Based on Rankings and Pairwise Analysis)  |             |             |             |             |
|--|-------------|-------------|-------------|-------------|
|  | Option 1    | Option 2    | Option 3    | Option 4    |
| <b>Objective 1:</b> Enhancing competition                                    | 0.08        | 0.00        | 0.42        | 0.08        |
| <b>Objective 2:</b> Reduce the cost of litigation                            | 0.38        | 0.95        | 0.76        | 0.76        |
| <b>Objective 3:</b> Provide certainty on litigation costs                    | 0.39        | 0.65        | 0.52        | 0.52        |
| <b>Objective 4:</b> Increase the transparency of litigation costs            | 0.38        | 0.47        | 0.47        | 0.38        |
| <b>Objective 5:</b> Maintain or improve quality of service                   | 0.12        | 0.00        | 0.35        | 0.12        |
| <b>Objective 6:</b> Improve access to justice for all citizens               | 0.23        | 0.23        | 0.35        | 0.23        |
| <b>Objective 7:</b> Reduce the time involved in litigation                   | 0.21        | 0.28        | 0.28        | 0.34        |
| <b>Objective 8:</b> Improve the effectiveness/efficiency of the legal system | 0.22        | 0.29        | 0.29        | 0.22        |
| <b>Objective 9:</b> Reduce pressure on the courts system                     | 0.19        | 0.31        | 0.25        | 0.31        |
| <b>Objective 10:</b> Ease of implementation of reform                        | 0.32        | 0.06        | 0.26        | 0.19        |
| <b>Total</b>   | <b>2.51</b> | <b>3.25</b> | <b>3.94</b> | <b>3.16</b> |
| <i>Source: Indecon analysis</i>  |             |             |             |             |

This report analyses in detail four reform options designed to support the overall objectives of controlling litigation costs in Ireland. Our analysis has been informed by extensive analysis of available empirical evidence<sup>2</sup>, a detailed review of the experience in other countries and a careful consideration of stakeholder views. Some limited new survey evidence was also completed. Our analysis suggests that Option 3 (non-binding guidelines with additional transparency measures) may be the strongest performing option under our baseline assumptions. Under alternative assumptions around the likely impact of cost-related policy objectives, the binding maximum guidelines also score highly.

<sup>2</sup> We note that significant data gaps remain in relation to the availability of empirical data on the cost of litigation in Ireland.

## SUMMARY OF MAIN CONCLUSIONS

Indecon's independent conclusions on the potential for the reform of litigation costs based on the detailed analysis completed and the stakeholder consultations are presented in the table below.

| Summary of Key Conclusions   |  |
|--|--|
| <b>1. LITIGATION COSTS IN IRELAND ARE SIGNIFICANT AND VARY BY SETTLEMENT CHANNEL</b>   | For employer liability injury settlement cases which were litigated, average legal costs accounted for 33% of total settlement costs. Where direct settlements are made, legal costs are lower at between 8-14%, and are much lower at between 2-4% when cases are dealt with by PIAB. There is also some evidence that litigation costs in other countries are lower than in Ireland although causation is difficult to determine.  |
| <b>2. MEASURES TO REDUCE LITIGATION COSTS HAVE BEEN IMPLEMENTED IN OTHER COUNTRIES</b>   | There is a lack of clear evidence of the precise impact of reforms in other countries in terms of reducing litigation costs or improving service quality. As a result there is no simple solutions which can be transposed to Irish circumstances. A number of the measures implemented in other countries, notably in the UK, however, appear to have had some impact on reducing costs.  |
| <b>3. DESPITE THE PROGRESS MADE IN RECENT YEARS IN COLLATING AND PUBLISHING DATA ON LEGAL COSTS, MAJOR GAPS IN INFORMATION ON THE COSTS OF LITIGATION STILL EXIST</b>  | Work by the Central Bank and other organisations has provided greater clarity on legal costs, but significant gaps remain. The information gaps reflect a barrier to evidence-based policy and hinders transparency for users of legal services. Continued work on improving information is required.  |
| <b>4. THERE ARE ISSUES RELATING TO THE TWO MAIN OPTIONS WHICH HAVE PREVIOUSLY BEEN IDENTIFIED TO REDUCE LITIGATION COSTS NAMELY (I) NON BINDING GUIDELINES ON MAXIMUM LITIGATION COSTS AND (II) MAXIMUM LITIGATION COSTS</b>   | On the first option Indecon agrees with the conclusion of the Chair of the Review Group, the Hon. Mr. Justice Peter Kelly, that more radical measures than the introduction of non-binding guidelines will be needed if costs are to be reduced. Indecon also agrees with the conclusion of the Competition and Consumer Protection Commission that the option of non-binding guidelines does not constitute a significant change to the existing process. Indecon however believes that binding guidelines depending on how they are implemented and on what level they are set may not have the desired results. Indeed, while they have the potential to reduce costs there is a risk that if levels are set at average cost elements, costs would rise for most litigants. |
| <b>5. THERE IS MERIT IN CONSIDERING ALTERNATIVE NEW OPTIONS TO REDUCE LITIGATION COSTS IN PARTICULAR (I) NON-BINDING GUIDELINES ON LITIGATION COSTS BUT WITH SIGNIFICANTLY ENHANCED TRANSPARENCY MEASURES AND (II) BINDING MAXIMUM LITIGATION COSTS BUT ONLY FOR NON-COMPLEX PERSONAL INJURY CASES</b> | Both of these options would enable policy makers to secure additional information which would facilitate any future evidence-based policy reforms which may be needed. The option of non-binding guidelines with enhanced transparency measures would act as an incentive for cost reductions.   |
| <b>6. THE NEW OPTION OF NON BINDING GUIDELINES BUT WITH SIGNIFICANTLY ENHANCED TRANSPARENCY MEASURES SCORES MOST HIGHLY IN THE MULTI CRITERIA ANALYSIS</b>   | This option is likely to best facilitate the objectives of enhancing competition and is also likely to have significant potential impacts in terms of reducing the cost of litigation, maintaining the quality of service and meeting other policy objectives. It would also enable policymakers to have much greater access to information on aspects of the cost of litigation. Indecon believes this option merits careful consideration.   |
| <i>Source: Indecon analysis</i>  |  |

## Acknowledgements and Disclaimer

Indecon would like to take this opportunity to express our gratitude to the wide range of organisations and individuals who played an important role in, or contributed to, the completion of our independent review. Particular thanks are due to Declan Costello, Liam Coen, and Gurchand Singh from the Department of Justice for their support. The team also benefitted from the detailed work completed by members of The Kelly Review. As part of our analysis, we undertook a detailed consultation process which included inputs from a range of stakeholders. Submissions from stakeholders provided valuable inputs to the review which we acknowledge with thanks. We are grateful to the legal practitioners and to leading corporate and insurance companies who participated in detailed survey work for this study. We also acknowledge the informative analysis submitted by the Competition and Consumer Protection Commission and other key stakeholders, including The Bar Council of Ireland and The Law Society, the Alliance for Insurance Reform, Insurance Ireland, IBEC, ISME, and other stakeholders. Particular thanks are due to Indecon's international academic advisor Professor Paul Fenn.

It should be recognised that there are inevitable limitations in the evidence base for evaluating the options and there are constraints on the applicability of international models to Irish circumstances. There is also judgements required on the likely impact of different options and what weighting to give to different policy objectives. The rigorous independent analysis undertaken by Indecon, however, has in all cases made explicit the underlying judgements made and the rationale for the findings. Indecon also presents the scoring of different criteria used in the evaluation of the options. We also provide quantitative sensitivity analysis in the MCA modelling. It is hoped that the analysis will inform policymakers of the likely impacts of various reform options and the need for careful planning for their implementation. **The usual disclaimer applies, and the views and analyses contained in this report are the sole responsibility of Indecon.**



# 1 Introduction and Background

## 1.1 Introduction

This report is an independent examination by Indecon for the Department of Justice of models to control litigation costs in Ireland. The Department of Justice appointed Indecon following a competitive tender process.

## 1.2 Background to the Project

Following a Government Decision in 2017, a Review Group, chaired by the then President of the High Court, Mr. Justice Peter Kelly, was established to review and reform the administration of civil justice in the State. The Group reported (hence referred to as the “Kelly Report”) to the Minister for Justice and made recommendations for changes with a view to improving access to civil justice in the State, promoting early resolution of disputes, reducing the cost of litigation, creating a more responsive and proportionate system, and ensuring better outcomes for court users.

The Review Group held an open call requesting submissions from interested persons or parties in relation to its work. The Group received over 90 submissions which were considered by the Review Group and a number of specialised sub-committees. Submissions were received from Government Departments, members of the judiciary, legal professionals, academics, non-profit organisations, professional bodies, and individual members of the public. As part of the process, researchers also reviewed caseload data for the various jurisdictional instances and considered international evaluations of the performance of Ireland’s civil justice system.

The Review Group provided over 90 important recommendations entailing measures to improve the efficiency and effectiveness of the civil courts system and examined ways litigation costs could be reduced. Some of the areas examined included options for primary and secondary legislation, changes in court procedure and practice, improved physical and ICT facilities, and new administrative arrangements. The Review Group was not, however, able to reach a unanimous agreement as to how effective change measures might be introduced to reduce litigation costs. The majority of the Group comprising representatives of the Supreme Court, Court of Appeal, High Court, Circuit Court, District Court, Bar Council, and Law Society were in favour of creating non-binding guidelines in relation to cost levels to assist parties and their representatives.

A minority of members recommended a table of maximum cost levels to be prescribed by a new Litigation Costs Committee, which would only be derogated from in exceptional circumstances. Also of note is that the Hon. Mr. Justice Peter Kelly, stated in his introductory letter to the Minister for Justice and Equality: “Having chaired the sub-group on litigation costs and carefully considered the issues, I am of the opinion that the recommendations of the minority are more likely to achieve much needed costs reductions than those of the majority. More radical measures than the introduction of guidelines will be needed to achieve the desired results in my view.”

On foot of this, the Department of Justice requested tenders for the design and conducting of research in the area of litigation costs, with the focus on evaluating the economic impact of measures to control litigation costs in the State, in particular binding and non-binding controls on contentious costs. Following a competitive tendering process, Indecon International Economic Consultants were appointed to undertake the research, which is the subject of this report.

### 1.3 Scope of Research and Methodology

This current independent study by Indecon concerns the completion of a Multi-Criteria Analysis (MCA), to evaluate the likely impact of alternative measures to control litigation costs identified by the Review Group, namely, binding and non-binding controls on contentious costs. In addition to the multi-criteria modelling, the methodology involved a detailed review of previous Irish and international research and analysis of existing datasets. It also involved consultation programme and review of detailed submissions from stakeholder groups. In addition, we also undertook new primary research as outlined below. The reforms considered will have fundamental implications not just for saving to the Exchequer, but equally for both businesses and individuals involved in legal disputes. This report is designed to help inform policymakers of the likely impact of different options for overall reform. These reforms would build on the significant steps already taken by the Irish Government to provide alternative options to litigation and hence reduce the legal costs of disputes.

In relation to Option 1, the Review Group noted that the guidelines should be expressed by reference to Schedule 1 of the Legal Services Regulation Act 2015, and the levels at which parties have either resolved or had adjudicated costs disputes. It was envisaged that they should take into account prevailing economic conditions and the need to ensure no more than a reasonable level of remuneration on a party-and-party basis, and that similar guidelines for practitioner and client costs also be formulated. In relation to Option 2, a minority of the Review Group recommended a maximum table of costs and indicated that this should not preclude legal practitioners from agreeing costs lower than the levels specified. The Group noted that the table of costs could be developed with regard to principles and policies which would be applied to legal practitioner and client costs, and party-and-party costs. In the case of both Options 1 and 2 above, it was envisaged that these will relate to contentious costs of litigation before the courts. The terms of reference also permitted Indecon to consider alternatives to the two options to reduce the costs of litigation.

#### **New Primary Research**

Our methodological approach involved a detailed examination of previous Irish and international research on the options for reducing litigation costs. We also invited submissions from key stakeholders, all of which have been carefully examined by the consultancy team. This included 14 submissions from different stakeholder organisations including representative organisations covering both consumer organisations and the legal profession. We undertook two rounds of stakeholder engagement in order to ensure that relevant stakeholders had the opportunity to comment on the two new proposed options in addition to the Kelly Review options. In addition, we completed new

primary survey work with both large corporates and with the legal profession. The survey was disseminated via an online survey link. The survey of legal practitioners was facilitated by the Law Society of Ireland and the Bar of Ireland. The Alliance for Insurance Reform also disseminated the survey to their members which gave us insight into the views of wider stakeholders. Large corporates were selected on the basis of their size and nature of their business. All of the publicly listed companies on the ISEQ20 were selected along with other large companies operating in Ireland. These surveys were targeted at the head of legal affairs in each of these organisations. While some of the companies contacted had no significant recent experience with litigation costs in Ireland and did not complete the survey. We, however, received 39 detailed survey responses, 12 of which represented corporate consumers of legal services, 20 represented legal practitioners and seven were received from wider consumer organisations or representative groups.

### Overview of Modelling Approach

In line with the Public Spending Code, we have subjected the range of options outlined in Section 5 to a Multi-Criteria Analysis (MCA).<sup>3</sup> The following chapter then outlines the criteria included in the MCA and the rationale for each of these criteria. These criteria have been informed by the nature of the policy objectives of the proposed reform options. This section also outlines the weightings assigned to each criterion before recapping on the scores for each criterion.

### Defining the Criteria

The criteria identified for inclusion in the MCA for this economic evaluation have been chosen on the basis of the policy objectives from the Programme for Government and the Department of Justice strategy.<sup>4</sup>

The key criteria that are included in the MCA are outlined below in no particular order.

- **Objective 1:** Enhance competition;
- **Objective 2:** Reduce the cost of litigation;
- **Objective 3:** Provide certainty on litigation costs;
- **Objective 4:** Increase the transparency of litigation costs;
- **Objective 5:** Improve access to justice for all citizens;
- **Objective 6:** Maintain and improve quality of services;
- **Objective 7:** Reduce the time involved in litigation;

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<sup>3</sup> <https://assets.gov.ie/43555/b026e01682a24a4fb4db411bc15c3df3.pdf>

<sup>4</sup> <https://assets.gov.ie/130911/fe93e24e-dfe0-40ff-9934-def2b44b7b52.pdf>

[https://www.gov.ie/en/organisation-information/15dea-department-of-justice-statement-of-strategy-2021-2023/?referrer=http://www.justice.ie/en/JELR/Department\\_of\\_Justice\\_Strategy\\_Statement\\_2021\\_-\\_2023.pdf/Files/Department\\_of\\_Justice\\_Strategy\\_Statement\\_2021\\_-\\_2023.pdf](https://www.gov.ie/en/organisation-information/15dea-department-of-justice-statement-of-strategy-2021-2023/?referrer=http://www.justice.ie/en/JELR/Department_of_Justice_Strategy_Statement_2021_-_2023.pdf/Files/Department_of_Justice_Strategy_Statement_2021_-_2023.pdf)

- **Objective 8:** Improve the effectiveness/efficiency of the legal system;
- **Objective 9:** Reduce pressure on the courts system; and
- **Objective 10:** Ease of implementation of reform.

### **Weighting of Criteria**

In weighting the criteria outlined above, we have undertaken a pairwise comparison exercise. This exercise compares and scores the relative importance of each policy objective versus the others, in a bilateral manner. The scoring scale is outlined overleaf:

- 1 – Equal importance;
- 3 – Moderately more important;
- 5 – Significantly more Important;
- 7 – Very significantly more important; and
- 9 – Overwhelmingly more important.

Pairwise comparison is a framework used to construct the weights for each of the headline criteria. It involves the direct comparison of each of the criteria, determining the extent to which one criterion is deemed more important than another. The scale used in the pairwise analysis can be thought of as an ordinal scale, with a maximum value of 9. In Section 6.13 of this report we discuss the details of the pairwise analysis. A value of 1 indicates that the criteria are deemed to be of equal importance, while a higher value means that one criterion (that on the y axis) is valued to a greater extent than the other (that on the x axis). The criteria in the rows are scored against those in each column on the above scale. Scores in counterpart cells comparing the same criteria are inversely related. Through the pairwise analysis the weights of each of these criteria are determined. These are calculated based on the geometric mean of the scores of each of the objectives. The calculation of the weightings for each of the policy objectives from the assessment matrix are then estimated. We also consider sensitivities to the modelling assuming each of the policy objectives are of equal weight.

## **1.4 Data Availability**

An important finding of Indecon's review is that despite the progress made in recent years in collating and publishing data on certain legal costs, major gaps in information on the costs of litigation still exists. In particular, there is no comprehensive information available on what are the detailed components of legal costs for most cases which proceed to litigation or how these costs have changed over time. There is also an absence of comprehensive data on how the costs vary between different providers of legal services. There is also a lack of data on litigation costs on cases that are settled outside of court. The resultant lack of transparency exasperates the challenges faced by consumers

of litigation services. This also hinders evidence-based policy development. As a result of the lack of comprehensive information, Indecon had to undertake much more detailed research than would otherwise have been required to complete this study. This included analysis of individual micro case data provided by Institute of Cost Accountants (ILCA). It also involved new survey evidence and stakeholder consultations. Despite the extensive work undertaken, significant data gaps remain. This has influenced the development of two innovative new options for consideration. Both of these would enhance policymakers access to evidence to inform the need for any additional reforms.

### **Outline of Work Undertaken**

To assist readers, it is useful to outline the extensive work undertaken by the Indecon team and our advisers in Ireland and internationally. This included a review of the evidence on the scale and components of legal costs in Ireland. This was useful as context for considering potential areas of reform. We also completed an examination of the experience in other countries of attempts to reduce litigation costs. It was also necessary to identify the potential options for reducing legal costs. These included options considered by the Kelly Review Group and in addition we identified a number of innovative new options. These were informed by the international experience and by Indecon analysis of the specific Irish context. To assist with the assessment of the options and to complete the multi criteria we consulted widely with stakeholders and reviewed a number of valuable submissions received. In addition we completed new primary survey research with both large corporate customers of legal services and with the legal profession. This was helpful in identifying both a customer perspective and a supplier perspective on aspects of legal costs and the options for reform.

In line with the terms of reference we also examined a multi criteria analysis. This is a formal approach which can be used to evaluate how different policy options compare to each other on the basis of different criteria. For example which option would have the highest ranking in terms of enhancing competition or providing certainty on litigation costs or reducing costs or on other criteria. The multi-criteria analysis (MCA) therefore involves the scoring of different options, based on their performance in achieving policy objectives. As such the MCAs captured impacts that may not be quantifiable for inclusion in other appraisal techniques. The steps in the process of completing an MCA include identifying the options and the criteria for assessing the options. Following this, a scoring system is identified. Indecon used a scoring method of 0-5 with each option scored between 0 (lowest) and 5 (highest) based on how well the option would meet each objective. Indecon ranked each objective in terms of its importance against each of the other objectives. This technical process is called a pairwise analysis, however we also evaluated the impact if each of the policy options was given equal weight.

## **1.5 Structure of the Report**

The remainder of this report is structured as follows:

- Section 2 outlines the current approach to Civil Litigation in Ireland including a review of various functions and a brief summary of the scale of civil litigation in Ireland in recent years;

- Section 3 presents a detailed examination of how litigation costs are controlled in other common law jurisdictions;
- Section 4 analyses the current level of litigation costs in Ireland involving a review of a number of different data sources;
- Section 5 outlines the four options that have been considered as part of this review; and
- Section 6 outlines the results and rationale from the application of the Multi-Criteria Analysis (MCA) to each of the four proposed reform options; and
- Section 7 provides a summary of the key conclusions of this review.

## 2 Review of Civil Litigation in Ireland

### 2.1 Introduction

As background context to this study, it is important to review aspects of civil litigation in Ireland. Some of this information is presented in the annexes but it is important as context to briefly discuss the role of some key organisations including the Department of Justice. One of key functions of the Department of Justice in relation to the Civil Courts system is the drafting of new legislation that is required to implement change. There are a number of civil justice bodies under the aegis of the Department. These include the Courts Service, Judicial Council and the Legal Services Regulatory Authority. These organisations and others are discussed in greater detail in Annex 7.

### 2.2 Irish Court System and District Court Schedule of Costs

In Ireland the judiciary includes the District Court, the Circuit Court, the High Court, the Commercial Court, the Court of Appeal, and the Supreme Court. The judiciary is independent of the executive arm of the State. Within the District Court a Schedule of Costs is used to determine legal costs. This represents an approach used by the State to control elements of litigation costs. The District Court deals with civil cases where the requested damages or compensation is less than €15,000.<sup>5</sup> These may include cases related to contracts, hire purchase, credit sale and consumer hire agreements, personal injury, evictions, and actions for the wrong detention of goods. It may also hear civil cases related to family law, enforcing judgements, and licensing

Important context to this current study is the District Court rules, especially 2014 Rule on Costs. As per S.I. No 17 of 2014, the District Court has followed a schedule of costs which is revised no less than once every three years. The costs outlined in the schedule are the only lawful costs unless special circumstances are found by the court in which case they may be diverged from. The costs in the schedule are exclusive of and in addition to any sum allowed as recovery of VAT and all actual and necessary outlay is allowed. The full schedule of costs is outlined in the Annex 3. One of the models put forward in this report looks to extend this approach to the higher courts.

### 2.3 Representative and Other Legal Regulatory Bodies

The two main representative bodies are the Law Society of Ireland and the Bar of Ireland.

#### *Law Society of Ireland*

The Law Society of Ireland is the educational, representative, and regulatory body overseeing solicitors and is governed by a Council comprised of elected and nominated members of the profession. Among its key objectives is contributing to policy debate in order to inform decision-

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<sup>5</sup> <https://www.courts.ie/what-happens-district-court>

making in relation to the justice system and law reform.<sup>6</sup> In addition, among the objectives of the regulation department of the Society is the proactive enforcement of legal cost orders, which is aimed at reducing the financial burden on compliant solicitors.<sup>7</sup> It has a number of core priorities including advocating for the rule of law and access to justice. As part of this, it campaigns for improvements in legal aid schemes to ensure access to justice for all.<sup>8</sup>

### *The Bar of Ireland*

The Bar of Ireland is the representative body for barristers in Ireland with a current membership of around 2,150. Among the key roles of the Bar of Ireland are to consider, report upon, and make representations as it considers necessary in all matters affecting the profession. It also controls and regulates the professional conduct of its members. There are six permanent committees of the Council, as well as other such committees as the need arises. It represents members across a variety of Government and non-Government agencies including the Courts Service and the Judicial Appointments Board and works in partnership with agencies including the Office of the Attorney General, the Director of Public Prosecutions, and the Chief State Solicitor's Office.

Figure 2.1 presents a brief description of the key functions of the main organisations in Ireland's civil litigation system.

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<sup>6</sup> <https://www.lawsociety.ie/About-Us/Strategy/objectives>

<sup>7</sup> [https://www.lawsociety.ie/globalassets/documents/about-us/about/lsoi\\_ss.pdf](https://www.lawsociety.ie/globalassets/documents/about-us/about/lsoi_ss.pdf)

<sup>8</sup> [https://www.lawlibrary.ie/app/uploads/securepdfs/2021/12/StrategicPlan2021-2024\\_web.pdf](https://www.lawlibrary.ie/app/uploads/securepdfs/2021/12/StrategicPlan2021-2024_web.pdf)



**Figure 2.1: Main Organisations Operating in the Civil Litigation System**

| Organisation                          | Key functions   |
|---------------------------------------|---|
| Department of Justice                 | draft legislation; widen access to justice system; prevent crime to protect public; community engagement; victim support; deliver fair immigration system; increase innovation and climate action |
| District Court                        | hears civil cases where the requested damages or compensation is less than €15,000  |
| Circuit Court                         | hears cases where the claim does not exceed €75,000, or €60,000 in the case of personal injury, and for actions involving real property with a market value of less than €3 million               |
| High Court                            | has full jurisdiction to determine all civil matters; there is no limit on the amount it can award in compensation or damages   |
| Commercial Court                      | a division of the High Court which deals with proceedings that have a commercial dimension and which generally have a value of not less than €1 million   |
| Court of Appeal                       | hears appeals in civil proceedings from the High Court; has the power to remit proceedings to the High Court or direct a new trial  |
| Courts Service                        | responsible for the administration and management of the courts in Ireland  |
| Office of the Legal Costs Adjudicator | independent adjudication service where there is a dispute in relation to certain legal costs  |
| Legal Aid Board                       | independent statutory body responsible for the provision of civil legal aid and advice, family mediation and vulnerable witness related services  |
| Bar of Ireland                        | representative body for barristers; controls and regulates the professional conduct of its members  |
| Central Bank of Ireland               | regulatory authority responsible for monetary and financial stability; produces periodical data on the banking, financial and insurance sectors   |
| Law Society of Ireland                | educational, representative and regulatory body overseeing solicitors; contributes to policy  |
| Legal Services Regulatory Authority   | independent regulator responsible for the oversight of solicitors and barristers  |
| Personal Injuries Assessment Board    | independent state body which assesses compensation in respect of personal injuries experienced by people in motor accidents, workplace accidents and public liability accidents                   |
| State Claims Agency                   | resolves personal injury and third-party property damage claims against the State and State Authorities and manages claims for legal costs related to same  |
| Insolvency Service of Ireland         | statutory role to contribute to the development of policy in the area of personal insolvency and to assist in addressing the level of mortgage arrears in the State                               |

**Source: Indecon analysis**

## 2.4 Characteristics of Litigation Cases in Ireland

As noted earlier, there is a sparsity of comprehensive data particularly on contentious litigation which is settled outside of court but which contribute to the overall costs of litigation. However, data is available from the Annual Courts Service report. As shown in Table 2.1, the evidence indicates that over 106,000 civil business cases were resolved in 2021. We observe a decrease in both incoming and resolved cases in the pandemic years (2020 and 2021) compared to pre-pandemic years (2019 and 2018).

**Table 2.1: Civil Business Cases by Jurisdiction**

|  | Incoming       |                |                |                | Resolved       |               |                |                |
|--|----------------|----------------|----------------|----------------|----------------|---------------|----------------|----------------|
|  | 2021           | 2020           | 2019           | 2018           | 2021           | 2020          | 2019           | 2018           |
| District Court                                   | 91,577         | 93,719         | 144,485        | 137,493        | 69,193         | 67,784        | 111,518        | 106,698        |
| Circuit Court                                    | 30,938         | 38,535         | 50,723         | 49,253         | 24,125         | 17,121        | 35,590         | 39,606         |
| High Court                                       | 17,121         | 29,811         | 36,701         | 39,219         | 12,401         | 12,784        | 28,117         | 30,982         |
| Court of Appeal                                  | 534            | 733            | 685            | 499            | 431            | 476           | 491            | 475            |
| Supreme Court                                    | 195            | 182            | 364            | 308            | 222            | 223           | 392            | 285            |
| <b>Total</b>                                     | <b>140,365</b> | <b>162,980</b> | <b>232,958</b> | <b>226,772</b> | <b>106,372</b> | <b>98,388</b> | <b>176,108</b> | <b>178,046</b> |
| <i>Source: 2021 Courts Service Annual Report</i> |                |                |                |                |                |               |                |                |

In considering ways of reducing litigation costs, it is useful to note the characteristics of different types of cases. For civil business litigation cases most relate to circumstances where one party is suing another. Table 2.2 indicates numbers of incoming and resolved cases by litigation route for 2018-2021. We observe a clear decrease in incoming and resolved cases during COVID-19 in 2020 and 2021.

**Table 2.2: Civil and Commercial Litigious Cases by Litigation Route**

|  | Incoming      |                |                |                | Resolved      |               |               |               |
|--|---------------|----------------|----------------|----------------|---------------|---------------|---------------|---------------|
|  | 2021          | 2020           | 2019           | 2018           | 2021          | 2020          | 2019          | 2018          |
| Cases where one party is suing another           | 97,079        | 100,310        | 135,208        | 128,222        | 73,407        | 67,444        | 85,193        | 80,095        |
| Corporate insolvency                             | 102           | 110            | 129            | 169            | 233           | 149           | 136           | 135           |
| Personal insolvency                              | 55            | 51             | 183            | 160            | 58            | 36            | 120           | 121           |
| Appeals to District Court                        | 58            | 55             | 103            | 163            | 35            | 38            | 61            | 97            |
| Litigious enforcement                            | 1,243         | 1,240          | 1,954          | 2,236          | 1,670         | 1,117         | 1,954         | 2,236         |
| <b>Total</b>                                     | <b>98,537</b> | <b>101,766</b> | <b>137,577</b> | <b>130,950</b> | <b>75,403</b> | <b>68,784</b> | <b>87,464</b> | <b>82,684</b> |
| <i>Source: 2021 Courts Service Annual Report</i> |               |                |                |                |               |               |               |               |

In relation to personal injury cases where one party sues another, Table 2.3 indicates that most are resolved by the Circuit Court (81% in 2021), while for High Court cases, the majority are resolved out of court.

**Table 2.3: Cases where one party sues another (Personal Injury, including Medical Negligence) by Jurisdiction**

|                | Incoming      |               |               |               | Resolved      |              |               |               |
|----------------|---------------|---------------|---------------|---------------|---------------|--------------|---------------|---------------|
|                | 2021          | 2020          | 2019          | 2018          | 2021          | 2020         | 2019          | 2018          |
| High Court     | 5,145         | 6,682         | 7,987         | 8,889         | 3,576         | 2,556        | 4,596         | 4,493         |
| Circuit Court  | 8,856         | 10,083        | 12,878        | 12,193        | 5,992         | 5,587        | 7,955         | 7,015         |
| District Court | 1,070         | 1,045         | 1,116         | 967           | 750           | 491          | 613           | 454           |
| <b>Total</b>   | <b>15,071</b> | <b>17,810</b> | <b>21,981</b> | <b>22,049</b> | <b>10,318</b> | <b>8,644</b> | <b>13,164</b> | <b>11,962</b> |

**Source: 2021 Courts Service Annual Report**

*\*Note: Cases dealt with by the court include all cases assigned to a judge. The majority of which are dealt with without a substantive court hearing.*

The majority of civil business cases represent civil and commercial litigious cases or civil and commercial non-litigious cases. Table 2.4 shows that there were over 76,000 resolved cases of the former and over 24,000 resolved cases of the latter in 2021. Such cases account for 95% of all resolved cases in 2021. Civil and commercial litigious cases are comprised of cases where one party sues another, corporate insolvency cases, personal insolvency cases, appeals to District court and litigious enforcement matters. On the other hand, civil and commercial non-litigious cases are comprised of proceedings issued that are not inter-parties (including probate, wards of court and personal insolvency cases concerning person debtor applications) and certain foreign proceedings.

**Table 2.4: Types of Civil Business Incoming and Resolved Cases**

|  | Incoming       |                |                |                | Resolved       |                |                |                |
|--|----------------|----------------|----------------|----------------|----------------|----------------|----------------|----------------|
|  | 2021           | 2020           | 2019           | 2018           | 2021           | 2020           | 2019           | 2018           |
| Civil and commercial litigious cases     | 107,330        | 132,705        | 135,208        | 131,159        | 76,841         | 68,301         | 85,193         | 82,744         |
| Civil and commercial non-litigious cases | 27,921         | 43,055         | 86,209         | 82,020         | 24,905         | 28,198         | 79,717         | 82,736         |
| Non-litigious enforcement cases          | 3,200          | 3,459          | 7,531          | 9,635          | 3,190          | 3,503          | 7,400          | 9,341          |
| Appeals                                  | 1,872          | 1,403          | 2,685          | 2,827          | 1,410          | 1,468          | 2,498          | 2,119          |
| Cases Stated                             | 42             | 60             | 33             | 39             | 26             | 15             | 8              | 14             |
| <b>Total</b>                             | <b>140,365</b> | <b>180,682</b> | <b>231,666</b> | <b>225,680</b> | <b>106,372</b> | <b>101,485</b> | <b>174,816</b> | <b>176,954</b> |

**Source: 2021 Courts Service Annual Report**

*\*Note: In previous years "other" consisted of Taxation of Costs which has now been replaced by the Office of the Legal Cost Adjudicators who produce their own Annual Report*

In Table 2.5 an analysis of the types of civil and commercial litigious cases shows that personal injury, debt recovery, domestic violence and childcare represent 78% of the total caseload. There are, however, differences in the percentage of resolved cases with a high level of resolution of personal injury cases at 69%.

Table 2.5: Types of Civil and Commercial Litigious Cases 2021

|   | Incoming      | Resolved      | % of Total Incoming |
|---|---------------|---------------|---------------------|
| Domestic Violence                                 | 22,596        | 21,096        | 22.93%              |
| Personal Injury (inc. medical neg)                | 15,071        | 10,318        | 15.29%              |
| Recovery of Debt                                  | 14,549        | 5,542         | 14.77%              |
| Supervision and care orders                       | 14,194        | 10,710        | 14.40%              |
| Guardianship, custody                             | 10,016        | 8,667         | 10.16%              |
| Divorce   | 5,856         | 4,286         | 5.94%               |
| Maintenance                                       | 5,451         | 4,289         | 5.53%               |
| Small Claims                                      | 2,134         | 2,553         | 2.17%               |
| Bail  | 1,726         | 1,715         | 1.75%               |
| Chancery  | 1,260         | 448           | 1.28%               |
| Litigious enforcement                             | 1,243         | 1,670         | 1.26%               |
| Judicial Review                                   | 914           | 998           | 0.93%               |
| Property  | 780           | 1,551         | 0.79%               |
| Judicial Separation                               | 550           | 292           | 0.56%               |
| European Arrest Warrant                           | 357           | 261           | 0.36%               |
| Commercial  | 282           | 111           | 0.29%               |
| Negligence  | 260           | 38            | 0.26%               |
| Breach of Contract                                | 246           | 39            | 0.25%               |
| Defamation  | 230           | 24            | 0.23%               |
| Assault   | 114           | 23            | 0.12%               |
| Regulation of Professions                         | 111           | 87            | 0.11%               |
| Habeas Corpus                                     | 97            | 67            | 0.10%               |
| Dissolution of partnership                        | 75            | 24            | 0.08%               |
| Wind Up Company Orders                            | 75            | 167           | 0.08%               |
| Garda Compensation                                | 60            | 110           | 0.06%               |
| Appeals to District Court                         | 58            | 35            | 0.06%               |
| Personal Insolvency                               | 55            | 58            | 0.06%               |
| Adoption  | 45            | 41            | 0.05%               |
| Proceeds of Crime                                 | 36            | 40            | 0.04%               |
| Child Abduction                                   | 32            | 43            | 0.03%               |
| Employment  | 22            | 21            | 0.02%               |
| Restrict Directors                                | 15            | 9             | 0.02%               |
| Nullity   | 12            | 10            | 0.01%               |
| Examinership                                      | 9             | 54            | 0.01%               |
| Cohabitation                                      | 3             | 3             | 0.003%              |
| Disqualify Directors                              | 3             | 3             | 0.003%              |
| <b>Total Civil and Commercial Litigious Cases</b> | <b>98,537</b> | <b>75,403</b> | <b>100.00%</b>      |
| <i>Source: 2021 Courts Service Annual Report</i>  |               |               |                     |

In evaluating measures to reduce litigation costs, the length of time from issuing of proceedings to resolution is important. This is important for a number of reasons including delaying access to justice for litigants. Long delays are likely to create uncertainties for litigants which has a societal and

economic costs and delayed justice could be viewed in some instances as justice denied with the civil justice system. It must be noted that these delays are likely to be related to a number of factors and not simply pressure on the courts system. The typical processing times increased in the High Court in 2021. Processing times also increased in the Circuit and District Courts in 2020 as can be seen in Table 2.6. This was driven by an increase in the length of proceedings for employment (dismissal), commercial, personal injury and judicial review cases for the High Court. It must be noted that the estimates in relation to overall timescales or elapsed time and not the days involved in litigation with the court system. As the Courts Service faces great diversity in the nature and type of cases dealt with in any one period, it is not suggested that any specific year presented is representative, but we were keen to include the latest data plus a pre-pandemic period.

| Table 2.6: Average Length of Civil Proceedings from Issue to Disposal (Days)  |            |       |       |      |                 |       |      |      |                  |      |      |      |
|---|------------|-------|-------|------|-----------------|-------|------|------|------------------|------|------|------|
|   | High Court |       |       |      | Circuit Court** |       |      |      | District Court** |      |      |      |
|   | 2021       | 2020  | 2019  | 2018 | 2020            | 2019  | 2018 | 2017 | 2020             | 2019 | 2018 | 2017 |
| All   | 797        | 660   | 785   | 749  | 740*            | 725 * | 749  | 678  | 150              | 144  | 163  | 120  |
| Employment (dismissal)  | 713        | 398   | 108   | 98   | 1,169           | 874   | 448  | 333  | n/a              | n/a  | n/a  | n/a  |
| Divorce   | 238        | 912   | 1,064 | 615  | 379             | 388   | 380  | 375  | n/a              | n/a  | n/a  | n/a  |
| Commercial  | 650        | 427   | 539   | 321  | n/a             | n/a   | n/a  | n/a  | n/a              | n/a  | n/a  | n/a  |
| Personal Injury   | 1188       | 1,183 | 974   | 983  | -               | -     | -    | -    | -                | -    | -    | -    |
| Judicial review   | 339        | 315   | 392   | 312  | n/a             | n/a   | n/a  | n/a  | n/a              | n/a  | n/a  | n/a  |
| <b>Source: 2021 Courts Service Annual Report</b>  |            |       |       |      |                 |       |      |      |                  |      |      |      |
| <i>*Note: Excludes licensing. n/a = not applicable. 'All' refers to the average length for all civil proceedings from Issue to Disposal</i> |            |       |       |      |                 |       |      |      |                  |      |      |      |
| <i>**Note: At time of print, 2021 figures for District Court and Circuit Court were not available – we provide 2020 figures.</i>            |            |       |       |      |                 |       |      |      |                  |      |      |      |

In addition, analysis of resolved commercial cases in Table 2.7 shows that many cases tend to trail off before reaching a full hearing. Whether they are settled after entry or even after the hearing date is set, there appears to be an opportunity to avoid proceeding to full hearing.

| Table 2.7: Analysis of Resolved Commercial Cases |      |      |      |      |      |
|--|------|------|------|------|------|
|  | 2021 | 2020 | 2019 | 2018 | 2017 |
| Motion to dismiss                                | 3    | 0    | 4    | 2    | 6    |
| Settled after entry                              | 15   | 32   | 10   | 7    | 9    |
| Settled after directions hearing                 | 8    | 13   | 10   | 18   | 10   |
| Settled after hearing date set                   | 7    | 15   | 11   | 12   | 15   |
| Settled at hearing                               | 7    | 10   | 14   | 19   | 11   |
| Full hearing                                     | 15   | 51   | 44   | 58   | 72   |
| Other  | 56   | 12   | 2    | 0    | 0    |
| Miscellaneous orders                             | 671  | n/a  | n/a  | n/a  | n/a  |
| Total  | 782  | 133  | 95   | 116  | 123  |
| <b>Source: 2021 Courts Service Annual Report</b> |      |      |      |      |      |

## 2.5 Summary of Key Findings

This section presented an overview of the current Civil Justice system in Ireland. It examined the quantum and type of cases that come before the various Courts. This information is important to know in order to understand the scale of litigation in Ireland and the nature of the cases, as this represents a determinant of the overall costs of litigation. The analysis highlighted the significant volume of cases that come before and are resolved by the Courts each year. There are a number of different organisations that have various roles in the administration of Civil Justice in Ireland. In order to examine the issue of litigation costs, it is important that the roles and responsibilities of each of these organisations is clearly defined. Important context to this current study is the District Court rules which set out a schedule of costs. The costs outlined in the schedule are the only lawful costs unless special circumstances are found by the court in which case they may be diverged from. It must be noted that this is the only example where the State directly intervenes to control costs in relation to litigation. One of the models put forward in this report looks to extend this approach to the higher courts.

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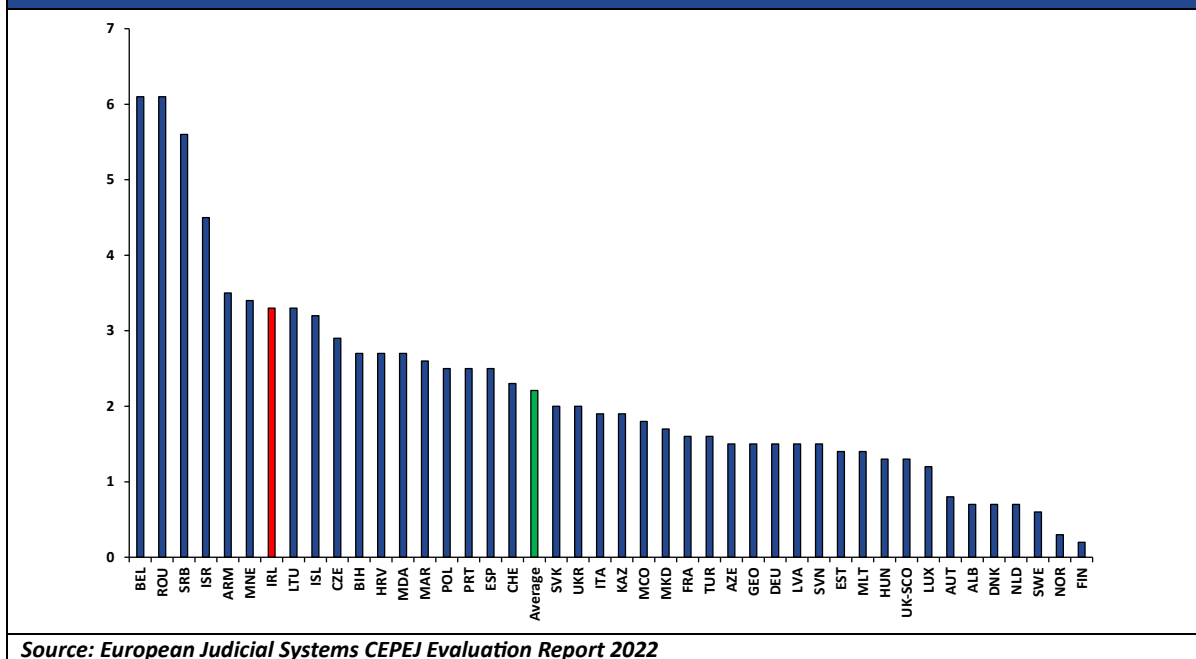
## 3 Review of International Experience

### 3.1 Introduction

This section presents the findings from Indecon's overview of international experience and approaches to the reform of the costs of litigation. The international experience is relevant in understanding the extent to which other countries have different approaches to Ireland. Other countries' experience indicates that reforms have been introduced on an incremental basis with policymakers learning from the experience of applying reforms to certain types of litigation costs. This could also be said to apply to Ireland whereby the State has undertaken significant steps to reduce litigation in areas such as personal injury cases. Indecon's analysis of international experience has informed the identification of the options considered in this report. Overall, it is clear that many countries have introduced many different measures to address litigation costs but there is a lack of clear evidence of what has been successful in terms of reducing litigation costs or improving service quality.

In placing the international experience in context, it is of note that Ireland adopts an adversarial approach and in respect of inter-party costs of litigation, costs are "shifted to" (or "recovered from") the losing party. Countries with similar systems and cost shifting rules are therefore of particular interest. These include: the UK, Canada, New Zealand, and Australia. It is also the case that these countries share the way the legal profession is divided into those who provide advocacy in court ("barristers" or "counsel") and those who help prepare the case ("solicitors"). In addition, we consider the experience of Germany. While the legal system is different, it is of interest due to the low costs of litigation. It must also be noted, as with any international review, there are limitations in comparing other jurisdictions with Ireland due to difference in practice and procedures, as well as differences in the legislative context. There is also limited evidence available on the impact of some of the reforms. The evidence has, however, been examined where available. This includes valuable work undertaken by Indecon's international academic adviser, Professor Paul Fenn.

Recent analysis by the Council of Europe's Commission on the Efficiency of Justice (CEPEJ) indicates that Ireland spends below the EU average in terms of expenditure per capita on the Judicial system when GDP is accounted for. This is relevant as it impacts on the timing of resolution of litigation cases and we note that the Irish Government has recently increased investment in this area. However, the complexities of using GDP as a proxy for economic output in an Irish context is subject to significant caveat. Analysis based on the same source of data shows that Ireland has a higher number of civil and commercial litigation cases per capita than the EU average. See Figure 3.1 overleaf.

**Figure 3.1: First Instance Civil and Commercial Litigious Cases per 100 Inhabitants (2020)**

### 3.2 Overview of Recent Developments in Comparator Countries

Prior to examining specific approaches in different jurisdictions, it is instructive to note that two main elements of litigation costs include: (1) Solicitors' preparation fees (hourly rates or fixed fees), and (2) Disbursements (typically paid by the solicitor to expert witnesses or counsel). Solicitors' "profit costs" is the term normally used to capture the total costs of their time which may be recovered from the losing party. These are calculated from the total time inputs for each fee earning solicitor multiplied by the normal hourly rate for these fee earners including a markup for overheads and profit. Solicitors' fees vary depending on the level of expertise required and the complexity of the case. Services provided under the hourly/daily fees include, but are not limited to, research, document preparation, correspondence, interviews, evidence review, and court appearances. Court costs are also a component of the costs of litigation but these tend not to be significant.

Costs shifting refers to the system of court awards that involves a court order for a portion of the litigation costs of one party to be paid by the other party, depending upon the outcome of the case. This common mechanism has several purposes. Firstly, it discourages frivolous or non-meritorious litigation because costs shifting can impose a "penalty" for such activity. Secondly, it encourages claimants with meritorious claims to come forward without fear of incurring high costs of litigation. Thus, claimants with few financial resources have a chance to succeed at court in spite of their lack of ability to pay up front. Finally, costs shifting can be used to allocate portions of liability among the parties to a case. For example, where accidental injuries are litigated, the ultimate findings may be that both parties are proportionally at fault and costs shifting can reflect this situation where each party bears some costs. It also has some drawbacks: when allowing successful claimants to avoid all costs, they may have limited incentive to minimise the overall costs of litigation, i.e., there may be



delays and costs imposed by the claimant who is immune from their effects: this is sometimes referred to as the “cost-shifting externality”.

Governments internationally have been focused on ensuring efficiency in the litigation system and where appropriate, in reducing litigation costs. In some countries there have been attempts to provide the cost judges with guidelines as to the appropriate hourly rates (GHRs) if agreement cannot be reached by the parties. Differing approaches including binding and non-binding guidelines have been introduced to determine legal costs in the context of court awards. Approaches adopted in other jurisdictions include independent officials, i.e., judges or legal costs assessors, to adjudicate on costs or to determine the appropriate level of cost recovery. In the following sections, we examine more closely the experiences of comparator countries including in the UK, Australia, New Zealand, and Canada. We also consider the experience of Germany although this is not a common law country.

### 3.3 UK

It is useful to examine the UK experience in some detail as there is a similarity in the overall judicial system to Ireland and the UK has been particularly active in attempting to introduce measures aimed at the reduction in litigation costs. The recent process of reform of the English Civil Justice system dates back to the mid-1990s with the Woolf Review (1996) and the introduction of no-win no-fee *conditional fee arrangements* (CFAs) funded through “success fees” - a markup on profit costs to capture the costs of losing cases. These reforms may have been influenced by the objectives of reducing the cost of legal aid (and therefore the public borrowing requirement) by transferring the risk of losing to the claimant solicitor rather than the state. These reforms are also likely to have been influenced by the desire to minimise litigation costs, the need to enhance competitiveness and importantly to improve access to justice. The UK is a particularly important country to examine as they have taken an incremental approach to reform of civil justice and have made a number of changes to the system over the last twenty years. Many of these reforms have been the subject of detailed ex-post analysis. A summary of this analysis is included in this country review.

The Access to Justice Act 1999 was responsible for making the success fees charged in CFAs recoverable from the losing party. This led to the so-called “costs wars” of the early 2000's and pressure from defendants to introduce a system of fixed recoverable costs in 2003: the Fixed Recoverable Costs Scheme for Low Value Road Traffic Accident (RTA) Claims. This set out the principle by which “revenue neutral” fixed cost formulae could be determined using data from current cost recoveries. The statistical analysis undertaken by Professor Paul Fenn for the Civil Justice Council in 2003 showed that average cost recoveries in low value Road Traffic Accident RTA personal injury claims varied in relation to the amount of damages and the stage of litigation at which the case settled; if cost recoveries were set at these average levels, then the annual revenues of claimant solicitors would remain unchanged with some cases recovering more and some less (the so-called “swings and roundabouts” principle). Subsequently, the Jackson's 2009 review recommended, *inter alia*, the extension of such fixed costs to other types of personal injury claims, the removal of the recoverability of success fees, and the introduction of conditional one-way cost shifting (i.e., if the defendant wins, they do not recover costs from the claimant).

Table 3.1 summarises a number of key UK reports which were critical to reforms. It is useful to note the overlap between implementation of the recommendations from the different reviews. This highlights the fact that reforms in the UK have evolved over time.

**Table 3.1: Key Documents relating to Costs of Litigation Reform in England and Wales, 2009-2021**

| Publication  | Overview   |
|--|--|
| Review of Civil Litigation Costs: Final Report (Jackson Final Report (2009)) <sup>1</sup>  | Thorough review of costs of civil litigation. Recommended Fixed Recoverable Costs limits on fast-track claims (<£25k) and Qualified One-Way Costs Shifting.  |
| Post-Implementation Review of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO): Civil litigation funding and costs <sup>2</sup>  | Ministry of Justice 2019 review of reforms implemented in 2012 based on Jackson 2009 recommendations. Data supports recovered base costs reduced by 8%-10%.  |
| Fenn & Rickman: The Impact of Legislation on the Outcomes of Civil Litigation: An Empirical Analysis of the Legal Aid Sentencing and Punishment of Offenders Act 2012 (February 2019) <sup>3</sup>   | Basis for the above conclusions in Ministry of Justice Review in 2019.   |
| Review of Civil Litigation Costs: Supplemental Report, Fixed Recoverable Costs (Jackson Supplemental Report 2017) <sup>4</sup>   | Follow up review in 2017 of costs of litigation. Recommended implementation of intermediate track claims (£25k-£100k) and extension of FRC; proposed FRC matrix and formula for periodic update for inflation. |
| Extending Fixed Recoverable Costs in Civil Cases: The Government Response (2021) <sup>5</sup>  | Ministry of Justice adopted Jackson 2017 reforms as of Sept 2021 after consultation process.   |
| Jackson (2017) recommendations   | To be implemented in 2023  |
| <b>Source:</b> <sup>1</sup> <a href="https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf">https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf</a><br><sup>2</sup> <a href="https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777039/post-implementation-review-of-part-2-of-laspo.pdf">https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777039/post-implementation-review-of-part-2-of-laspo.pdf</a> <sup>3</sup> <a href="https://ssrn.com/abstract=3326665">https://ssrn.com/abstract=3326665</a> or <a href="http://dx.doi.org/10.2139/ssrn.3326665">http://dx.doi.org/10.2139/ssrn.3326665</a> <sup>4</sup> <a href="https://www.judiciary.uk/wp-content/uploads/2017/07/fixed-recoverable-costs-supplemental-report-online-2-1.pdf">https://www.judiciary.uk/wp-content/uploads/2017/07/fixed-recoverable-costs-supplemental-report-online-2-1.pdf</a><br><sup>5</sup> <a href="https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1015019/extending-fixed-recoverable-costs-civil-cases-government-response.pdf">https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1015019/extending-fixed-recoverable-costs-civil-cases-government-response.pdf</a> |  |

### The Jackson Report 2009

Costs of litigation and access to the English justice system were examined in the Jackson Report (2009).<sup>9</sup> The Foreword of that document noted that: “In some areas of civil litigation costs are disproportionate and impede access to justice. I therefore propose a coherent package of interlocking reforms, designed to control costs and promote access to justice.” This quotation is reflective of the link between the cost of litigation and access to justice. In other words, accessibility issues would require a multifaceted, systemic reform that goes beyond mere price caps.

Jackson (2009) reviewed rules and principles governing the costs of civil litigation, case management procedures, litigation funding, and international experience as background information. It then provided a set of recommendations for reform in England and Wales supported by evidence and data. The report found that in some areas, costs were not disproportionate and did not make recommendations for change. In Table 3.2, we summarise the areas recommended for reform. The

<sup>9</sup> Jackson, R., 2009, “Review of Civil Litigation Costs: Final Report” accessed at <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>

detailed rationale for the reforms were outlined in the Jackson Report. It is, however, informative to our analysis to summarise the key reforms in other countries. While some of the details of these reforms are not directly relevant to the economic multi-criteria evaluation of the two Kelly Report options, or to alternative options examined, they provide a useful context to our report.

**Table 3.2: Summary of Jackson Report (2009)**

|   |
|---|
| No win, no fee agreements have been major source of disproportionate costs  |
| Success fees and after-the-event insurance premiums should cease to be recoverable from unsuccessful opponents  |
| Success fees should be shifted to the (successful) client, not paid by defendant  |
| General damage awards should increase by 10% and maximum amount of damages that lawyers may deduct for fees should be capped at 25% of the award  |
| Lawyers should not be permitted to charge referral fees, as this amounts to “buying/selling” of cases   |
| Qualified one-way costs shifting should be adopted. Claimant should not be required to pay defendant’s costs if claim is unsuccessful; defendant should be required to pay claimant’s costs if successful   |
| Recommendations above may/may not be relevant to some categories of litigation  |
| Fast track litigation (value up to £25k where trial can be concluded in one day) should have fixed limit on costs recoverable (£12k)  |
| Certainty of cost exposure; avoidance of cost assessment process; and proportionality are advantages of fixed costs   |
| If fixed cost system is implemented, costs recoverable will require regular periodic review and update  |
| Overall expected result of implementing recommendations were as follows: <ul style="list-style-type: none"> <li>• Most personal injury claimants will recover more damages than at present</li> <li>• Claimants will have financial interest in level of costs incurred on their behalf</li> <li>• Claimant lawyers will still be able to make reasonable profit</li> <li>• Costs payable to claimant lawyers by liability insurers significantly reduced</li> <li>• Costs will become more proportionate as defendants will no longer have to pay success fees and after-the-event insurance premiums</li> </ul> |
| <b>Source:</b> The Jackson Report (2009) accessed at:<br><a href="https://www.judiciary.uk/wpcontent/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf">https://www.judiciary.uk/wpcontent/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf</a>  |

With specific reference to hourly rates charged by lawyers in fast-track cases, Jackson (2009) p. 460, recommended that: “Guideline hourly rates: GHRs should be set which are applicable to both summary assessment and detailed assessment.”

This recommendation meant that hourly rate guidelines should be set regardless of whether the costs will be assessed in summary or detailed manner by the court. Previously, “A” and “B” rates were applicable depending on the type of cost assessment to be used, which increased complexity in calculations and uncertainty as to final costs.

Since Jackson (2009), there have been several attempts to revise the original GHRs. The Advisory Committee on Compensation Costs (ACCC) attempted to update for inflation each year; the Foskett Review focused on grounding the GHRs on evidence relating to solicitors' expense of time; and the Stewart Review tried to capture what cost judges were in practice deciding in the courts.

### Post-Implementation Review of Jackson 2009 Reforms

In 2019, the UK Government published a post-implementation review of the impacts of legislation based on the Jackson (2009) reforms.<sup>10</sup> In general, it found that the reforms had successfully reduced the costs of civil litigation. In particular, evidence showed that costs of personal injury and clinical negligence claims had reduced by approximately 8-10% and early settlement of cases increased.<sup>11</sup> The Kelly Report states: “While it was noted that claimants and their lawyers would benefit from the extension of qualified one-way costs shifting (QOWCS) to claims other than for personal injuries, in being able to litigate at no or reduced costs risk, it was recognised that this would shift costs back to defendants, risk an overall increase in costs and create potential for prolonging rather than settling litigation. Government wished to be satisfied that these risks have been addressed before considering the case for extending costs protection further.”<sup>12</sup> It should be noted that the research by Fenn and Rickman cited in the 2019 review found that the overall Jackson rule changes, which included QOWCS, and reduced costs and delay.<sup>13</sup> It is difficult, however, to evaluate the specific effect of QOWCS and the effect of other changes, including in particular the reversal of recoverability for success fees.

It is important to note that whilst qualified one-way cost shifting effectively reduced costs to claimants, a risk remains that an overall increase in costs to defendants as a result could have the effect of prolonging litigation rather than settling claims early. The Government noted in its review that it “wished to be satisfied that these risks have been addressed before considering the case for extending costs protection further.”<sup>14</sup> This has been subject to Supreme Court challenge (*Ho vs. Adekun* [2021]).

### Supplemental Jackson 2017 Recommendations

Table 3.3 contains a summary of the supplementary Jackson report (2017) recommendations.

| Table 3.3: Summary of Recommendations - Jackson Supplemental Report (2017)   |
|--|
| All recoverable costs in fast track should be fixed* and figures reviewed every three years                                |
| New “intermediate” track with streamlined procedure should be created for cases of modest complexity and value up to £100k |
| Grid of fixed recoverable costs for intermediate track cases* and figures reviewed every three years                       |

<sup>10</sup>Ministry of Justice (2012), POST-IMPLEMENTATION REVIEW OF PART 2 OF LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS (LASPO) ACT 2012: INITIAL ASSESSMENT BY MOJ, accessed at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/719140/pir-part-2-laspo-initial-assessment.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/719140/pir-part-2-laspo-initial-assessment.pdf)

<sup>11</sup> Ibid.

<sup>12</sup> Kelly Report (2020) at p. 305

<sup>13</sup> Fenn, Paul and Rickman, Neil, The Impact of Legislation on the Outcomes of Civil Litigation: An Empirical Analysis of the Legal Aid Sentencing and Punishment of Offenders Act 2012 (February 2019). Available at SSRN: <https://ssrn.com/abstract=3326665> or <http://dx.doi.org/10.2139/ssrn.3326665>

<sup>14</sup> Kelly Report (2020). at p. 305

|   |
|---|
| Fixed Recoverable Costs (FRC) should apply to (a) applications to approve settlements for children and protected parties; and (b) costs only proceedings re intermediate track cases  |
| Part 8 claims <sup>15</sup> should be excluded from proposed FRC framework  |
| Working party should be set up to develop bespoke process for clinical negligence claims up to £25k with grid of FRC for such cases   |
| Pilot of capped recoverable costs in conjunction w/streamlined procedures for business and property cases valued up to £250k  |
| If pilot is successful, regime should be made available at judge's discretion in suitable cases   |
| Aarhus Rules <sup>16</sup> adapted and extended to all judicial review claims   |
| Costs management should be introduced at judicial discretion in "heavy" judicial review claims  |
| Consideration should be given to: (a) developing grid of FRC for incurred costs in different categories of case and a pre-action procedure for seeking leave to exceed FRC; and (b) extending scope of the intermediate track and range of FRC  |
| <b>Source: The Jackson Report (2017) accessed at: <a href="https://www.judiciary.uk/wp-content/uploads/2017/07/fixed-recoverable-costs-supplemental-report-online-2-1.pdf">https://www.judiciary.uk/wp-content/uploads/2017/07/fixed-recoverable-costs-supplemental-report-online-2-1.pdf</a></b> |
| *Note: See Jackson (2017) Ch. 5 (fast track claims) and Ch. 7 (intermediate track claims) for allowable fixed costs formulae  |

In examining the UK experience it is of interest to note that fast track procedures are available in the UK for cases valued under £25k. This streamlines the process and reduces costs of litigation in instances where costs have often approached or exceeded the claim value.

Court procedural rules stipulate the fast track is the normal track for cases where:

- (a) the trial is likely to last for no longer than one day; and
- (b) oral expert evidence will be limited to one expert per party in any field and not more than two expert fields.<sup>17</sup>

Fast track procedures including fixed recoverable cost provisions have been used in the UK for cases up to £25k in value. The use of an Online Solutions Court was recommended in 2016 for fast-track claims which would entail registering and processing claims online without the need for court intervention (assuming no contest). This proposed that cases would assign FRC (fixed recoverable costs) principles in awarding damages.<sup>18</sup> Certain types of cases were recommended to be excluded from the fast track, such as personal injury, clinical negligence, possession, intellectual property, and housing disrepair. It was envisaged that the remainder fast track cases would be assigned strictly limited recoverable costs.<sup>19</sup>

Jackson (2017) noted that the then-current fixed costs regime was working satisfactorily according to respondents to his consultation. Jackson (2017) recommended extending FRC across the whole of the fast track.<sup>20</sup>

<sup>15</sup> CPR Part 8 claim is an alternative procedure aimed at disputes where a claimant is seeking the court's decision on a question which is unlikely to involve a substantial dispute of fact. See <https://www.womblebondnickinson.com/uk/insights/articles-and-briefings/civil-procedure-rules-cpr-part-8-claims-update>

<sup>16</sup> <https://www.legislation.gov.uk/nisr/2013/81/contents/made>

<sup>17</sup> Jackson (2017) at p. 78

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid. at p. 81

Drawing on the work of the Fast Track Working Group, Jackson (2017) proposed that all fast-track cases be placed into four bands of complexity, Band 1 being the least complex and Band 4 being the most complex. The report contains tables of values and a matrix of complexity bands with fixed recoverable amounts by type of claim.<sup>21</sup> The matrix provides a tool for assessment of recoverable costs requiring no judicial input except in cases where costs are subject to dispute. In those instances, summary procedure will be used to assess costs at the end of the hearing where the case goes to trial; and by a short form of detailed assessment where the case does not go to trial.<sup>22</sup>

Jackson (2017) recommended that the principles underlying fast track claims be extended to intermediate claims, i.e., claims valued from £25-100k.<sup>23</sup>

Recognising that value of claims alone should not dictate the application of FRC in specified tracks, Jackson (2017) proposed that a set of criteria be applied to determine the appropriateness of sending claims through the intermediate track. Table 3.4 illustrates the criteria for intermediate track cases.

| Table 3.4: Criteria for Intermediate Track Cases – Jackson Report (2017)  |  |
|---|--|
| No.   | Criteria   |
| i   | The case is not suitable for small claims or fast track (i.e., <£25k)  |
| ii  | Value of claim does not exceed £100k   |
| iii   | Trial will not last more than 3 days   |
| iv  | No more than 2 expert witnesses giving evidence for each party   |
| v   | Case can be justly and proportionately managed under expedited procedure*  |
| vi  | No wider factors (e.g., public importance, reputation, etc.,) which make case inappropriate for intermediate track |
| vii   | Cases involving certain lung diseases are inappropriate for the intermediate track and are excluded                |
| viii  | Other exclusions may apply, relating to complexity of personal injury and professional negligence claims           |
| Source: <i>The Jackson Report (2017)</i> accessed at: <a href="https://www.judiciary.uk/wp-content/uploads/2017/07/fixed-recoverable-costs-supplemental-report-online-2-1.pdf">https://www.judiciary.uk/wp-content/uploads/2017/07/fixed-recoverable-costs-supplemental-report-online-2-1.pdf</a> |  |
| *Note: Expedited procedure guidelines in Section 4 of Jackson 2017  |  |

### Impact Assessment (2019)

The UK Ministry of Justice conducted an impact assessment in 2019 which analysed the options relating to Jackson (2017) recommendations, specifically evaluating the effects of the new “tracks” for assigning claims of particular values. Analysis from the impact assessment illustrates potential savings incurred where claims are processed according to the Jackson (2017) recommendations. The analysis is based on data obtained from Taylor Rose TTKW<sup>24</sup> which shows the legal costs for all their

<sup>21</sup> Ibid. at pp. 84-89

<sup>22</sup> Ibid. at p. 89

<sup>23</sup> Jackson 2017 op. cit. at p. 99

<sup>24</sup> Taylor Rose is an independent, top-60 law firm with nationwide offices across the UK and employs over 1,000 solicitors and legal experts. This is the same data used in Jackson (2017) and analysed by Prof. Fenn.

personal injury claims other than clinical negligence cases from 1 July 2006 – 1 January 2017. Market share of Taylor Rose for the period is estimated at 10% and caseload is national, therefore, there is no reason to believe the dataset to be biased.<sup>25</sup>

The Ministry of Justice (2019)<sup>26</sup> summarised the costs of the package of reforms to extend Fixed Recoverable Costs as follows:

- Net legal fees likely reduced due to some elements of reform, but lack of data prevents determination of total costs.
- Impact on solicitors will vary according to their cases and current costs. Likely to be reduced income per case; however, cases could be settled more quickly resulting in efficiencies and lawyers could handle more cases. Net impact on lawyers is not assumed to be a loss.
- Cases may be settled more quickly, as incentive to prolong litigation is reduced, causing potential cash flow costs for unsuccessful litigants.
- Courts service may experience implementation costs from proposed FRC to the lower end of the multi-track, but this is not expected to be significant.
- Some judicial training will be required but costs of this should be minimal.

Benefits of the proposed reforms under were summarised as follows:<sup>27</sup>

- Key impact is to fix and reduce costs recovered by winning party, resulting in benefit to the losing party.
- Solicitors would no longer have to maintain documentation required for cost assessment or spend time arguing costs in certain cases. Fewer resources devoted to settlement. Extent of saving is unclear.
- Reforms may result in business efficiencies via reduced management costs. Faster settlements allow solicitors to take on more cases and maintain profit margins.
- Key benefit of all reforms is controlled legal costs. All parties benefit from this aspect.
- Less time spent arguing over costs results in cash flow benefits to successful claimants.
- Claimants may be less likely to be deterred from pursuing judicial review claims if cost budgeting is available to reduce risk of cost increase.
- FRC encourages early settlement by streamlining the proceedings, leading to earlier resolution, and time savings for court services.
- Overall improved economic efficiency results from fewer resources used to achieve equivalent outcomes, freeing up resources for alternative uses.

## **Developments Since 2017 Jackson Report**

<sup>25</sup> Ministry of Justice (2019) Extending Fixed Recoverable Costs, Impact Assessment.

<sup>26</sup> Ibid. at pp. 20-21

<sup>27</sup> Ibid.



In 2017, Jackson published a supplemental report to the 2009 review. This supplement concerned fixed recoverable costs specifically.<sup>28</sup> In this report, the author suggested that:

“There are only two ways of controlling the recoverable costs in advance: (i) A general scheme of fixed recoverable costs (“FRC”), so that parties can look at a grid and read off from it what the recoverable costs will be in their case. That, essentially, is the German system; (ii) Imposing at an early stage a binding budget in each case. That is ‘costs management’ or ‘costs budgeting’.”<sup>29</sup>

In late 2021, the UK government adopted the supplemental Jackson 2017 recommendations and expanded the application of fixed recoverable costs and expanded the “fast track” and “intermediate track” claims in the FRC matrix. This expansion was based on evidence that earlier interventions based on Jackson 2009 had been effective in reducing litigation costs in some areas:

“The Government was keen to emphasise that existing FRC arrangements had, in their view, promoted access to justice for both claimant and defendants. Furthermore, analysis of pre- and post-LASPO data had shown a reduction in real recovered costs in personal injury claims by just under 8%.”<sup>30,31</sup>

In its response to the Consultation, the UK Government indicated that it would implement the Jackson 2017 recommendations, apart from the suggestion that a new Intermediate Track be created. There will be enhanced fixed recoverable costs for “intermediate cases” but no procedural change to the fast track. It will take a number of years before the impact of these rules can be rigorously evaluated.<sup>32</sup>

## Reforms in Scotland

The position on legal reforms in Scotland is somewhat different from the situation in England and Wales. Lawyers’ fees in Scotland are regulated by law.<sup>33</sup> The Scottish Court of Session adopted rules in 2019 relating to a table of detailed charges allowable for specific services provided by counsel.<sup>34</sup>

<sup>28</sup> Jackson, R., 2017, “Review of Civil Litigation Costs: Supplemental Report Fixed Recoverable Costs”, accessed at: <https://www.judiciary.uk/wp-content/uploads/2017/07/fixed-recoverable-costs-supplemental-report-online-2-1.pdf>

<sup>29</sup> Ibid. at p. 12

<sup>30</sup> Clyde & Co. Legal development Insights, 8 Sept 2021, accessed at:

<https://www.clydeco.com/en/insights/2021/09/personal-injury-government-confirms-intention-to-e>

<sup>31</sup> Extending Fixed Recoverable Costs in Civil Cases: The Government Response, Sept. 2021, Ministry of Justice, accessed at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1015019/extending-fixed-recoverable-costs-civil-cases-government-response.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1015019/extending-fixed-recoverable-costs-civil-cases-government-response.pdf)

<sup>32</sup> Ibid.

<sup>33</sup> <https://www.lawscot.org.uk/for-the-public/client-protection/cost-of-legal-services/>

<sup>34</sup> Act of Sederunt 2019 accessed at: [https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/caf-committee-papers/cafc-meeting---13-december-2021/paper-4-1b---act-of-sederunt-\(taxation-of-judicial-expenses-rules\)-2019.pdf?sfvrsn=c43316f4\\_2](https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/caf-committee-papers/cafc-meeting---13-december-2021/paper-4-1b---act-of-sederunt-(taxation-of-judicial-expenses-rules)-2019.pdf?sfvrsn=c43316f4_2)



The schedule consists of allowable “units” for services provided, i.e., similar to the time allocations discussed later relating to New Zealand.

The Scottish Court of Session rules relate to a schedule of detailed recoverable charges allowable for the full range of specific services provided by counsel.<sup>35</sup> The schedule consists of allowable “units” for each of the services provided. Each unit is currently valued at £16.40. For example, taking/preparing witness statements are assigned 5 units per 250 words, i.e., recoverable charge for a 2500-word statement would equal £820. Stipulating allowable units instead of costs simplifies the eventual need for updating the fee schedules, i.e., instead of updating fees for various services, it requires an update of only the value of a single unit.

Additionally, the Scottish Government adopted the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018, which gives Ministers the power to regulate “the maximum amounts of success fees that may be provided for under success fee agreements.” Such regulations “may specify maximum amounts or provide for them to be determined in accordance with the regulations”. Limitations under the Act are as follows:

- 20% of the damages up to £100,000;
- 10% of the damages over £100,000 and up to £500,000; and,
- 2.5% of the damages over £500,000.

Indecon notes that the Irish Government has prohibited the use of success fees as of 2015.<sup>36</sup> This does not mean, however, that specific fee limits could not be applied in the broader sense.

In Scotland, although there is no lower threshold to simplified process for claims, the qualified one-way cost shifting (QOWCS) method corrects for any anomalies at low value claims subject to the 20% maximum stated above.<sup>37</sup>

Data submitted by the Forum of Scottish Claims Managers in their response to the Scottish Government Success Fee Consultation showed that:<sup>38</sup>

1. Data from over 7,000 litigated cases that settled below £5,000 damages in the period to 2015 showed average damages paid were £2,874.50 but average claimant costs paid were £3,858.64. (I.e., £1.34 costs paid for every £1 paid in damages.)
2. After the opening of the All-Scotland Personal Injury Court in 2015 average claimant costs increased to £1.73 for every £1 paid in damages.

The QOWCS method was adopted in Scotland in June 2021. This means that: “In most personal injury actions, a pursuer’s liability for the defenders’ costs in the event that a pursuer’s claim is unsuccessful is removed. This is a substantial change for Scotland which arguably could improve access to justice for those who have suffered personal injury by removing the risk of them incurring a substantial costs

<sup>35</sup> Act of Sederunt 2019 (Taxation of Judicial Expenses Rules) 2019, Table 3, accessed at: [https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/caf-committee-papers/cafc-meeting---13-december-2021/paper-4-1b---act-of-sederunt-\(taxation-of-judicial-expenses-rules\)-2019.pdf?sfvrsn=c43316f4\\_2](https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/caf-committee-papers/cafc-meeting---13-december-2021/paper-4-1b---act-of-sederunt-(taxation-of-judicial-expenses-rules)-2019.pdf?sfvrsn=c43316f4_2)

<sup>36</sup> <https://www.irishstatutebook.ie/eli/2015/act/65/enacted/en/pdf> at para 149.

<sup>37</sup> <https://www.weightmans.com/insights/changes-to-the-qocs-in-scotland-from-30-june-2021/>

<sup>38</sup> [https://consult.gov.scot/justice/success-fee-agreements/consultation/view\\_respondent?uuld=451870008](https://consult.gov.scot/justice/success-fee-agreements/consultation/view_respondent?uuld=451870008)

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liability in respect of a failed claim, something which could have a profound effect on whether a pursuer decides to continue with their claim or not.”<sup>39</sup> The Court has discretion to not apply this principle in cases where litigation is not meritorious.<sup>40</sup>

### 3.4 Australia

In Australia the 2011 Federal Court Rules set out the non-binding scale on costs. The amount that an unsuccessful party will be ordered to pay is usually limited to the scale. The Federal Court of Australia’s hourly rate fee guidelines for legal services including fees for appearance at hearing, preparation time, conferences, opinions/advice, and settling of claims or other documents.<sup>41</sup> In general, hourly rate guidelines range from \$265-\$740, and are ultimately determined by the complexity of tasks and skill level required. Charges for appearances at hearings or other formal proceedings are typically made on a daily rate basis and can be as high as \$6,400.<sup>42</sup> These guidelines for Counsel fees are set out in Table 3.5. The Federal Court periodically issues guidelines for the amount that may be applied in determining taxing costs. The width of the bands may reflect a desire to keep some flexibility to reflect differences in the complexity of cases.

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<sup>39</sup> <https://www.weightmans.com/insights/changes-to-the-qocs-in-scotland-from-30-june-2021/>

<sup>40</sup> <https://www.inhouselawyer.co.uk/legal-briefing/all-change-in-scottish-civil-litigation-funding/>

<sup>41</sup> <https://www.fedcourt.gov.au/forms-and-fees/legal-costs/national-guide-counsel-fees>

<sup>42</sup> Ibid.

| Table 3.5: Australian National Guide to Counsel Fees  |   |
|---|---|
| Legal Services  | Fee Guidelines  |
| Fee on Brief (incl. preparation at discretion of taxing officer and appearance on first day of hearing)<br>OR<br>Appearance at hearing (daily rate incl. conference)  | Jr. Counsel: \$1275-5100<br>Sr. Counsel: \$2100-7650<br><br>Jr. Counsel: \$900-4200<br>Sr. Counsel: \$2060-6400 |
| Interlocutory hearing <ul style="list-style-type: none"> <li>• Short (&lt;2 hrs)</li> <li>• Long (&gt;2 hrs)</li> </ul>   | Jr. Counsel: \$370-2125<br>Sr. Counsel: \$425-3185<br>Jr. Counsel: \$690-4140<br>Sr. Counsel: \$850-6400        |
| Other, Hourly Rate for: <ul style="list-style-type: none"> <li>• Directions hearing</li> <li>• Preparation time</li> <li>• Conferences (not occurring in day of hearing)</li> <li>• Settling applications, statements of claim, affidavits, defence, other documents</li> <li>• Opinions, advice on evidence</li> <li>• Written submissions (where not allowed above)</li> <li>• Attending to receive judgment (where appropriate)</li> <li>• Not otherwise provided for</li> </ul> | Jr. Counsel: \$265-530<br>Sr. Counsel: \$425-740  |
| <b>Source:</b> Federal Court of Australia ('FCAC') <a href="https://www.fedcourt.gov.au/forms-and-fees/legal-costs/national-guide-counsel-fees">https://www.fedcourt.gov.au/forms-and-fees/legal-costs/national-guide-counsel-fees</a>  |   |

Australia is made up of six states, each of which has a different legal system. Each system is based on common law but the methods to control litigation costs vary somewhat by state. The Kelly Report in their analysis of the Australian system, noted that scales or tables of cost amounts recoverable by a successful party against another party are employed in the Federal Court and in all State Supreme Courts except New South Wales.<sup>43, 44</sup> However, Kelly noted that in New South Wales the court may, of its own motion or on the application of a party, specify the maximum costs that may be recovered by one party from another.

While cost budgeting is not generally employed in Australia as noted by the Kelly Report,<sup>45</sup> in the Federal Court parties are required to exchange their best preliminary estimate of the cost associated with discovery. Kelly also noted that the Commonwealth Access to Justice Report of 2009 and the Australian Government's Productivity Commission inquiry "Access to Justice Arrangements" of 2014 recommended steps to introduce costs budgeting.

<sup>43</sup> Kelly Report at p. 318

<sup>44</sup> Federal Court of Australia, Costs Practice Note (GPN-COSTS) 2013 indicates that the table of costs is "not intended to be inflexibly applied." Accessed at: <https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-costs>

<sup>45</sup> Kelly Report at p. 309

In 2020, the Law Council of Australia submitted the following recommendations to the Joint Costs Advisory Committee:<sup>46</sup>

- Due to the impact of the COVID-19 pandemic, the Federal Costs Advisory Committee (FCAC) formula should not be applied by the JCAC in 2020. Rather, the Joint Costs Advisory Committee (‘JCAC’) should recommend that, at a minimum, an increase of between 1.95% and 2.00% be applied to the scales of costs.
- The JCAC should review the scales of costs against the types of costs reasonably incurred by practitioners when conducting matters by Audio-Visual Link (AVL) to ensure that they represent a fair and accurate estimate of work reasonably required to be undertaken.

The Council noted that the original scale was adopted in 2013 and has not been updated since. It further recommended that the scale be updated annually according to a new formula designed to ensure allowable fees stay current with respect to actual wages rates and fluctuations in market conditions, i.e., costs of doing business.<sup>47</sup>

The Australian parties and their lawyers are obligated by law to use the “most inexpensive and efficient practices available.”<sup>48</sup> Where charges are in dispute, a “fair and reasonable test” is applied, and the taxing officer will consider the cost effectiveness of approaches used. A reduction in the amounts allowed for disputed items may apply where less efficient practices were adopted, e.g., personal attendance at Registry would be less efficient and more costly than filing online, therefore an excess charge for personal attendance would be disallowed.

Early Determination of Costs practice and Consolidated Cost Orders<sup>49</sup> to enforce management of costs and determine party liable for costs operate in Australia. Section 3.4 of the Costs Practice Notice (2016) indicates: “The early determination of costs involves the determination of who is entitled to be paid the costs of a proceeding and on what basis – e.g., on a “party and party” or “indemnity” basis (“costs entitlement question”). The costs entitlement question may be determined in the judgment or order following the trial as to liability and/or quantum or penalties (“judgment”) or will otherwise be determined at the earliest practicable and appropriate time following judgment.”<sup>50</sup>

Section 3.7 of the Costs Practice Notice states that, “the Court will, if it considers it appropriate to do so, make a consolidated costs order which has the effect of consolidating multiple or competing costs entitlements and future costs processes. This process may involve offsetting one party's costs entitlement against another party's costs entitlement and awarding the balance in one global costs order on a percentage basis or making no order as to costs in respect of one or more costs entitlements. Wherever possible, the aim is to consolidate multiple or competing costs entitlements into one consolidated costs order to simplify any future costs process. Such consolidated costs orders may also be awarded as lump-sum costs orders where appropriate.”<sup>51</sup>

<sup>46</sup> Law Council of Australia, 2020, ‘Inquiry into Legal Practitioners’ Scales and Costs’, accessed at: <https://www.lawcouncil.asn.au/publicassets/a76f6215-2ef2-ea11-9434-005056be13b5/3877%20-%202020%20Inquiry%20into%20Legal%20Practitioners%20%20Scales%20of%20Costs.pdf>

<sup>47</sup> Ibid. at p. 5

<sup>48</sup> Federal Court of Australia Act 1976, Sec. 37M, 37N.

<sup>49</sup> Federal Court of Australia, Costs Practice Note 2016, accessed at: [Costs Practice Note \(GPN-COSTS\) \(fedcourt.gov.au\)](https://www.fedcourt.gov.au/costs-practice-note/gpn-costs)

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

It is important to note that the Court in Australia maintains broad discretion in assigning costs to parties depending on the outcome of litigation. In general, Australian courts follow a set of costs allocation rules where the loser pays the winner's fees. The purpose of this was recognised by the Australian Law Reform Commission in its 1995 report to "...reinforce the court or tribunal's control of the proceedings (disciplinary and case management costs orders) and the need to ensure that people are able to pursue meritorious claims or defences regardless of their resources (the 'material effect' exception) and that people wishing to pursue public interest litigation are not discouraged from doing so (public interest costs orders)." <sup>52</sup>

Western Australia State Courts operate a system where a party can only claim a maximum amount on a party-and-party basis. These maximum amounts are decided by the Legal Cost Committee who publish these maximum costs. It must be noted that these scales pertain to recoverable costs and may be lower than what the legal professional actually charges, in which case the client would still owe a balance to their lawyer. The Legal Cost Committee in Western Australia is an independent statutory authority and is required to review all legal cost scales at least biennially. Under the system in Western Australia,<sup>53</sup> parties may enter into written agreements in relation to litigation costs. The Legal Cost Committee also publish an annual report which sets out the number of determinations made within the year.

Scales (or tables) of maximum costs are also currently operating in the Australian state of Victoria. These scales apply in the Supreme Courts (High Court) and County Courts (Circuit Court) and provide monetary figures for various aspects of a litigation case. A Legal Costs Committee oversees these scales. However, this committee requested the Council of Judges of the Supreme Court of Victoria to instigate a review of the use and utility of the scale of costs in Victorian courts. A discussion paper<sup>54</sup> was prepared and a public consultation was initiated in November 2021. The discussion paper gave a brief of the current system in Victoria and also highlighted a number of criticisms of the current Victorian approach. These are outlined in Table 3.6.

<sup>52</sup> ALRC Report 75, 1995 accessed at <https://www.alrc.gov.au/publication/costs-shifting-who-pays-for-litigation-alrc-report-75/>

<sup>53</sup> <https://www.wa.gov.au/government/publications/determinations-scales-legal-profession-solicitors-costs-legal-costs-committee>

<sup>54</sup> <https://www.supremecourt.vic.gov.au/sites/default/files/2021-11/Review%20of%20Litigious%20Costs.pdf>

**Table 3.6: Criticisms of the Victorian approach**

|   |
|---|
| The current Scale attached is anachronistic in substance, terminology and in day to-day practice, is not used by the profession.  |
| There is a complete disconnect between the Scale and how costs are calculated in the market. The overwhelming majority of lawyers, in real life, use (and bill clients) at hourly rates, and do not maintain their files in a manner that is referable to the Scale.  |
| The use of technology in legal practice has increased and there are difficulties in adapting the Scale to this evolving landscape in a way which provides a fair and reasonable costs recovery  |
| The bill of costs for a party/party and lawyer/client bill (where the basis for the charges under the fees agreement is the Scale) is both highly artificial and opaque. It is not the method by which the practitioner manages the file. A client who wished to discover the amount owing on a file at a particular point of time would never be referred to the Scale.                                  |
| As the Scale is generally not used in practice as between lawyer and client, the preparation of bills of costs in taxable form involves retrofitting the Scale to the work that has been done to prepare a bill that reflects the content and structure of the Scale. That is, for work generally performed, recorded, and charged by solicitors to the client and often also by counsel on a time basis. |
| The preparation of a Scale based bill of costs - usually by a costs consultant - is expensive amounting to as much as 15% of the bill for a taxation.   |
| A Scale based bill of costs is inappropriate as a significant amount of money is incurred on work which is of no relevance to the client. It is simply a recovery exercise which may impede payment to a client of his or her settlement or judgment.   |
| Indemnity costs orders are prima facie quantified by reference to the Scale which may bear little resemblance to the successful party's actual costs resulting in a recovery that is substantially less than the indemnity intended by the court.   |
| The Scale is used in limited circumstances as described previously: first, perhaps as the basis of solicitor/client, or counsel/client fee agreements, usually confined to personal injury claims. Second, the Scale is used as the basis for Supreme Court and County Court party/party costs orders.  |
| Scale rates may provide, at least for the legal profession, an objective rate of charge. For instance, the amount allowed on an hourly basis when considering questions of the reasonableness of the hourly rates specified in a Costs Agreement or when a Costs Agreement is found to be void under the Uniform Law.   |
| <b>Source: Supreme and County Court Costs Review of Litigation Costs – Discussion paper(2021) accessed at: <a href="https://www.supremecourt.vic.gov.au/sites/default/files/2021-11/Review%20of%20Litigious%20Costs.pdf">https://www.supremecourt.vic.gov.au/sites/default/files/2021-11/Review%20of%20Litigious%20Costs.pdf</a></b>  |

The Supreme and County Court of Victoria have (August 2022) published the report on this consultation<sup>55</sup> and have endorsed the recommendations set out in the report. These recommendations will lead to significant changes in relation to how costs awarded to successful litigants will be determined. The report makes a number of recommendations which are outlined below:

- The scales will be discarded (short-term)
- Guidelines based on time costing be developed by the Legal Costs Committee (short-term)
- These guidelines should be revised by the Legal Costs Committee on a regular basis (preferably annually) (short-term)
- Prospective cost scheme based on the England & Wales model to be introduced involving:
  - Fixed costs for particular types of litigation (medium-term)

<sup>55</sup> <https://www.supremecourt.vic.gov.au/sites/default/files/2022-08/Report%20on%20Litigious%20Costs%20-%20Executive%20Summary.pdf>

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- In all other cases, costs budgets approved by the Court shortly after the commencement of proceedings (medium-term)
  - If such a scheme is adopted, then the courts engage in judicial education on new model

### 3.5 New Zealand

In New Zealand legal costs awarded to successful litigations are based on scales set out by court procedural rules. These in effect set specific limits on *recoverable* daily rates, i.e., maximum amounts which must not be exceeded in calculating costs to be awarded to the successful claimant as part of damages. These rates are calculated on the basis of maximum daily rates (as shown overleaf) multiplied by factors stipulated in the regulations relating to time allocations for each portion of the proceedings.

The New Zealand High Court Rules 2016 (LI 2016/225), Section 14.2 Principles applying to determination of costs states:<sup>56</sup>

1. the party who fails with respect to a proceeding or an interlocutory application should pay costs to the party who succeeds;
2. an award of costs should reflect the complexity and significance of the proceeding;
3. costs should be assessed by applying the appropriate daily recovery rate to the time considered reasonable for each step reasonably required in relation to the proceeding or interlocutory application;
4. an appropriate daily recovery rate should normally be two-thirds of the daily rate considered reasonable in relation to the proceeding or interlocutory application;
5. what is an appropriate daily recovery rate and what is a reasonable time should not depend on the skill or experience of the solicitor or counsel involved or on the time actually spent by the solicitor or counsel involved or on the costs actually incurred by the party claiming costs;
6. an award of costs should not exceed the costs incurred by the party claiming costs; and,
7. so far as possible the determination of costs should be predictable and expeditious.

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<sup>56</sup> <https://legislation.govt.nz/regulation/public/2016/0225/latest/DLM6952105.html>

**Table 3.7: Maximum Daily Recovery rates in New Zealand (NZD)**

| Category of Proceedings   | Appropriate Daily Recovery Rate* |
|---|----------------------------------|
| • Straightforward procedure, skill level required of Junior Counsel   | \$1590                           |
| • Average complexity, skill level required of average Counsel   | \$2390                           |
| • High complexity/significance require special skill and experience in High Court   | \$3530                           |
| <p><b>Source: New Zealand government legislation accessed at:</b><br/> <a href="https://legislation.govt.nz/regulation/public/2016/0225/latest/DLM6953317.html#DLM6953317">https://legislation.govt.nz/regulation/public/2016/0225/latest/DLM6953317.html#DLM6953317</a></p> <p>*Note: High Court Rules 2016 Section 14.2 (d) above indicates that “daily recovery rate should normally be 2/3 of the daily rate considered reasonable.</p> |                                  |

In New Zealand there can also be adjustment made to reflect certain situations such as where a litigant has secured some success in a case or where parties have unnecessarily resulted in increased time or costs.

Recoverable counsel fees in New Zealand are also regulated by time allocations provided in the High Court Rules 2016 Schedule 3.<sup>57</sup> (See Table 3.8 overleaf.) Time allocations are based on days (or fractions thereof) typically required for steps in general civil proceedings, i.e., commencement of proceedings, reply/ counterclaim, preparation, appearances, hearings, filings and documents. For example, the time allocation for commencement of proceeding by plaintiff is up to 10 days, meaning recoverable counsel fees can total up to 10 times the daily rate for this service. Time allocations range from 0.2 days for simple notices, 2.5 days for lists of documents on discovery, 4.8 days for counterclaims, etc.<sup>58</sup> Details on time allocations set are outlined in the next table.

Similar to the other jurisdictions reviewed, New Zealand provides for some shifting of costs onto the successful litigant, subject to prescribed limits. Recoverable daily fee totals are subject to High Court Rules 2016 Schedule 2, which stipulates the appropriate daily recovery amounts in three bands by level of complexity/experience as noted above. The court may determine the applicable category of skill/complexity required for the purposes of cost determination.<sup>59</sup>

<sup>57</sup> High Court Rules (LI 2016/225) accessed at  
<https://www.legislation.govt.nz/regulation/public/2016/0225/latest/DLM6959801.html>

<sup>58</sup> NZ High Court Rules 2016, Schedule 3 accessed at:  
<https://www.legislation.govt.nz/regulation/public/2016/0225/latest/DLM6952106.html#DLM6952106>

<sup>59</sup> <https://www.legislation.govt.nz/regulation/public/2016/0225/latest/DLM6953317.html>



Table 3.8: Time Allocations re Recoverable Daily Rates New Zealand (NZD)

| General civil proceedings |  | Allocated days or part days |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  | </ |
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Source: NZ High Court Rules 2016 Schedule 3, accessed at: <https://www.legislation.govt.nz/regulation/public/2016/0225/latest/DLM6953320.html#DLM6953320>

### 3.6 Canada

In Canada the portion of fees which may be recoverable are subject to broad discretion of the court. Hourly counsel fee rates in Canada vary by region and by level of experience. Rates in Ontario are higher than the other regions.<sup>60</sup> *Canadian Lawyer* magazine publishes an annual survey of fees charged across the country. As shown in Table 3.9, in 2020, the national average hourly rate ranged from \$332-\$1,616 depending on level of experience, the lowest rate for lawyers practising less than one year and the higher end for those with over 20 years' experience.<sup>61</sup>

| Table 3.9: Canada Survey of Counsel Fees 2020 |  |
|---|--|
| Experience Level                              | Hourly Rates by Region (CAD)                                   |
| 1 Year or less                                | National \$332<br>West \$215<br>East \$374.50<br>Ontario \$446 |
| 2-5 Years                                     | National \$427<br>West \$281<br>East \$457<br>Ontario \$573    |
| 6-10 Years                                    | National \$580<br>West \$362<br>East \$647<br>Ontario \$789    |
| 11-20 Years                                   | National \$681<br>West \$455<br>East \$641<br>Ontario \$909    |
| >20 Years                                     | National \$1616<br>West \$475<br>East \$648<br>Ontario \$2939  |
| Source: <i>Canadian Lawyer magazine</i>       |  |

Costs shifting is used in all jurisdictions in Canada, following the principle that costs “follow the event” or are “in the cause” of the litigation.<sup>62</sup> An objective of cost shifting is to enable litigants without means to bring meritorious claims and to discourage frivolous lawsuits. Court costs as well as counsel fees are recoverable, although recovery rates may vary by jurisdiction and awarded amounts are at the discretion of the court.

Legal costs are typically awarded on a partial indemnity scale at the discretion of the court. The range in legal costs generally awarded as part of damages is a percentage of actual, reasonable costs –

<sup>60</sup> [https://cdn-res.keymedia.com/cms/files/ca/120/0299\\_637245655342367595.pdf](https://cdn-res.keymedia.com/cms/files/ca/120/0299_637245655342367595.pdf)

<sup>61</sup> Ibid.

<sup>62</sup> Sirivar, J., and Kalamut, A., “The Global Damages Review: Canada”, McCarthy Tétrault LLP, 17 October 2021. Accessed at: The Global Damages Review - The Law Reviews

subject to tariff limits where applicable. The successful claimant often receives a portion of their legal fees as part of damages but is still obligated to pay the remainder of their legal fees.<sup>63</sup> The court can exercise discretion and raise the scale of costs to be awarded in exceptional circumstances, e.g., frivolous litigation, or for example in the cases where unnecessary delay tactics have been applied.

Canada consists of ten provinces and three territories, each with its own separate and independent judicial system. Each of these territories follows common law with the exception of Quebec. The Kelly Review noted that scales or “tariffs” limiting the amount of legal costs recoverable by one party against another are employed in eight of the nine provinces in Canada which observe the common law tradition, with some variants of approach between them. Kelly also notes that Ontario has since 2005 replaced a tariff with guidelines. Generally, the tariffs prescribed are not absolutely mandatory, some scope being reserved for the judge when awarding costs, and for the legal costs assessor when assessing them, to depart from the tariff.

Binding controls in the form of *recoverable costs* vary by province. For example:

- Alberta Rules of Court, Schedule C, contains maximum tariffs of recoverable legal costs for the purposes of damage awards.<sup>64</sup> This is a table of *recoverable* fees for the various duties of lawyers in any proceeding, with maximum charges stipulated for each duty. Each tariff varies by value of claim in five ranges.<sup>65</sup>
- Ontario Civil Procedure Rule 57 applies to costs of proceedings and grants the court substantial discretion in determining *recoverable* costs based on factors such as complexity, amount of claim, and apportionment of liability.<sup>66</sup> In addition, the court must apply a tariff of costs, which is prescribed by Ontario Regulation 284/01 as a costs grid of allowable amounts for a variety of lawyer’s services throughout proceedings in terms of “partial indemnity” and “substantial indemnity” scales.<sup>67</sup> For example, the grid indicates recoverable costs for counsel at trial at a daily rate up to \$2300 (partial indemnity) and \$4000 (substantial indemnity). It is important to note that these rates may still be subject to variations where circumstances and level of expertise are relevant, and the court has discretion in this matter.
- A set of tariffs for costs are also applied in Manitoba.<sup>68</sup> The court has the discretion to fix all or part of the costs without reference to the cost guidelines. In such cases, the court will refer these for assessment.

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<sup>63</sup> Ibid.

<sup>64</sup> Alberta Rules of Court

<sup>65</sup> Ibid.

<sup>66</sup> R.R.O. 1990, Reg. 194: RULES OF CIVIL PROCEDURE (ontario.ca)

<sup>67</sup> R01284\_e.doc (live.com)

<sup>68</sup> <https://web2.gov.mb.ca/laws/rules/qbr1e.php#r57>

### 3.7 Germany

While Germany does not have a common legal system and is not therefore directly comparable, it, however, merits discussion as has resulted in low levels of lawyers' fees. In Germany, legal fees comprise of court fees and lawyers' fees.<sup>69</sup> Court fees are set out by the Court Costs Act (Gerichtskostengesetz) (GKG) and lawyers' fees are laid out in the Lawyers' Remuneration Act (Rechtsanwaltsvergütungsgesetz) (RVG). The losing party in a dispute is liable for the court fees and the other party's statutory lawyer's fees. The Act states that: "The fees shall indemnify all the work of the lawyer from the award of the mandate to settlement of the matter unless otherwise determined in this Act."<sup>70</sup> Any legal costs in excess of the rates set in the Act cannot be recovered. There is an inbuilt incentive in the fee table to encourage lawyers to settle a case rather than proceed to trial. In general, both court and lawyer fees depend on the amount in dispute.

The general limitation period for bringing a claim in a German court is three years, although there are exceptions to this.<sup>71</sup> This includes a special statutory limitation period of ten years on claims relating to the transfer of ownership of real property and the reassignment of property rights. The courts of first instance in civil and commercial matters are the local civil courts (Amtsgerichte) and the regional civil courts (Landgerichte). Generally, the regional courts have jurisdiction to hear civil and commercial matters where the value in disputes exceeds €5,000, with local courts having jurisdiction over cases below that threshold.

There is no distinction between solicitors, barristers, or advocates in Germany.<sup>72</sup> Where a lawyer represents a client in court, the fees charged cannot be less than those outlined by law, although they may be higher where agreed. The Kelly Review Report noted that the law on the Remuneration of Attorneys (*Rechtsanwaltsvergütungsgesetz* (RVG) of 2004 comprehensively prescribes the fees payable to a lawyer by the client for contentious and non-contentious business. For contentious business, a table of basic fees fixes a fee (by reference to the value of the claim). In some other civil law jurisdictions such as the Netherlands, lawyers' fees are not in general controlled except in relation to the costs of a losing party where in most cases these are calculated on the basis of a guideline table of appropriate fees.

The position in Germany involves a basic table of fees and "multipliers may apply for different actions or factors within proceedings. Two principal fee items will be allowable for civil proceedings generally which proceed to trial, viz. the procedural fee (*Verfahrensgebühr*)...If the parties arrive at a settlement after proceedings have issued, the settlement fee is equal to the basic fee in the table. Certain additional fees, including fixed amounts, may be payable depending on the type of proceedings or steps in the proceedings...These fees are the minimum payable...and higher fees may be agreed contractually. If in all the circumstances the agreed remuneration is assessed, on referral

<sup>69</sup> <https://www.dlapiperintelligence.com/litigation/insight/index.html?t=09-costs&c=DE>

<sup>70</sup> Act on the Remuneration of Lawyers (Rechtsanwaltsvergütungsgesetz - RVG) - [https://www.gesetze-im-internet.de/englisch\\_rvg/englisch\\_rvg.html](https://www.gesetze-im-internet.de/englisch_rvg/englisch_rvg.html)

<sup>71</sup> [https://uk.practicallaw.thomsonreuters.com/1-502-0728?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/1-502-0728?transitionType=Default&contextData=(sc.Default)&firstPage=true)

<sup>72</sup> <https://e-justice.europa.eu/37/EN/costs?GERMANY&member=1>

to the court, as inappropriately high, it may be reduced to the amount of the statutorily prescribed remuneration aforementioned. An agreement between lawyer and client remunerating the lawyer on the basis of a share of the proceeds of an award is permissible only in an individual case and only if the client, upon reasonable consideration, would be deterred from taking legal proceedings without such an agreement due to the client's economic situation.”<sup>73</sup>

Annex 1 of the RVG sets out a detailed remuneration schedule prescribing either fixed fees or fee ranges (which stipulate a maximum and minimum) applicable to individual activities. As mentioned above, the fee level is generally determined by the value of the claim and is set out in Annex 2 of the Act as shown in Table 3.10 overleaf.<sup>74</sup>

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<sup>73</sup> Kelly Report page 316

<sup>74</sup> Act on the Remuneration of Lawyers (Rechtsanwaltsvergütungsgesetz - RVG)

| Table 3.10: Germany Lawyers' Fee Structure by Value of Claim (Annex 2 of RVG) |           |                                   |           |
|---|-----------|-----------------------------------|-----------|
| Value of the claim up to<br>... €   | Fee ... € | Value of the claim up to<br>... € | Fee ... € |
| 500   | 45        | 50,000                            | 1,163     |
| 1,000   | 80        | 65,000                            | 1,248     |
| 1,500   | 115       | 80,000                            | 1,333     |
| 2,000   | 150       | 95,000                            | 1,418     |
| 3,000   | 201       | 110,000                           | 1,503     |
| 4,000   | 252       | 125,000                           | 1,588     |
| 5,000   | 303       | 140,000                           | 1,673     |
| 6,000   | 354       | 155,000                           | 1,758     |
| 7,000   | 405       | 170,000                           | 1,843     |
| 8,000   | 456       | 185,000                           | 1,928     |
| 9,000   | 507       | 200,000                           | 2,013     |
| 10,000  | 558       | 230,000                           | 2,133     |
| 13,000  | 604       | 260,000                           | 2,253     |
| 16,000  | 650       | 290,000                           | 2,373     |
| 19,000  | 696       | 320,000                           | 2,493     |
| 22,000  | 742       | 350,000                           | 2,613     |
| 25,000  | 788       | 380,000                           | 2,733     |
| 30,000  | 863       | 410,000                           | 2,853     |
| 35,000  | 938       | 440,000                           | 2,973     |
| 40,000  | 1,013     | 470,000                           | 3,093     |
| 45,000  | 1,088     | 500,000                           | 3,213     |

Source: Act on the Remuneration of Lawyers (Rechtsanwaltsvergütungsgesetz - RVG)

In Germany the appropriate fee set for each prescribed range is designed to take into account the scope and difficulty of the work involved in the case, the importance of the case and the client's income and financial circumstances.<sup>75</sup> Where the lawyer faces particular risk of liability, this may also be considered in the assessment of their fees. It is noted that in addition to the fees, disbursements for witnesses are recoverable. In a report prepared by EY and commissioned by The Bar of Ireland and the Law Society of Ireland, they suggest that in Germany, parties to litigation have higher court fees and they suggest that the higher costs of administering the German legal system should be taken into account.

<sup>75</sup> <https://e-justice.europa.eu/37/EN/costs?GERMANY&member=1>

### 3.8 Summary of Key Findings

This section presented an overview of international approaches to the costs of litigation, focussing on the experiences of countries with similar legal systems. Table 3.11 overleaf summarises some key findings from the review. Other countries have effectively introduced measures designed to reduce legal costs.

While there are limitations in the evidence available to date of the impact of measures implemented, it is clear that some countries have lower legal costs than those in Ireland. There is also evidence that some of the measures introduced in the UK reduced costs by 8% for PI cases and just under 10% for clinical negligence cases. While these reductions may be less than some advocates had hoped, any cost reductions are welcome and in aggregate could represent significant savings for the Exchequer and for businesses and individuals.

The Irish experience also demonstrates that reforms can impact on the level of cases proceeding to litigation. Cases which are settled have much lower levels of legal costs and this therefore represents an important driver of overall legal costs. Other countries' experience indicates that reforms have been introduced on an incremental basis with policymakers learning from the experience of applying reforms to certain types of cases.

**Table 3.11: Summary of findings**

|   |
|---|
| <p><b>England and Wales:</b></p> <ul style="list-style-type: none"> <li>Fixed Recoverable Costs for non-complex Personal Injury cases up to an award value of £25,000 have been in operation since 2013. There are plans to extend this to cases with an award value of £100,000.</li> <li>The key perceived benefit of fixed recoverable costs is controlled legal costs. This can potentially result in a reduction in the time/cost involved in adjudicating costs as well as a possible increase in early settlements.</li> <li>There are a number of risks involved with the fixed recoverable costs including that legal practitioners may potentially be less likely to take on complex cases.</li> </ul>  |
| <p><b>Scotland:</b></p> <ul style="list-style-type: none"> <li>The Scottish Court of Session adopted rules in 2019 relating to a schedule of detailed recoverable charges allowable for the full range of specific services provided by counsel. The schedule consists of allowable "units" for each of the services provided and currently engages a £16.40 value per unit.</li> <li>Scotland has adopted Qualified One-Way Cost Shifting in most personal injury actions with the intention of improving access to the justice system for claimants by removing risk of substantial costs in the event of an unsuccessful claim.</li> <li>Scottish law places limits on the portion of awards that can be designated as success fees.</li> </ul>  |
| <p><b>Australia:</b></p> <ul style="list-style-type: none"> <li>At the national level, the Federal Court of Australia publishes a National Guide to Counsel Fees. Amounts range according to level of experience required and complexity of the case. Lawyers are required by law to charge for the "most inexpensive and efficient practices available".</li> <li>On the state level, scales or tables of cost amounts recoverable are applicable in all states except NSW.</li> <li>Court retains discretion in applying recoverable costs when awarding damages. The guidelines have not been updated since 2013 and a proposal has been made to apply formula to allowable fee increases according to inflation and current costs of doing business.</li> <li>Case management procedures can be applied by the court including application of cost principles.</li> </ul> |

|   |
|---|
| <ul style="list-style-type: none"> <li>Recent decision to move away from cost scales in Victoria Courts.</li> </ul>   |
| <b>Canada:</b> <ul style="list-style-type: none"> <li>Counsel fees and FRCs in Canada vary by province.</li> <li>Recoverable costs vary by province.</li> <li>Recoverable costs are awarded on partial indemnity basis; court has broad discretion on assignment of costs.</li> </ul>   |
| <b>New Zealand:</b> <ul style="list-style-type: none"> <li>In New Zealand there is a cap for maximum recoverable daily rates. Schedule 3 of the High Court Rules 2016 maintains a list of allowable time allocations for lawyers' services, i.e., days or fractions of days that are appropriate for fee determination purposes.</li> <li>These allocations are based on three levels of expertise required. Recoverable costs are limited to the formula in the High Court Rules.</li> </ul> |
| <b>Germany:</b> <ul style="list-style-type: none"> <li>Lawyers' fees are explicitly set in the Lawyers' Remuneration Act (Rechtsanwaltsvergütungsgesetz) (RVG).</li> <li>The losing party in a dispute is liable for the court fees and the other party's statutory legal fees.</li> </ul>  |
| <b>Source: Indecon Analysis</b>   |



## 4 Legal Costs in Ireland

### 4.1 Introduction

The overall costs of litigation as reflected in the levels of awards discussed in Section 3 are in part impacted by the legal costs incurred in litigation or in securing settlement. This is influenced by a wide range of factors including the number of trial days where cases proceed to court, as well as the complexity of the legal issues involved in individual cases. The overall levels of professional costs of litigation includes the costs of input of solicitors, junior and senior counsel fees, expert witness costs, as well as other out-of-pocket expenses incurred, and VAT. In this section it is useful to consider the overall levels and trends in legal costs as these are contextually important in the consideration of any reforms to control litigation costs. A summary of the typical costs involved in a litigation case are shown in Table 4.1. It must be noted that these only represent an illustration and specific cases may have costs that are specific to that type of case.

| Table 4.1: Illustrative Example of Bill of Costs for a Large Litigation case  |                           |
|---|---------------------------|
| Solicitors' Professional fees*  |                           |
| -   | Instruction Fee           |
| -   | Research fee              |
| -   | Document preparation      |
| -   | Correspondence            |
| -   | Evidence reviews          |
| -   | Court appearances         |
| Postage & Miscellaneous   |                           |
| Junior Counsel  |                           |
| -   | Negotiation fee           |
| -   | Motion for Judgement fees |
| -   | Affidavit fees            |
| -   | Brief fee                 |
| -   | Refresher fee             |
| Senior Counsel  |                           |
| -   | Brief Fee                 |
| -   | Pre-trial consultation    |
| -   | Advice on Proofs          |
| -   | Refresher fee             |
| Outlay & Commissioners Fees (not subject to VAT)  |                           |
| Witness & Other Expenses  |                           |
| <b>Note: All fees above are subject to VAT at the standard rate (23%)</b>   |                           |
| <b>*The solicitors' professional fee may be broken down into a number of categories or aggregated into a small number of areas.</b> |                           |
| <b>Source: Indecon Analysis</b>   |                           |

#### Significance of Legal Costs in Personal Injury Insurance Claims

Before examining the trends in legal costs it is necessary to place the discussion in the context of how significant legal costs are as a percentage of overall settlement awards. Data on the proportion of overall settlement costs which is due to legal costs for motor insurance injury claims is presented in Table 4.2. These indicate that over the period 2015 - 2021 legal costs accounted for between 8% and 14% of overall settlement costs for motor insurance injury claims where a direct settlement was made. This percentage increased over the period. For motor insurance cases involving PIAB, legal costs were

low and ranged from 2% in 2015 to 4% in 2021. It is, however, in the cases which were subject to litigation that legal costs became one of much greater significance. These ranged from 34% in 2016 and 2019, to 31% in 2021. This is the context in which reforms to control litigation costs is being considered. It is clear that in cases where PIAB is used, the legal costs are significantly lower.

| <b>Table 4.2: Average Proportion of Costs by Settlement Type (Motor Insurance Injury Settlement)</b> |                            |                           |                    |                    |
|--|----------------------------|---------------------------|--------------------|--------------------|
| <b>Settled Year</b>  | <b>Number of Claimants</b> | <b>Compensation Costs</b> | <b>Legal Costs</b> | <b>Other Costs</b> |
| <b>Direct</b>  |                            |                           |                    |                    |
| 2015   | 5,985                      | 89%                       | 8%                 | 3%                 |
| 2016   | 5,973                      | 89%                       | 8%                 | 3%                 |
| 2017   | 5,460                      | 88%                       | 9%                 | 4%                 |
| 2018   | 5,478                      | 87%                       | 9%                 | 4%                 |
| 2019   | 5,948                      | 85%                       | 11%                | 4%                 |
| 2020   | 5,116                      | 84%                       | 12%                | 4%                 |
| 2021   | 4,367                      | 83%                       | 14%                | 4%                 |
| <b>PIAB</b>  |                            |                           |                    |                    |
| 2015   | 2,343                      | 94%                       | 2%                 | 4%                 |
| 2016   | 2,368                      | 94%                       | 2%                 | 4%                 |
| 2017   | 2,124                      | 93%                       | 3%                 | 4%                 |
| 2018   | 1,828                      | 93%                       | 3%                 | 4%                 |
| 2019   | 1,905                      | 93%                       | 4%                 | 4%                 |
| 2020   | 1,562                      | 93%                       | 3%                 | 4%                 |
| 2021   | 1,335                      | 91%                       | 4%                 | 4%                 |
| <b>Litigated</b>   |                            |                           |                    |                    |
| 2015   | 4,097                      | 64%                       | 33%                | 3%                 |
| 2016   | 3,976                      | 64%                       | 34%                | 3%                 |
| 2017   | 4,214                      | 66%                       | 32%                | 2%                 |
| 2018   | 4,200                      | 64%                       | 33%                | 3%                 |
| 2019   | 4,023                      | 65%                       | 34%                | 0%                 |
| 2020   | 3,370                      | 65%                       | 33%                | 2%                 |
| 2021   | 3,107                      | 67%                       | 31%                | 2%                 |

**Source: Indecon Analysis of Central Bank of Ireland, NCID Private Motor Insurance Report 4 2022**

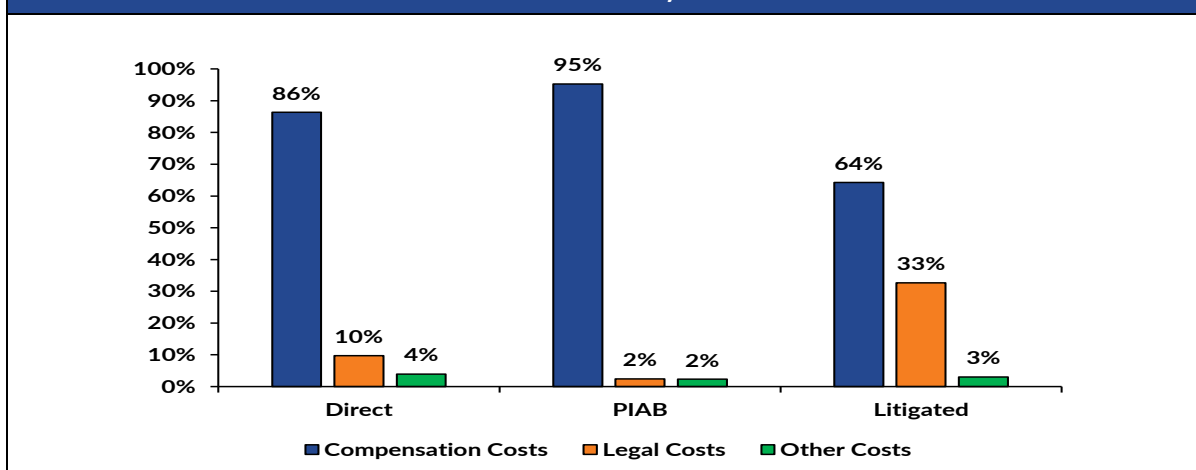
The next table provides further insights on legal costs by settlement channels. Total legal costs over the period 2019 – 2021 including own legal costs and third-party legal costs represented 46% of the total cost for motor insurance cases litigated with court award and 33% for cases litigated before court award. In contrast, the legal costs for PIAB settled cases for the period 2019 – 2021 amounted to 4%. Legal costs settled directly but after PIAB were, however, higher.

**Table 4.3: Average Proportion of Costs by Settlement Type 2019-2021 (Motor Insurance Injury Settlement)**

| Settlement Channel           | Compensation General | Compensation Special | Legal Costs Own | Legal Costs Third Party | Other Costs |
|------------------------------|----------------------|----------------------|-----------------|-------------------------|-------------|
| Direct Before PIAB           | 82%                  | 6%                   | 1%              | 7%                      | 5%          |
| Direct After PIAB            | 72%                  | 6%                   | 1%              | 17%                     | 3%          |
| PIAB                         | 85%                  | 7%                   | 4%              |                         | 4%          |
| Litigated Before Court Award | 49%                  | 17%                  | 10%             | 23%                     | 1%          |
| Litigated With Court Award   | 46%                  | 6%                   | 16%             | 30%                     | 2%          |

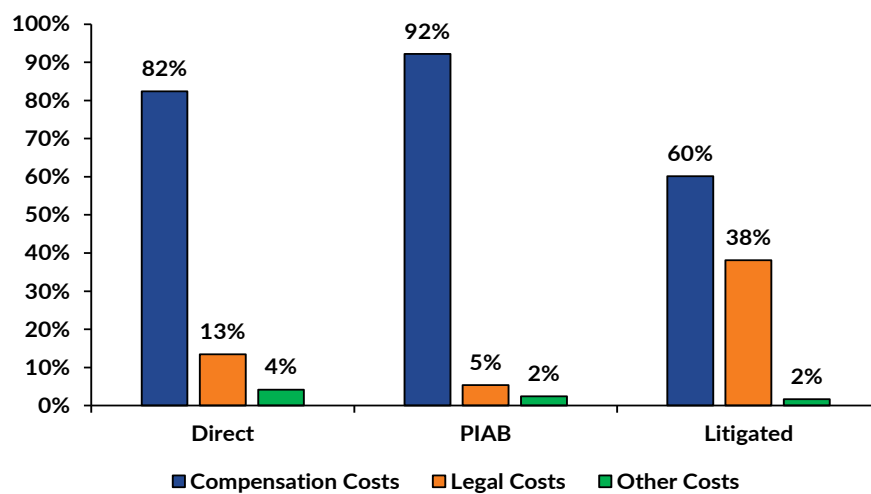
Source: Indecon Analysis of Central Bank of Ireland, NCID Private Motor Insurance Report 4 2022

The legal costs involved in employer liability (EL) injury settlement cases also varied by settlement mechanisms. (See Figure 4.1.) In EL injury litigated claims, legal costs account for 33% of the total settlement costs. However, the levels of legal costs as a percentage of settlement costs were much lower where cases were settled directly or through PIAB.

**Figure 4.1: Average Proportion of Costs by Settlement Type 2015-2020 (EL Insurance Injury Settlement)**

Source: Indecon Analysis of Central Bank of Ireland, Employers Liability, Public Liability and Commercial Property Insurance Report 2 2022

Data on legal costs in Public Liability cases are presented in the figure below. Approximately 38% of the claim cost is accounted for by legal costs in public liability injury settlement costs where cases proceeded to litigation. Again, legal costs are less significant for cases directly settled or through PIAB.

**Figure 4.2: Average Proportion of Costs by Settlement Type 2015-2020 (PL Insurance Injury Settlement)**

Source: Indecon Analysis of Central Bank of Ireland, Employers Liability, Public Liability and Commercial Property Insurance Report 2 2022

The overall significance of legal costs is shown in Table 4.4. This indicates that for employer and public liability insurance settlement cases over the period 2015 – 2020 the legal costs involved amounted to €571,637,670.

**Table 4.4: Average Costs by Settlement Type 2015-2020 (EL & PL Insurance Injury Settlement)**

| Liability | Cost type          | Direct      | PIAB        | Litigated    |
|-----------|--------------------|-------------|-------------|--------------|
| Employer  | Compensation Costs | €92,864,390 | €57,371,274 | €519,623,677 |
|           | Legal Costs        | €10,496,460 | €1,434,847  | €264,378,476 |
|           | Other Costs        | €4,202,806  | €1,392,469  | €24,522,463  |
| Public    | Compensation Costs | €91,993,247 | €81,599,123 | €434,462,561 |
|           | Legal Costs        | €14,994,524 | €4,789,075  | €275,544,288 |
|           | Other Costs        | €4,681,092  | €2,123,805  | €12,297,793  |

Source: Indecon Analysis of Central Bank of Ireland, Employers Liability, Public Liability and Commercial Property Insurance Report 2 2022

## 4.2 Legal Costs on OLCA and Other Cases

In considering the levels of legal costs it is also useful to examine information on cases handled by the Office of the Legal Costs Adjudicator (OLCA). This organisation aims to provide access to the independent, impartial, and objective resolution of legal costs disputes in Ireland.<sup>76</sup> The office deals with disputes on legal costs, usually but not always, as between parties involved in litigation in the

<sup>76</sup> Courts service (2022) available [here](#)

Superior Courts. As a result of the intervention by the OLCA, cost savings have been achieved as represented by the gap between settled and adjudicated claim values. It is unclear what drives a large gap between claimed and settled/adjudicated legal costs in one year over another. For OLCA data, the exact nature of cases is mostly unknown so it is difficult to determine whether certain types of cases are impacting on the results. Similarly, State Claims Agency (SCA) data is separated between clinical, general, tribunals on inquiry, and other categories. This is not sufficient to determine a driver for any gaps. It is, however, likely that the difference is due to a judgement by the OLCA that some elements of legal costs, such as instruction fee, brief fees, daily rates, or time incurred, may have been too high. This could relate to either Junior or Senior Counsel costs or Solicitors' costs. Reductions in the costs claimed for expert witnesses may also be part of the driver for savings achieved. This highlights the importance of measures to enhance the transparency of litigation costs and has influenced Indecon's evaluation of options for reform.

To maintain transparency of this service, outcomes are published in so far as permitted by law and accessible via the register of determinations, in order to inform both legal practitioners and the public. Thus, OLCA serves as a useful resource in an analysis of legal costs in Ireland.

OLCA replaced the Office of the Taxing Master (OTM) on the 7<sup>th</sup> of October 2019 following the commencement of the Legal Services Regulation Act, 2015. The OTM has published 101 case files between 2012 and 2018. The OLCA has published 80 between 2019 and 2022 via the register of determinations.<sup>77</sup> The small number of cases in this register is likely to have been impacted by the COVID-19 outbreak, and by the fact that not all cases can be made public.

A total of 2,306 applications have been made to the OLCA between 2019 and 2021. Table 4.5, overleaf, shows that the majority of applications were for road traffic accidents, judicial reviews and employer and occupiers' liability. The total amount of claims for legal costs between 2019 and 2021 amounted to €313 million for the sample of cases dealt with by the OLCA in this period. Medical negligence accounts for €72 million of this figure. The average claim for legal costs is €136,000. In this sample, an average medical negligence case has a claim amount of €333,000 while an average tribunal of inquiry case has a claim amount of €1.2 million. It is important to note that legal costs include costs of solicitors, barristers, out-of-pocket expenses, expert witness costs, and VAT. While detailed data on all of the components of the legal bill for a representative litigation costs is not available, we present evidence later on some of the components of legal costs including junior and senior counsel fees. Also in Annex 2, we present new evidence on components of litigation costs including solicitors costs, counsel fees, and expert witness and other costs.

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<sup>77</sup> As of 15/11/2022

Table 4.5: Adjudicator Applications by Case Type 2019-2021

|  | Cases        | Legal Costs Claimed (€) | Av Claim for Legal Costs (€) |
|--|--------------|-------------------------|------------------------------|
| Medical Negligence                     | 215          | 71,531,217              | 332,703                      |
| Road Traffic Accidents                 | 497          | 42,379,748              | 85,271                       |
| Employer & Occupiers Liability         | 332          | 29,635,530              | 89,264                       |
| Judicial Review                        | 287          | 28,653,143              | 99,837                       |
| Tribunal of Inquiry                    | 17           | 20,904,584              | 1,229,681                    |
| Other                                  | 186          | 20,835,576              | 112,019                      |
| Commercial Court                       | 25           | 16,179,670              | 647,187                      |
| Contract                               | 113          | 16,102,129              | 142,497                      |
| Appeal - Court of Appeal               | 82           | 10,861,509              | 132,457                      |
| Motions Interlocutory                  | 144          | 9,848,619               | 68,393                       |
| Public Liability                       | 90           | 6,902,313               | 76,692                       |
| Appeal - Supreme Court                 | 32           | 5,854,723               | 182,960                      |
| Defamation. Libel & Slander            | 23           | 5,764,799               | 250,643                      |
| Constitutional Law                     | 16           | 3,314,045               | 207,128                      |
| Assault & Battery                      | 21           | 2,675,945               | 127,426                      |
| Immigration Law                        | 20           | 2,438,869               | 121,943                      |
| Employment Law                         | 16           | 2,175,105               | 135,944                      |
| Family Law                             | 12           | 1,819,227               | 151,602                      |
| Arbitration                            | 12           | 1,808,159               | 150,680                      |
| Planning Matters                       | 9            | 1,669,089               | 185,454                      |
| Professional Negligence                | 12           | 1,499,873               | 124,989                      |
| Wards of Court                         | 22           | 1,208,290               | 54,922                       |
| Bankruptcy                             | 9            | 1,168,265               | 129,807                      |
| Injunctions                            | 9            | 1,159,773               | 128,864                      |
| Security for Costs                     | 12           | 1,128,768               | 94,064                       |
| Practitioner and Client                | 10           | 1,080,397               | 108,040                      |
| Probate Matters                        | 26           | 1,018,265               | 39,164                       |
| Sale of Land                           | 7            | 760,857                 | 108,694                      |
| Nuisance                               | 1            | 732,208                 | 732,208                      |
| Solicitors Acts                        | 19           | 648,325                 | 34,122                       |
| Article 40/Habeas Corpus               | 5            | 554,308                 | 110,862                      |
| Companies Act                          | 14           | 426,322                 | 30,452                       |
| Case Stated                            | 2            | 236,927                 | 118,464                      |
| Garda Compensation Acts                | 6            | 166,175                 | 27,696                       |
| Pension Matters                        | 1            | 77,452                  | 77,452                       |
| Residential Institutions Redress Board | 1            | 28,117                  | 28,117                       |
| Judgement Mortgage                     | 1            | 12,576                  | 12,576                       |
| <b>TOTAL</b>                           | <b>2,306</b> | <b>313,260,897</b>      | <b>135,846</b>               |

Source: Indecon Analysis of OLCA 2019, 2020 &amp; 2021 Reports

Between 2019 and 2021, OLCA dealt with 2,867 cases. Table 4.6 shows that the majority of cases dealt with each year are settled or adjourned. Settled and adjourned cases also have the highest amount claimed for legal costs. The average claim for legal costs in a settled case is €132,000 while the average claim for a determined case is €102,000.

| Table 4.6: Adjudicator Applications Dealt With 2019-2021             |                 |                                   |                                   |
|--|-----------------|-----------------------------------|-----------------------------------|
|  | Number of Cases | Amount of Legal Costs Claimed (€) | Average Claim for Legal Costs (€) |
| <b>Settled</b>   | 1,558           | 205,816,550                       | 132,103                           |
| <b>Adjourned/Part Heard</b>  | 895             | 158,254,196                       | 176,820                           |
| <b>Determined by the OLCA</b>  | 377             | 38,590,563                        | 102,362                           |
| <b>Under Consideration</b>   | 37              | 7,086,537                         | 191,528                           |
| <b>TOTAL</b>   | <b>2,867</b>    | <b>409,747,846</b>                | <b>142,919</b>                    |
| <i>Source: Indecon analysis of OLCA 2019, 2020 &amp; 2021 report</i> |                 |                                   |                                   |

Between 2019 and 2021, there were 1,558 settled cases. Table 4.7 overleaf shows that these cases largely consist of road traffic accidents, judicial review, medical negligence and employer and occupier liability. Medical negligence has the highest amount of legal costs claimed out of all case types with €47.5 million. The average settled claim amount is €132,100. Medical negligence cases exceed this average with an average claim amount of €294,900.

Table 4.7: Settled Cases by Case Type 2019-2021

|                                  | Number of Cases | Amount of Legal Costs Claimed (€) | Average Claim for Legal Costs (€) |
|----------------------------------|-----------------|-----------------------------------|-----------------------------------|
| Medical Negligence               | 161             | 47,486,116                        | 294,945                           |
| Road Traffic Accidents           | 372             | 32,320,747                        | 86,884                            |
| Employer and Occupiers Liability | 262             | 23,720,292                        | 90,535                            |
| Judicial Review                  | 243             | 22,611,734                        | 93,052                            |
| Tribunal of Inquiry              | 11              | 17,246,381                        | 1,567,853                         |
| Other                            | 114             | 14,225,595                        | 124,786                           |
| Contract                         | 46              | 9,746,658                         | 211,884                           |
| Appeal - Court of Appeal         | 36              | 6,305,930                         | 175,165                           |
| Motions Interlocutory            | 69              | 4,233,007                         | 61,348                            |
| Commercial Courts                | 10              | 3,965,514                         | 396,551                           |
| Public Liability                 | 68              | 3,885,182                         | 57,135                            |
| Appeal - Supreme Court           | 14              | 2,420,361                         | 172,883                           |
| Immigration Law                  | 19              | 2,408,790                         | 126,778                           |
| Employment Law                   | 14              | 1,947,088                         | 139,078                           |
| Assault and Battery              | 15              | 1,946,993                         | 129,800                           |
| Defamation, Libel and Slander    | 14              | 1,922,027                         | 137,288                           |
| Family Law                       | 7               | 1,459,452                         | 208,493                           |
| Planning Matters                 | 4               | 947,560                           | 236,890                           |
| Bankruptcy                       | 6               | 915,242                           | 152,540                           |
| Wards of Court                   | 13              | 846,226                           | 65,094                            |
| Nuisance                         | 1               | 732,208                           | 732,208                           |
| Professional Negligence          | 3               | 677,843                           | 225,948                           |
| Arbitration                      | 6               | 625,243                           | 104,207                           |
| Injunctions                      | 2               | 616,885                           | 308,443                           |
| Practitioner and Client          | 6               | 587,284                           | 97,881                            |
| Constitutional Law               | 13              | 387,731                           | 29,825                            |
| Article 40/Habeas Corpus         | 2               | 330,150                           | 165,075                           |
| Probate Matters                  | 9               | 325,272                           | 36,141                            |
| Sale of Land                     | 2               | 280,774                           | 140,387                           |
| Companies Act                    | 3               | 273,089                           | 91,030                            |
| Solicitors Acts                  | 6               | 100,612                           | 16,769                            |
| Security for Costs               | 2               | 90,817                            | 45,409                            |
| Garda Compensation Acts          | 3               | 87,465                            | 29,155                            |
| Pension Matters                  | 1               | 77,452                            | 77,452                            |
| Cases Stated                     | 1               | 62,832                            | 62,832                            |
| <b>TOTAL</b>                     | <b>1,558</b>    | <b>205,816,552</b>                | <b>132,103</b>                    |

Source: Indecon Analysis of OLCA 2019, 2020 & 2021 Reports



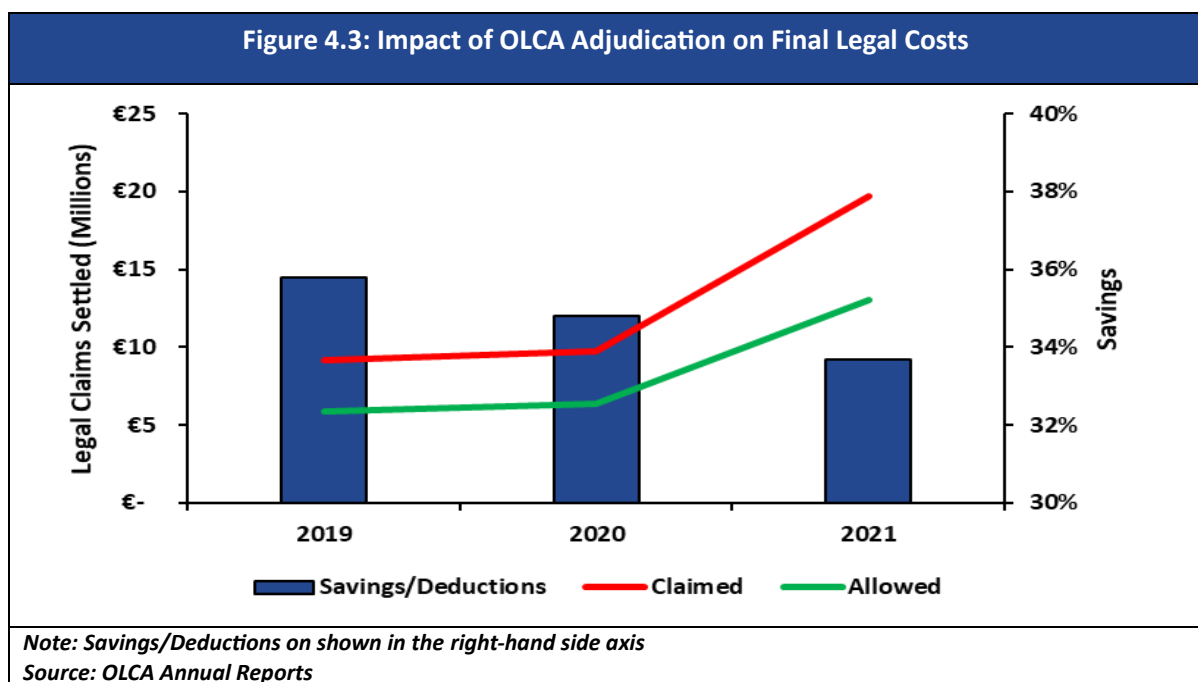
There were 377 determined cases between 2019 and 2021. Table 4.8 shows that 34% of claimed amounts between 2019 and 2021 were dismissed. Large reductions in claim amounts were seen in medical negligence, professional negligence, and tribunal of inquiry cases. However, this does not mean all of these costs were unreasonable. Many costs cannot be recovered for a variety of reasons<sup>78</sup> such as limitations on recoverable amounts with regards to the terms of settlement or a court order, or a difference in the interpretation of a liability for costs. Also of note is that the type of costs sought may not be recoverable on the application law or facts of the case.

| Table 4.8: Determined Cases by Case Type 2019-2021 |                 |                    |                     |                    |                               |
|--|-----------------|--------------------|---------------------|--------------------|-------------------------------|
|  | Number of Cases | Amount Claimed (€) | Amount Deducted (€) | Amount Allowed (€) | Proportion of Claim Dismissed |
| Road Traffic Accidents                             | 76              | 5,585,789          | 1,671,135           | 3,914,654          | 30%                           |
| Other  | 32              | 2,116,004          | 687,513             | 1,428,490          | 32%                           |
| Employer and Occupiers Liability                   | 39              | 2,406,307          | 783,171             | 1,623,136          | 33%                           |
| Medical Negligence                                 | 17              | 3,225,744          | 1,351,925           | 1,873,820          | 42%                           |
| Contract   | 21              | 2,075,902          | 699,415             | 1,376,488          | 34%                           |
| Appeal - Court of Appeal                           | 22              | 2,059,645          | 845,390             | 1,214,254          | 41%                           |
| Judicial Review                                    | 19              | 2,671,703          | 992,451             | 1,679,250          | 37%                           |
| Probate Matters                                    | 12              | 473,505            | 80,793              | 357,713            | 17%                           |
| Security for Costs                                 | 9               | 563,022            | 163,434             | 399,588            | 29%                           |
| Commercial Court                                   | 10              | 8,340,123          | 2,899,740           | 5,440,383          | 35%                           |
| Motions Interlocutory                              | 39              | 1,496,474          | 477,559             | 1,018,914          | 32%                           |
| Public Liability                                   | 14              | 2,111,948          | 620,048             | 1,491,901          | 29%                           |
| Appeal - Supreme Court                             | 8               | 1,087,049          | 393,871             | 693,179            | 36%                           |
| Companies Act                                      | 10              | 141,570            | 38,368              | 103,201            | 27%                           |
| Planning Matters                                   | 4               | 466,568            | 200,172             | 266,397            | 43%                           |
| Injunctions  | 3               | 347,639            | 100,883             | 246,756            | 29%                           |
| Defamation, Libel and Slander                      | 4               | 345,756            | 64,082              | 281,674            | 19%                           |
| Professional Negligence                            | 3               | 154,180            | 81,363              | 72,817             | 53%                           |
| Family Law   | 4               | 259,950            | 81,552              | 178,398            | 31%                           |
| Garda Compensation Acts                            | 3               | 78,710             | 24,690              | 54,021             | 31%                           |
| Arbitration  | 4               | 397,974            | 152,894             | 245,081            | 38%                           |
| Assault & Battery                                  | 5               | 652,574            | 173,981             | 478,594            | 27%                           |
| Employment Law                                     | 2               | 228,017            | 78,510              | 149,507            | 34%                           |
| Solicitors Acts                                    | 7               | 222,379            | 58,527              | 163,852            | 26%                           |
| Wards of Court                                     | 3               | 56,859             | 7,913               | 48,946             | 14%                           |
| Tribunal of Inquiry                                | 4               | 732,821            | 427,991             | 304,831            | 58%                           |
| Sale of Land                                       | 1               | 233,829            | 76,805              | 157,025            | 33%                           |

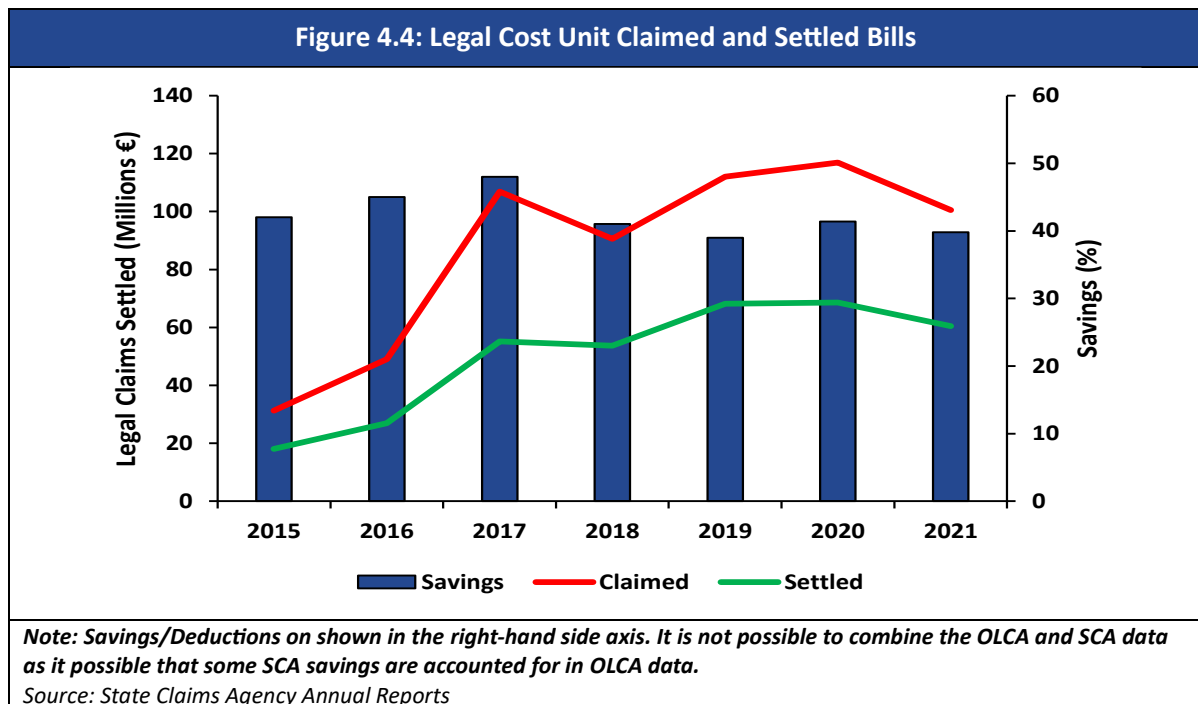
<sup>78</sup> OLCA 2020 Report available [here](#)

|   |            |                   |                   |                   |            |
|---|------------|-------------------|-------------------|-------------------|------------|
| <b>Article 40/Habeas Corpus</b>                                       | 1          | 36,597            | 23,799            | 12,799            | 65%        |
| <b>Bankruptcy</b>   | 1          | 21,926            | 9,389             | 12,537            | 43%        |
| <b>Total</b>  | <b>377</b> | <b>38,590,564</b> | <b>13,267,364</b> | <b>25,288,206</b> | <b>34%</b> |
| <i>Source: Indecon Analysis of OLCA 2019, 2020 &amp; 2021 Reports</i> |            |                   |                   |                   |            |

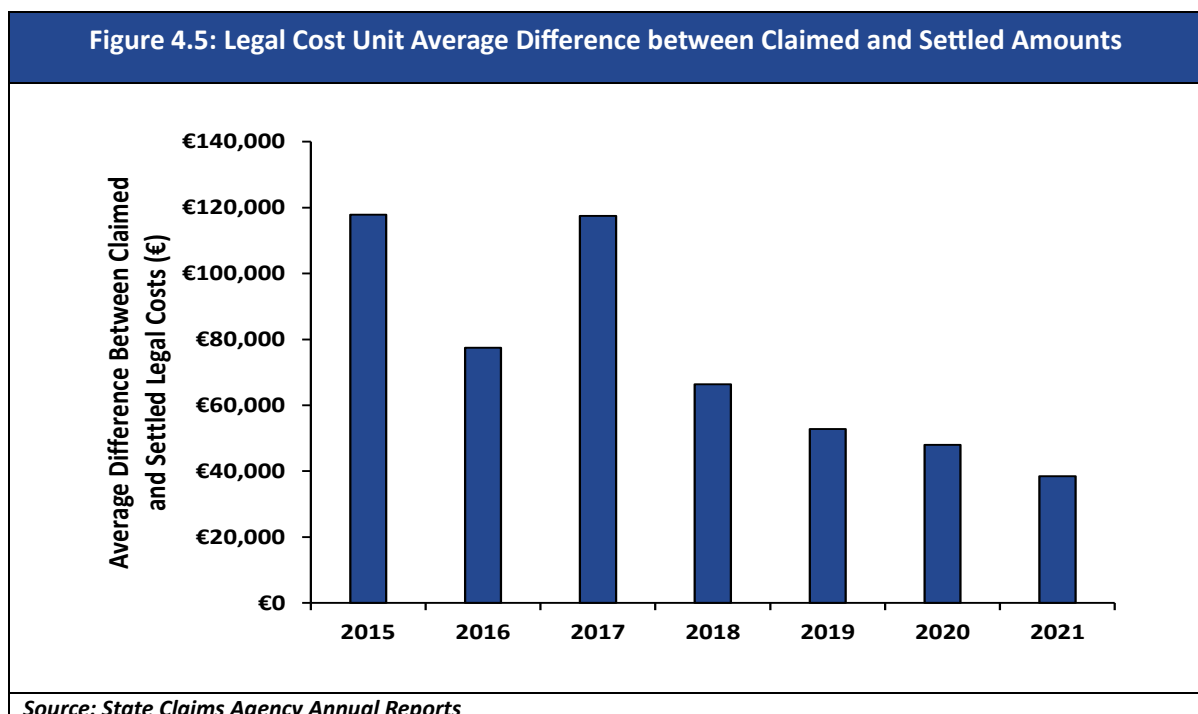
The impact of the OLCA adjudication process in terms of percentage deductions over the last three years is shown in Figure 4.3. These show that typically cases that come before the OLCA have their claims for legal costs reduced by just under 35%. However, it must be noted that only a fraction of cases ends up before the OLCA and are likely to represent the larger cases or cases where dispute on costs is greater. It must be noted that at circuit court level, the role of the OLCA is typically undertaken by the County Registrar. This process also leads to some cost deductions in certified legal costs but the amounts in question are much smaller than those examined by the OLCA.



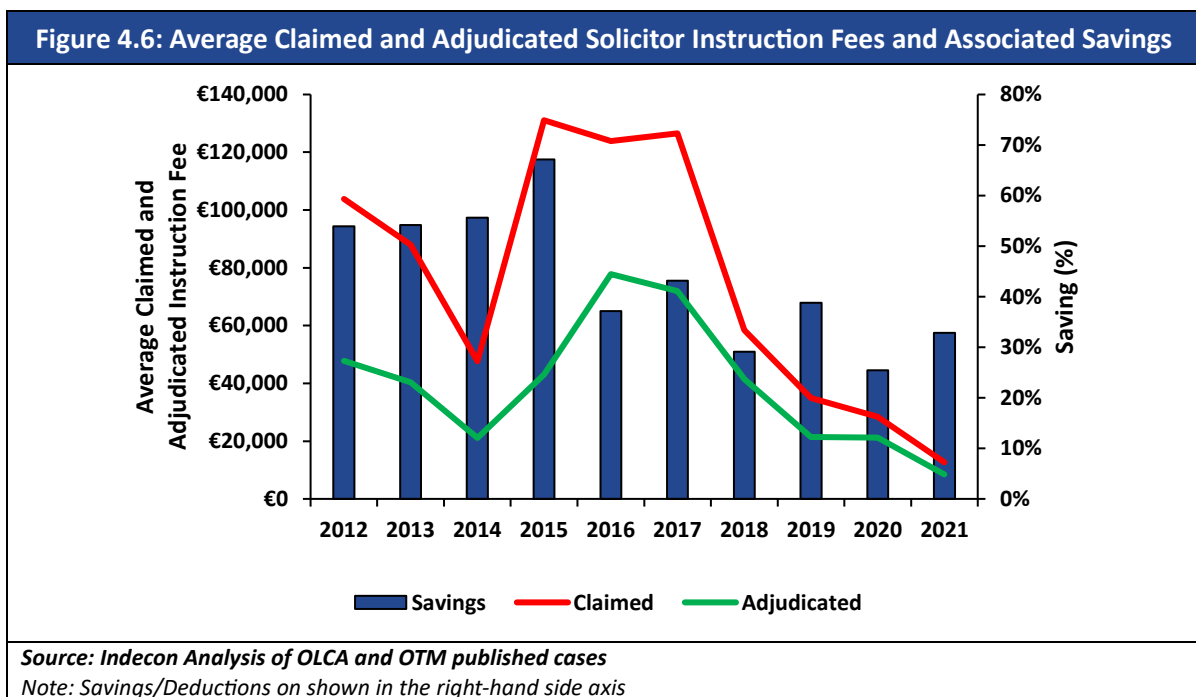
The SCA's Legal Cost Unit (LCU) deal with third party legal costs of the State and State authorities that are delegated to it. Costs paid are often negotiated. If the LCU and the relevant plaintiffs' representatives cannot agree, the matter is elevated to the Office of the Legal Cost Adjudicators subject to a right of appeal to the High Court. On average, the LCU has made legal cost savings of 42% each year between 2015 and 2021. The difference between claimed and settled legal costs can be seen in Figure 4.4.



Calculating the average legal cost claim and settlement amount and computing the difference shows that average savings have declined. Figure 4.5 reports average savings of €117,857 in 2015 compared to average savings of €38,462 in 2021. However, the differences in the potential nature of the cases considered in any year should be noted.



Within the case files published by the OLCA and the OTM, it is useful to consider the detailed components of legal costs. A common cost that is disputed in cases before the OLCA is the solicitor's instruction fee.<sup>79</sup> Between 2012 and 2021, the average adjudicated solicitor instruction fee was €34,161. Average instruction fees, both claimed and adjudicated, have been falling since 2016 as can be seen in Figure 4.6. Meanwhile, savings as a percentage of claim cost have averaged 44% per year in this period.

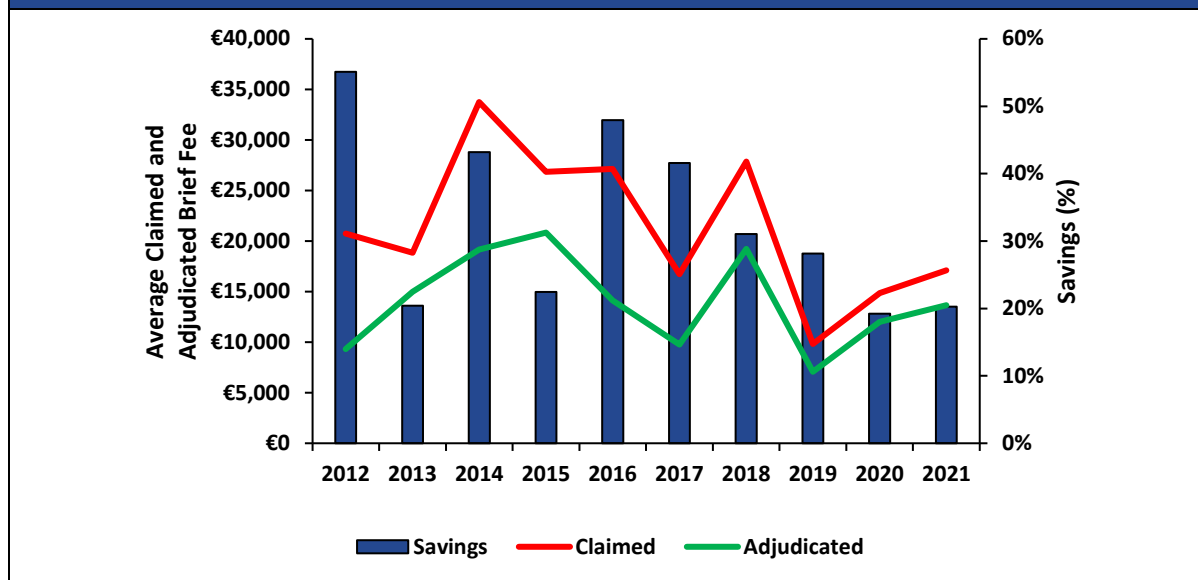


Other costs which are often disputed include the briefing fees of senior and junior counsel. A brief fee incorporates any work arising in relation to negotiations of a settlement or subsequent applications to rule a settlement.<sup>80</sup> The total average adjudicated brief fee for senior counsel was €13,320 between 2012 and 2021. As can be seen in Figure 4.7, adjudicated and claimed senior counsel fees have been increasing since 2019. Savings have averaged 33% each year between 2012 and 2021.

<sup>79</sup> Cheng Zhang and Stephen Farrell (2022) High Court available [here](#)

<sup>80</sup> Kate Murphy (a minor) suing by her mother and next friend Sarah Murphy and Health Service Executive and Raymond Howard (2014) High Court available [here](#)

Figure 4.7: Average Claimed and Adjudicated Senior Counsel Brief Fees and Associated Savings

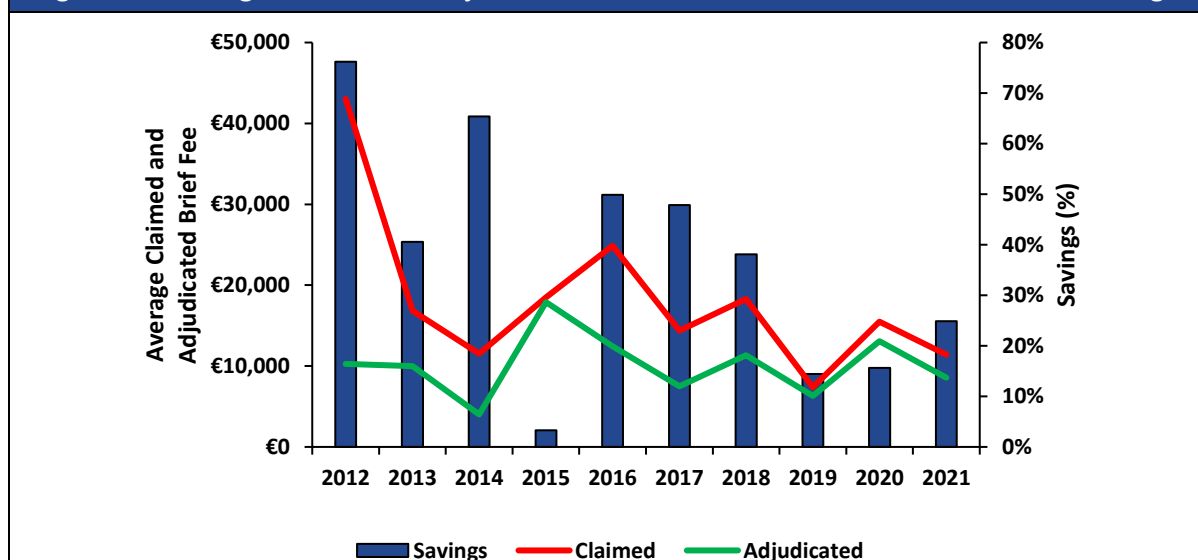


Source: Indecon Analysis of OLCA and OTM published cases

Note: Savings/Deductions on shown in the right-hand side axis

The total average adjudicated brief fee for junior counsel was €10,015 between 2012 and 2021. Often found in the OLCA case files is junior counsel fees to the amount of two thirds the senior counsel fee. It is difficult to evaluate the merits or otherwise of sample cases without detailed information on the role played by different practitioners. However, what matters from a consumer perspective is the overall level of litigation costs. The difference between claimed and adjudicated fees amounted to 76% in 2012, but the average between 2012 and 2021 is more moderate, at 38%.

Figure 4.8: Average Claimed and Adjudicated Junior Counsel Brief Fees and Associated Savings



Source: Indecon Analysis of OLCA and OTM published cases

Note: Savings/Deductions on shown in the right-hand side axis

A refresher fee is an additional sum payable in respect of each second or subsequent day of a hearing.<sup>81</sup> The refresher fee is payment for any preparation before and after court for each additional day required. Much like other fees, senior counsel will tend to charge more than junior counsel for their services. As shown in Table 4.9, the average adjudicated cost of a refresher fee is €2,647 for senior counsel and €1,836 for junior counsel. Written submissions can vary by purpose but can contain the facts leading up to the instruction of the solicitor,<sup>82</sup> the issue of costs,<sup>83</sup> and more. For senior and junior counsel, the average adjudicated written submission fee is €2,205 and €2,089, respectively.

| Table 4.9: Average Senior & Junior Counsel Fees (€) 2012-2021                              |                |               |                    |                |               |                    |
|--|----------------|---------------|--------------------|----------------|---------------|--------------------|
|  | Senior Counsel |               |                    | Junior Counsel |               |                    |
| Year   | Brief          | Refresher     | Written Submission | Brief          | Refresher     | Written Submission |
| 2021   | €13,643        | €2,167        | €2,167             | €8,581         | €1,450        | €1,500             |
| 2020   | €12,067        | €3,250        | €2,750             | €11,944        | €1,609        |                    |
| 2019   | €7,065         | €2,350        | €2,500             | €6,307         | €1,917        | €2,400             |
| 2018   | €19,208        | €2,583        | €2,333             | €11,317        | €1,876        | €1,781             |
| 2017   | €9,773         | €3,500        | €2,375             | €7,493         | €2,125        | €2,750             |
| 2016   | €14,121        | €2,000        | €1,500             | €12,450        | €1,500        | €1,000             |
| 2015   | €20,832        | €3,375        |                    | €17,893        | €1,925        |                    |
| 2014   | €19,167        |               |                    | €4,000         |               |                    |
| 2013   | €15,000        |               | €1,500             | €10,000        | €2,000        | €3,000             |
| 2012   | €9,313         | €750          | €1,000             | €10,250        | €2,000        | €2,500             |
| <b>Total</b>   | <b>€13,320</b> | <b>€2,647</b> | <b>€2,205</b>      | <b>€10,015</b> | <b>€1,836</b> | <b>€2,089</b>      |
| <i>Source: Indecon Analysis of OLCA register of determinations and OTM published cases</i> |                |               |                    |                |               |                    |

Hourly rates are a common cause of contention as they vary significantly. In an analysis of legal cost adjudication cases available from the OLCA and the OTM, we present the average hourly rates found for each of the positions listed in Figure 4.9. Partners earn an average hourly rate of €376, while Solicitors earn an average hourly rate of €298.

<sup>81</sup> Legal Aid Board available [here](#)

<sup>82</sup> Aderonke Adenekan and Jadesola Boluwatife Soetan (a minor) suing by her mother and next friend Aderonke Adekan and Ashimedua Okonkwo Practising under the style and title of Cyril & Co Solicitors (2020) High Court available [here](#)

<sup>83</sup> Holly Hunter and Nurendale Limited Trading as Panda Waste Services Limited (2016) High Court available [here](#)

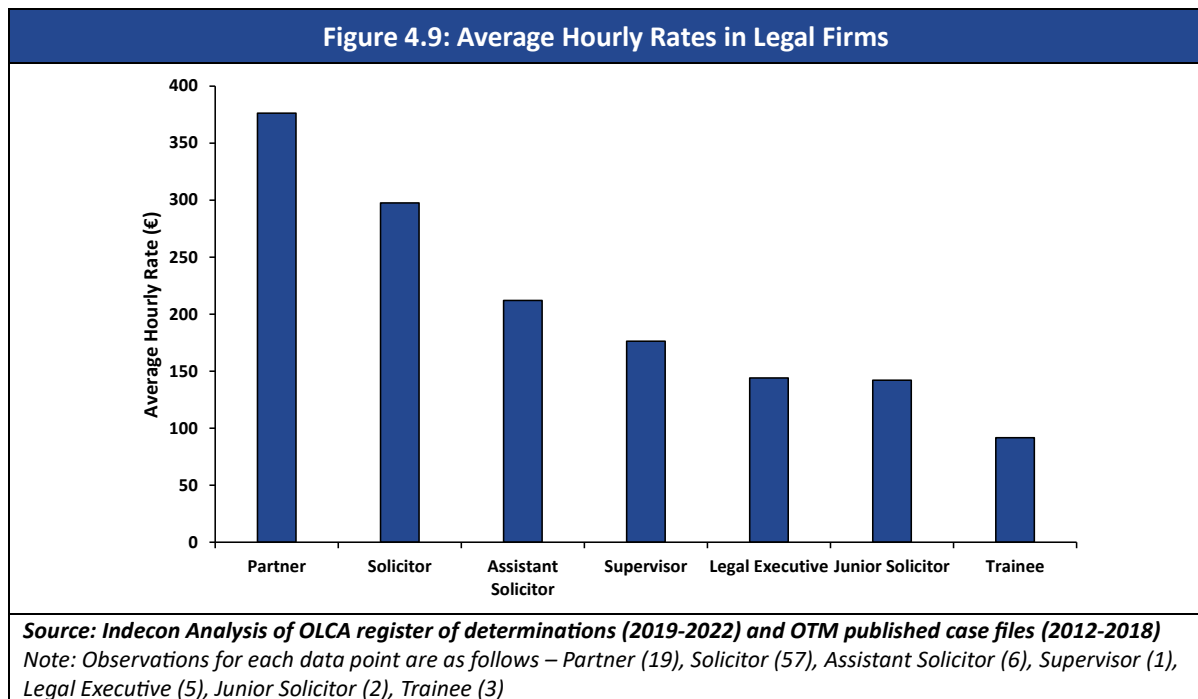
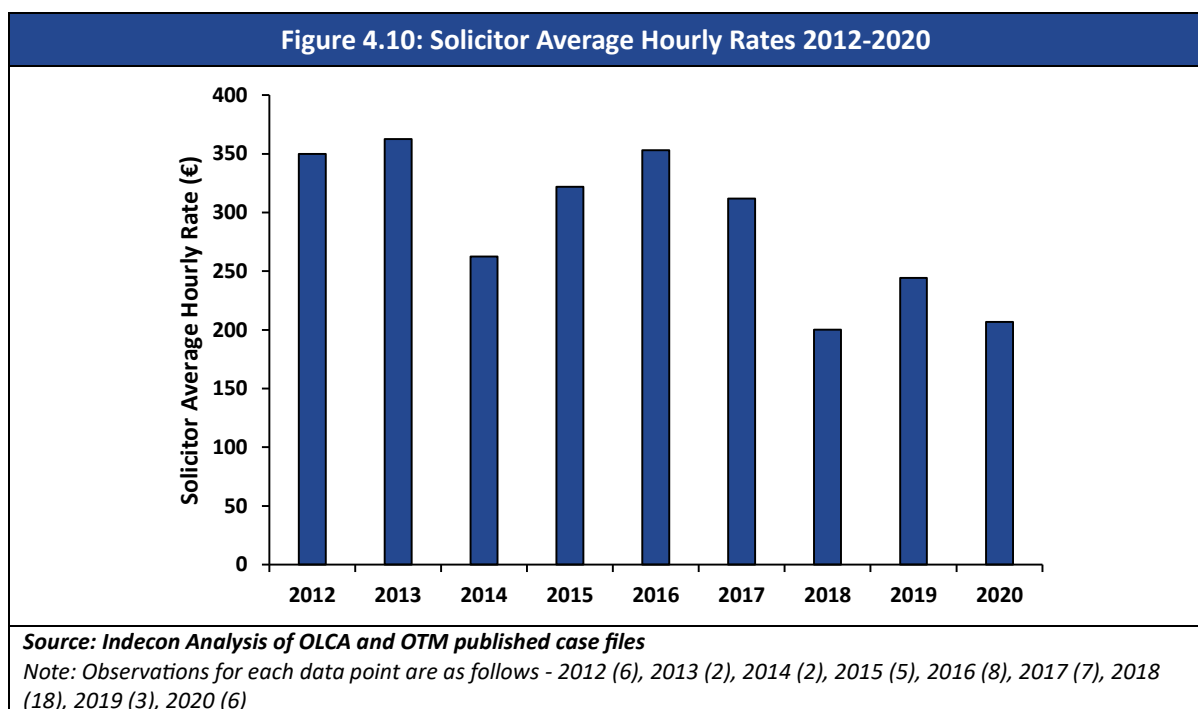


Figure 4.10 illustrates average solicitor hourly rates from 2012-2020. The hourly rate of a solicitor in OLCA and OTM cases appears to have fallen by an average of 41% over the period. Because of the small sample of cases, Indecon would caution against interpreting any general trend. This, again, highlights the need for measures to provide greater transparency on litigation costs.



### 4.3 Legal Costs on ILCA Cases

In addition to information provided by OLCA which relates only to disputed legal costs, an important source of information is data collected by the Institute of Legal Cost Accountants (ILCA). Indecon is very appreciative for the helpful analysis of trends in legal costs provided in a joint submission by The Bar of Ireland/Law Society of Ireland prepared by Ernst and Young (EY) Business Advisory Services. This included a detailed analysis of new unpublished data on a total of 256 cases of which 184 were personal injuries and medical negligence cases and which utilised data from the ILCA. The findings suggested that the median award levels for personal injury and medical negligence cases decreased by 12% between 2011 – 2013 and 2017 – 2019, and that the typical number of days at trial also decreased over the time period by 31%, but the median case duration increased by 29%. The data also indicated that the median professional legal fees (which included the fees associated with solicitors, junior counsel and senior counsel) decreased by 10% between the two time periods 2011 – 2013 and 2017 – 2019. The data presented in the submission suggested that over the period 2011 – 2019 the median value of solicitors' fees on cases dealt with by ILCA fell by 13%, and junior counsel fees declined by 12%, and the median value of senior counsel fees fell by 9%.

A number of important points are relevant to the above data. These were highlighted by EY in the detailed report. It was suggested for example that the decline in median costs "is attributed to the lagged response of the cost of legal services to the impact of the post-2008 economic crash which would have straddled the period to 2014."<sup>84</sup> However, EY also noted that "the professional fees in this sample should not be taken to represent the average fee a legal professional would earn from a case, as the sample provided by the ILCA is representative of the more complex cases where the input of a legal cost accountant was required."<sup>85</sup>

Indecon would also note that every case is different and looking at changes in the overall median value of legal costs to interpret any trends is challenging. To understand the implications of the ILCA data it is useful to examine the variance by year in costs and also the variance between cases. Also of note is that the median figures provided by EY and included in the submission, represent a useful summary description of the characteristics of the distribution of legal costs, like all summary measures, it does not give a full picture of the costs which have been incurred for different cases. As only aggregate median values were presented in the submission by The Bar of Ireland/Law Society of Ireland, to further examine the relevance of the summary statistics provided, Indecon approached the ILCA to obtain the underlying data which was the basis for the estimation of the median cost numbers used by EY. The ILCA indicated that the full underlying data set used in the calculation of the median estimates presented in the EY report had not been kept but they helpfully provided micro data on 129 of the 184 personal injury and medical injury cases.

Using the micro data provided by ILCA, it is important to examine the variance in the costs incurred by type of case and by year. The data for personal injury cases settled in 2011 shows great variance in both overall levels of awards and the overall level of costs. For example, solicitor costs in the six cases

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<sup>84</sup> EY Report, page 42.

<sup>85</sup> EY Report, page 42.



included in the database for 2011 ranged from €11,377 - €82,718, while counsel fees ranged from €1,538 to over €35,000. While median costs were €31,947, average costs were €50,366.

For medical negligence cases settled in 2011 and held in the ILCA database an even smaller number of cases were included but much greater variance in legal costs and levels of award applied. For example, professional legal costs ranged from approximately €71,000 to over €650,000. Interestingly, the average mean figures are much higher than the median reflecting the range in costs.

Indecon also examined detailed data on cases for each of the years 2012 – 2019. The detailed tables for each year 2011 – 2019 are presented in Annex 2. 2019 data on personal injury cases shows a great variance in legal costs. Professional costs in 2019 ranged from as low as €9,838 to €211,965. The scale of variance in costs is reflected in the fact that the average or mean costs are more than double the median estimate. While the figures for 2019 show lower median costs, the overall level of costs was much higher than in 2011. Given the small number of cases and the variance in legal costs, it is not feasible to identify any overall trend in whether legal costs have increased or decreased.

The analysis undertaken by Indecon of the total overall aggregate cost of litigation for cases included in the ILCA database showed great annual variance and no overall trend in costs can be identified. Because of the small sample and diversity of cases in any year there is no clear explanation for yearly variation in the data. This again highlights the need to collate additional evidence on litigation costs on an ongoing basis.

| Table 4.10: Legal Costs as Percentage of Award for Personal Injury Cases                                |                               |                                  |                                    |
|---|-------------------------------|----------------------------------|------------------------------------|
| Year of Settlement  | Total Overall Legal Costs (€) | Total Overall Level of Award (€) | Legal Costs as Percentage of Award |
| 2011  | 363,868                       | 355,500                          | 102%                               |
| 2012  | 197,857                       | 396,000                          | 50%                                |
| 2013  | 275,295                       | 630,000                          | 44%                                |
| 2014  | 428,464                       | 1,507,000                        | 28%                                |
| 2015  | 237,637                       | 510,011                          | 47%                                |
| 2016  | 452,166                       | 674,000                          | 67%                                |
| 2017  | 486,221                       | 1,716,950                        | 28%                                |
| 2018  | 347,702                       | 643,000                          | 54%                                |
| 2019  | 905,106                       | 2,163,248                        | 42%                                |
| <b>Source: Indecon Analysis of 129 ILCA Cases.</b>  |                               |                                  |                                    |
| <i>Note: Counsel Fees include aggregation of Junior and Senior Counsel Fees. All data includes VAT.</i> |                               |                                  |                                    |

A similar analysis is presented below for medical negligence cases.

| Table 4.11: Legal Costs as Percentage of Award for Medical Negligence Cases   |                               |                                  |                                    |
|---|-------------------------------|----------------------------------|------------------------------------|
| Year of Settlement  | Total Overall Legal Costs (€) | Total Overall Level of Award (€) | Legal Costs as Percentage of Award |
| 2011  | 1,564,113                     | 5,429,000                        | 29%                                |
| 2012  | 319,695                       | 935,000                          | 34%                                |
| 2013  | 307,593                       | 545,000                          | 56%                                |
| 2014  | 601,762                       | 475,000                          | 127%                               |
| 2015  | 1,082,960                     | 1,949,435                        | 56%                                |
| 2016  | 317,345                       | 955,000                          | 33%                                |
| 2017  | 912,426                       | 1,312,500                        | 70%                                |
| 2018  | 648,174                       | 1,530,000                        | 42%                                |
| 2019  | 2,239,519                     | 21,290,500                       | 11%                                |
| <b>Source: Indecon Analysis of 129 ILCA Cases.</b><br><i>Note: Counsel Fees include aggregation of Junior and Senior Counsel Fees. All data includes VAT.</i> |                               |                                  |                                    |

In understanding the impact of either binding or non-binding guidelines, it is important to note the diversity of cases and the variance in legal costs. To take a very simple example based on new Indecon analysis of a sample of 16 personal injury cases settled in 2019, the evidence shows the diversity of litigation costs.

| Table 4.12: Analysis of ILCA Data on Legal Costs for Personal Injury Cases Settled in 2019 |          |                |            |                          |                  |   |                                |
|--|----------|----------------|------------|--------------------------|------------------|---|--------------------------------|
| Background Details   |          |                |            | Legal Costs              |                  |   |                                |
| Case   | Duration | Level of Award | Trial Days | Total Professional Costs | Solicitors Costs | Combined Junior and Senior Counsel Fees | Expert Witness and Other Costs |
| 1  | 40       | 38,280         | N/A        | 9,838                    | 8,300            | 1,538                                   | 406                            |
| 2  | 34       | 53,968         | N/A        | 11,457                   | 9,366            | 2,091                                   | 1,056                          |
| 3  | 45       | 85,000         | N/A        | 23,964                   | 20,520           | 3,444                                   | 2,333                          |
| 4  | 44       | 30,000         | 1          | 17,677                   | 11,835           | 5,843                                   | 4,880                          |
| 5  | 84       | 96,000         | N/A        | 39,637                   | 34,763           | 4,874                                   | 7,851                          |
| 6  | 43       | 100,000        | 1          | 41,252                   | 31,842           | 9,410                                   | 10,126                         |
| 7  | 20       | 30,000         | N/A        | 11,993                   | 9,840            | 2,153                                   | 725                            |
| 8  | 27       | 65,000         | 14         | 126,702                  | 68,880           | 57,822                                  | 12,510                         |
| 9  | 51       | 60,000         | N/A        | 17,087                   | 15,611           | 1,476                                   | 1,592                          |
| 10   | 45       | 65,000         | N/A        | 45,085                   | 36,168           | 8,918                                   | 7,258                          |
| 11   | 24       | 67,500         | N/A        | 16,232                   | 13,680           | 2,552                                   | 3,029                          |
| 12   | 53       | 900,000        | N/A        | 211,965                  | 147,870          | 64,095                                  | 24,210                         |
| 13   | 79       | 225,000        | N/A        | 110,362                  | 74,846           | 35,516                                  | 25,987                         |

|   |           |                |           |                |                |               |               |
|---|-----------|----------------|-----------|----------------|----------------|---------------|---------------|
| 14  | 43        | 85,000         | N/A       | 12,072         | 9,840          | 2,232         | 2,882         |
| 15  | 18        | 37,500         | N/A       | 10,394         | 9,225          | 1,169         | 850           |
| 16  | 31        | 225,000        | N/A       | 39,750         | 35,000         | 4,750         | 6,091         |
| <b>Max</b>  | <b>84</b> | <b>900,000</b> | <b>14</b> | <b>211,965</b> | <b>147,870</b> | <b>64,095</b> | <b>25,987</b> |
| <b>Min</b>  | <b>18</b> | <b>30,000</b>  | <b>1</b>  | <b>9,838</b>   | <b>8,300</b>   | <b>1,169</b>  | <b>406</b>    |
| <b>Median</b>   | <b>43</b> | <b>66,250</b>  | <b>1</b>  | <b>20,820</b>  | <b>18,065</b>  | <b>4,097</b>  | <b>3,955</b>  |
| <b>Mean</b>   | <b>43</b> | <b>135,203</b> | <b>5</b>  | <b>46,592</b>  | <b>33,599</b>  | <b>12,993</b> | <b>6,987</b>  |
| <i>Source: Indecon Analysis of 129 ILCA Cases</i>   |           |                |           |                |                |               |               |
| <i>Note: Counsel Fees include aggregation of Junior and Senior Counsel Fees. All data includes VAT.</i> |           |                |           |                |                |               |               |

#### 4.4 Summary of Findings

- ❑ In understanding how the costs in litigation are structured, it is useful to first consider the overall significance of legal costs in claims faced by the state and other parties varies by whether cases are settled directly or litigated.
- ❑ For motor insurance claims, the evidence shows legal costs amounted to 8% - 14% of total settlement costs for cases where a direct settlement was made, and a lower level of 2% - 4% applied in cases dealt with via PIAB. For motor insurance cases subject to litigation, average legal costs ranged from 31% - 34% of total settlement costs.
- ❑ The legal costs involved in employer liability injury settlement cases also varied by settlement channel and where cases were litigated, legal costs accounted for 33% of the total settlement costs.
- ❑ The overall significance of legal costs is evident by examining even one category of claims, namely employer and public liability cases. For these cases, legal costs amounted to over €570 million in the period 2015 – 2020.
- ❑ Data in a helpful submission by The Bar of Ireland/Law Society of Ireland using data provided by Institute of Legal Cost Accountants (ILCA) noted that for certain cases the median professional legal fees had decreased by 10% between the periods 2011 – 2013 and 2017 – 2019. A detailed examination of the micro data on these cases completed by Indecon, shows the extent of variance in costs and the very small number of cases in the ILCA database for any year. This highlights the challenge in attempting to identify any trends in costs. For example, in a sub-set of data provided to Indecon by ILCA, legal costs in the sample cases reviewed in one year ranged from €12,915 to €107,281.

## 5 Potential Options to Reduce Legal Costs

### 5.1 Introduction

This section examines the potential options to reduce litigation costs. The first two options follow the report of the Review Group chaired by the then President of the High Court, Mr. Justice Peter Kelly. The Group was unable to reach a consensus regarding recommendations on how to reduce litigation costs. A majority of the Group members recommended the drawing up of non-binding guidelines for costs levels, while a minority of Group members representing the key government departments recommended a table of maximum cost levels be prescribed by a new Litigation Costs Committee, which could be derogated from in exceptional circumstances.

The main advantages and disadvantages of these two Kelly Review options are outlined in the report of the Review Group.<sup>86</sup> Submissions have been made by different interests strongly in favour of one or the other of the options. As well as these two main options Indecon also considered the merits of evaluation of some alternative models.

It is important to note that this study concerns the design and completion of a multi-criteria analysis in the area of litigation costs, with the focus restricted to evaluating the economic impact of measures to control litigation costs. The options examined also have taken account of the need to improve access to justice by reducing the cost of litigation and/or improving cost transparency for consumers, as well as wider policy objectives. Indecon notes the Department of Justice may subsequently require legal advice on the options from the Office of the Attorney General.

In evaluating options for consideration, we have taken account of the need for any new measures to be as efficient and incentive compatible as possible. We have reflected differences in the legal work required across different types of cases. In addition, we believe it is important to ensure that any options, where possible, would not restrict competitive market forces from providing lower-cost services. The lack of transparency on legal costs and information asymmetry has been identified as important factors influencing the intensity of competition in the legal profession. These are key drivers of whether any reforms will reduce costs and improve efficiency.

Our review of potential models suggests that in addition to the table of non-binding controls and a table of binding maximum costs, there is merit in considering two additional options. These have been informed by alternatives considered in other countries, as well as innovative adjustments to take account of the Irish context and the factors influencing the levels of competition. The two new options include a revised non-binding guidelines option but with significantly enhanced transparency measures. This is a radically different option to the option considered by the Kelly Review Group. This innovative new option involves structural transparency measures and strong incentives for the guidelines to be implemented. It also would facilitate competition among legal practitioners. The options included in our multi-criteria assessment are presented in Table 5.1.

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<sup>86</sup> <https://www.gov.ie/en/publication/8eabe-review-of-the-administration-of-civil-justice-review-group-report/>

**Table 5.1: Overview of Options for Consideration****Kelly Review Group Options**

5. Non-binding guidelines on maximum litigation costs (Majority Justice Kelly Review Option).
6. Binding guidelines on maximum litigation costs (Minority Justice Kelly Review Option).

**Additional Alternative Options**

7. Non-binding guidelines on litigation costs but with significantly enhanced transparency measures. These to include written cost information provided to prospective and current clients and notification to OLCA (cost adjudicator) of deviation from guidelines and other incentives to reduce costs.
8. Binding maximum litigation costs but only for non-complex personal injury cases below a €30,000 settlement level.

One issue which was considered by Indecon is what any table of costs or any guidelines on costs might look like. Indecon believes that under each of the four options significant work will be required by the Department in consultation with stakeholders. An important aspect of any table of costs concerns the level of granularity in costs which would be set. While the detailed design of any table of costs or any guidelines is outside the scope of this assignment, we believe this should set levels for individual cost components. It is also necessary to recognise that from a consumer perspective what matters is the overall costs which are incurred. A useful starting point in considering the level of granularity in costs is the model currently used in determining costs in the District Court. We would, however, advise that the breakdown in costs used for the District Court is likely to require amendment when applied to cases in higher courts. In terms of achieving market efficiency, Indecon would also advise that a range in costs would be desirable rather than a precise single figure for any cost element. This would facilitate competition and would provide some flexibility to reflect differences in circumstances.

## 5.2 Discussion of the Options Examined

### Option 1 (Kelly Review)

**Table 5.2: Summary of Kelly Option 1 – Non-Binding Guidelines**

An analysis of this option was presented in the Kelly Report and this option was supported by the majority of members. The main concern of the minority of the Group was whether this would be effective in reducing legal costs. This remains a valid concern. Details were presented in the Kelly Report of international experience relevant to this option. This option largely represents the status quo with the addition of non-binding guidelines.

#### Model Characteristics:

Non-binding guidelines could be potentially used to inform the adjudication of contentious claims for costs which are considered by the Office of Legal Cost Adjudicators of the High Court (OLCA). We understand that this has some similarities to the situation which existed in England before fixed recoverable costs (FRC) were introduced in 2013. However, as the OLCA may already implicitly use certain guidelines (as per Schedule 1 of the Legal Services Regulation Act 2015) from their caseload

on appropriate costs, this may not have any significant impact on the outcome of OLCA and other cases. The guidelines could also potentially influence overall costs in cases which are not subject to formal review by the OLCA. The implementation of this option would involve the drawing up of non-binding guidelines for the assistance of parties and their representatives, by reference to individual costs for different legal tasks and could be presented in tabular form. The task of producing such guidelines could be given as a responsibility to the Office of Legal Costs Adjudicators or the Legal Services Regulatory Authority (LSRA) (with input from the former).

The Kelly Report noted that non-binding guidelines could be drawn up by reference to the criteria established in Schedule 1 of the Legal Services Regulation Act 2015, and the levels at which parties have either resolved or had adjudicated costs disputes. They would need to take into account prevailing economic conditions to ensure no more than a reasonable level of remuneration. There would also be the possibility of instructing the OLCA to generally apply new guidelines on adjudication. This could impact on the settlement process between the parties in relevant claims, as dissatisfied claimants would make a claim for costs if those offered were not in line with the guidelines. The guidelines could be constructed from data on existing decisions on costs by OLCA, based on statistical analysis of mean costs allowed for differing types of claims by case severity, complexity, and value. This would then imply a similar level of cost recoveries as at present, but with less litigation over contentious costs (i.e., the “costs of costs” would be reduced). If the current level of cost recoveries is in practice non-indemnifying (i.e., solicitors are receiving less than the reasonable costs incurred), then solicitors must be obtaining their unrecovered costs from the claimants’ damages, and this would presumably continue at the same level overall. However, it is important to bear in mind that any new guidelines based on a statistical analysis of mean cost recoveries will imply some losers and some winners by comparison with the status quo. Some types of cases could see higher cost recoveries than before, some lower.

This option would require the relevant body developing the guidelines to examine costs by case type, by severity, and by stage of settlement. While the evidence from the English experience and from the OLCA in Ireland could assist in inputting to this, significant work<sup>87</sup> would be required to develop Irish guidelines. It is not feasible in the context of the scope of the current study to quantify the extent of work which would be involved in developing such guidelines but this would not be a trivial exercise. (This would also apply to Options 2 and 3.) Additionally, guidelines would need to be updated on a regular basis.

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<sup>87</sup> It is not possible to estimate the work involved in this process as this will be based on a number of policy decisions that will have to be made. The level of granularity both in terms of types of cases and type of professional service will have a significant impact on the work involved.

## Option 2 (Kelly Review)

**Table 5.3: Summary of Kelly Option 2 – Table of maximum costs prescribed by a new Litigation Court Committee which could be derogated from in exceptional circumstances**

An analysis of this option was presented in the Kelly Report. The merits of this option were identified in the Kelly Report by minority group members. A key issue would be to ensure that any maximum level set did not result in all costs rising to the maximum level or the restriction of competition.

### Model Characteristics:

A mechanism for prescribing the maximum levels of litigation costs chargeable, in the form of a table of costs, could be introduced similar to Option 1. The key difference would be that the cost parameters would be binding. This would effectively extend the model used in the Irish District Court to be applicable to Circuit and Higher Court cases.

## Option 3

**Table 5.4: Summary of Option 3 - Non-binding guidelines on costs but with significantly enhanced transparency measures and other incentives to reduce costs.**

This option would be very different from simply setting a table of non-binding costs which could be ignored by the legal profession. Critically, a requirement would be that all clients would be informed, in writing prior to appointment, of these costs **and** the factors, if any, which could lead to any divergence from the guidelines. There would also, under this option, be a requirement for legal professionals to submit details to the OLCA of any divergence in costs from the guidelines and an annual publication of such cases would enhance transparency of the impact of the implementation of the guidelines. This would also provide an evidence base subsequently to consider other measures if it was deemed appropriate.

### Model Characteristics:

Non-binding guidelines on costs would be set as per Option 1. This revised option identified would, however, include very significantly enhanced transparency measures and other strong incentives to reduce costs. Under this alternative option, all clients would be informed in writing of these detailed costs prior to appointment,<sup>88</sup> and the factors which could lead to any divergence from the guidelines. A written explanation of the reasons why any divergence from the guidelines would also be provided at the earliest possible date and prior to the invoicing of costs if the guidelines were not applied. In addition, legal practices would provide details of cases where costs diverged from the guidelines to the Office of the Legal Costs Adjudicator. The OLCA would publish an annual report documenting all such cases. The increased transparency would help consumers make more informed decisions when choosing a legal practitioner. It could also potentially facilitate practitioners who wished to gain a

<sup>88</sup> Clients should also be informed during the case of any cost changes that diverge from the guidelines and a rationale for these

competitive advantage by offering costs below the guidelines or by providing certainty that there would be no exceptions to the guideline costs.

This option would significantly extend the existing rules in relation to cost disclosures as enshrined in Section 150 of the Legal Services Regulation Act 2015 (“the 2015 Act”). In terms of enhanced transparency measures, the cost disclosures would be published by the OLCA to improve customer access to information on the levels of charges in the wider market for litigation services.

#### Existing rules in relation to cost disclosures:

Section 150 of the 2015 Act strengthened the statutory obligation concerning disclosure in respect of charges for legal costs which previously had only applied to solicitors and extends that obligation to barristers. A legal practitioner is required to:

- Provide to the client a written notice in clear, easily understood language disclosing the legal costs that will be incurred in relation to the matter concerned; or
- If not reasonably practicable to disclose the legal costs at that time, set out the basis on which the legal costs are to be calculated and, provide the notice aforementioned as soon as may be after it becomes practicable to do so.

A legal practitioner must, where s/he becomes aware of any other factor that would increase the legal costs likely to be incurred significantly beyond that disclosed or indicated, provide the client concerned with a new notice as soon as possible.<sup>89</sup>

A legal practitioner may not engage a practising barrister, expert witness, or provider of any other service without first, to the extent practicable:

- Ascertaining the likely cost or basis of costs of engaging the person;
- Providing the client with that information; and
- Satisfying herself/himself of the client’s agreement to engaging the person.

The notice must, save in specified circumstances, allow for a “cooling off” period for the client.

Where a charge for a matter or item is not included in a Section 150 notice, the charge may not be allowed on a later adjudication of legal costs unless the Legal Costs Adjudicator considers that to disallow the matter or item would create an injustice between the parties.

However, the existing rules only require them to outline the basis for the costs and do not require the type of information included in detailed non-binding guidelines of costs.

The new option involving the development of guidelines on costs but with significant additional measures on transparency and incentive mechanisms would help address the information gaps

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<sup>89</sup> The Consultancy team also believes that such changes should also be reported to the OLCA including the original and additional litigation costs.



faced by both consumers and policymakers. It would be important that the information which is gathered would include the following:

- Detailed data on the extent to which costs elements varied from the guidelines;
- Reasons for any variance;
- What percentage of cases had costs which varied from the guidelines;
- Distribution of cost variance from the guidelines. For example, for what percentage of costs where guidelines were not followed were costs in excess of 5%, 10%, 20% or higher?

The published information would greatly enhance consumer awareness of the cost of litigation and provide a basis for policymakers to decide on the need for any additional reforms. The publication of this information would also act as an incentive for the legal profession to apply the guidelines where feasible.

## Option 4

**Table 5.5: Summary of Option 4 - Binding Maximum Costs but only for Non-Complex Personal Injury Cases below a €30,000 Settlement Level**

This option would involve prescribed binding maximum costs for non-complex personal injury cases below a €30,000 settlement level. This would be similar to the FRC option that has been in operation in England for non-complex PI cases up to an award value of £25,000.

### Model Characteristics:

This is similar to Option 2 but would only be applied to the large volume, non-complex PI cases. This could be a first step in any reform process and would provide the evidence to inform policymakers of whether any further extension was warranted. There is likely to be greater data availability in terms of statistically reliable estimates of mean costs for non-complex PI cases than if binding controls were applied to all services. Data reliability to set binding guidelines becomes more difficult with high value, complex claims because of a reduction in sample sizes and differences in the levels and nature of the work involved. This is similar to the model that has been implemented in England and preliminary evidence indicates that it has had some impact on reducing legal costs. An issue is that it would only apply to personal injury cases of a certain size. The UK Government analysis of fixed recoverable costs was published in 2021. The report suggested that research by Fenn and Rickman (2019) showed that the Jackson Reforms (including fixed recoverable costs for personal injury cases up to £25,000) had reduced costs. However, Fenn and Rickman explicitly excluded cases subject to FRC and their findings therefore related to other elements of reform.

As there is a schedule of costs already applied in Irish District Court cases, what is most relevant to this project are cases in the Circuit Court and High Court. Broken out by jurisdiction, personal injury cases accounted for 30% of High Court Cases and 28% of Circuit Court cases (See Table 5.6.). These exclude Supreme Court and Court of Appeal cases which represent a minority of cases. Even these numbers may understate the significance of personal injury cases, as many may be settled prior to initiation of court proceedings.

**Table 5.6: Civil Business by Jurisdiction – Incoming, 2021**

|                               | <b>Total</b> | <b>Personal Injury Incl.<br/>medical negligence</b> | <b>% Personal Injury Incl.<br/>medical negligence</b> |
|-------------------------------|--------------|---|---|
| Circuit Court                 | 30,938       | 8,856   | 28%   |
| High Court                    | 17,121       | 5,145   | 30%   |
| <i>Source: Courts Service</i> |              |   |   |

## 6 Multi-Criteria Assessment of Options

### 6.1 Introduction

In this section, Indecon considers the impact of each of the proposed options and presents our multi-criteria analysis. Each option is evaluated in a formal multi-analysis framework. The analytical approach benefits from detailed data analysis, stakeholder engagement and extensive new primary research. The material identifies the views of stakeholders on specific aspects of the different options. Stakeholder views differ significantly, which also reflects the findings of the Kelly Review Group. The approach to this new primary research was detailed in Section 1.3.

In this section we consider the independent assessment by Indecon on the impact of the options on key objectives. A multi-criteria analysis has been applied and the impact of the modelling identified.

In assessing the options against the multi-criteria objectives set, it is useful to review some of the key features of the four options, particularly the two new alternative options identified by the Indecon Review Team. The first two options which for convenience we are calling non-binding guidelines and binding guidelines, represent the two options considered in the Kelly Report. The Kelly Report commented on the extent to which similar approaches to these options had been implemented in other countries and their impact. An update on this has been included in an early chapter of this report. The non-binding guidelines would enhance certainty and the transparency of legal costs but by not as much as binding guidelines. The binding guidelines would enhance certainty on costs but would have other implications for risks to consumer determinant in terms of competition and the quality of services which are considered in this chapter.

As the two Kelly Report options have been subjected previously to detailed review and their characteristics are well known, it is particularly useful to review the features of the two new options. In relation to non-binding guidelines, with additional transparency measures, this has been designed to address the gaps in information faced by consumers of legal services. This would require legal practitioners to highlight the guidelines to parties prior to being appointed and to explicitly indicate in writing in advance if there are any circumstances where the guidelines on costs may differ from the final estimates.

In addition, legal practitioners would be required to provide a written explanation to the parties prior to invoicing if there were any divergences from the guidelines which would result in an increase in costs and to provide an explanation for such a divergence. The Competition and Consumer Protection Commission (CCPC) has highlighted the importance of the timing of providing this information to consumers. Indecon believes this should be provided at the earliest possible date and the reasons for the divergence identified. This would enable consumers to make informed decisions. This could also assist consumers in deciding if a case should be made to the Office of the Legal Cost Adjudicator to arbitrate on the validity of the explanations provided and the merits or otherwise for the cost divergence.

In addition, under this option there would be a requirement on legal practitioners to notify the Office of the Legal Cost Adjudicator on the details of all cases where there was a divergence from the guidelines and the explanation for this. The OLCA would subsequently produce an annual report documenting each case where this applied. Indecon accepts that this would involve an administrative cost and ultimately all such costs are paid by consumers or wider society. However, it

would provide an incentive for practitioners to follow the guidelines unless there were valid reasons not to. Legal practitioners who provided a guarantee in advance that the guidelines would be followed may be able to gain a competitive advantage and hence strengthen competition. The information provided to OLCA would provide the evidence base for policymakers on the extent to which the guidelines are being followed or not, and whether any additional regulatory measures were required.

In relation to the fourth option, namely binding maximum guidelines for non-complex personal injury cases below a certain level, this option is similar to the approach previously implemented in the UK. It would have the advantages of providing a pilot scheme to assess the implications of binding guidelines. A disadvantage is that it would apply to a minority of cases.

## 6.2 Overview of Objectives

As part of our analytical framework, we have examined the different options under 10 different key policy objectives. These include an assessment of how the options would be likely to impact on the objectives which are presented below in no particular order. The importance of each of the objectives is determined by the weighting system which is discussed below.

- **Objective 1:** Enhance competition
- **Objective 2:** Reduce the cost of litigation
- **Objective 3:** Provide certainty on litigation costs
- **Objective 4:** Increase the transparency of litigation costs
- **Objective 5:** Improve access to justice for all citizens
- **Objective 6:** Maintain and improve quality of services
- **Objective 7:** Reduce the time involved in litigation
- **Objective 8:** Improve the effectiveness/efficiency of the legal system
- **Objective 9:** Reduce pressure on the courts system
- **Objective 10:** Ease of implementation of reform

Each of the options are evaluated in the multi-criteria assessment (MCA) by allocating scores of how the options rate against the objectives. This enables the underlying judgements to be explicit. A weighting system has also been utilised to take account of assumptions on the relative importance of the different objectives. We have also considered the impact of assuming each of the criteria are of equal weight.

The scoring for the options is based on a rating of 0-5 and represent the independent opinion of the Indecon Review Team. A score of 5 would indicate that an option has a large impact on an objective while a score of 0 indicates that an option would have no impact on an objective. This, where feasible, has been informed by the empirical analysis of legal costs in Ireland, as well as the review of international experience. It has also been informed by new empirical survey evidence and by the extensive stakeholder submissions made to the Indecon Review Team. There is, however, inevitably a judgement required in determining the appropriate scores and the estimates are based on the

balance of evidence provided. In our analysis we also model the impact on alternative scoring of the cost-related objectives as it was evident from stakeholder consultations that there were different views expressed on this issue. These differences of views may, in part, have led to differences in the conclusions of the members of the Kelly Review Group.

### 6.3 Impact of Options on Enhancing Competition

A very insightful submission was made to the Indecon Review Team by the Competition and Consumer Protection Commission (CCPC) on the different options from a competition perspective. Some extracts from the CCPC on the opinions are presented in the next box. The full submission merits careful consideration by policymakers and, *inter alia*, highlights the importance of how the implementation of different options is managed and the potential impacts from a competition perspective. The CCPC views reinforce Indecon's opinions on the importance of transparency of costs in any reform options.

| Box 6.1: Extracts from CCPC Submission   |
|--|
| <i>"The CCPC strongly recommends that the impact of the proposed options on competition should be key criteria of the analysis."</i>   |
| <i>"The CCPC is of the view that any option will have to address the information asymmetry which will be present in almost all client – lawyer interactions."</i>  |
| <i>"Transparency in legal fees can bring many benefits to recipients of legal services including facilitating shopping around and reducing the information gap ...both of which promote competition. Price transparency also enables parties to make more informed decisions."</i>   |
| <i>"Collusive behaviour including tactic collusion where service providers charge the same price ... is usually easier where participants can pick a simple and clear focal point as the price"... The CCPC cautions that binding maximum costs tables present a greater risk of detriment caused by collusive behaviour than non-binding guidelines."</i> |
| <i>"Option 1 (non-binding guidelines) ... does not constitute a significant change in the existing process regarding cost disputes."</i>   |
| <i>"Option 1 because of its non-binding nature, may mislead and confuse customers."</i>  |
| <i>"The additional transparency measures in Option 3 significantly enhance Option 1 and should be adopted in preference to Option 1" (Subject to 'other CCPC observations')."</i>  |
| <i>"The introduction of binding maximum costs as proposed in Option 4 could be used to inform whether and how binding costs or indeed other price regulation measures can be applied to more complex actions."</i>   |
| <b>Source: CCPC Submission to the Indecon Review Team</b>  |

The Irish Competition Authority, now the CCPC, previously found that there was "limited information available to consumers of legal services about fees and costs prior to engaging the services of a lawyer. The lack of transparency in the price of legal services makes it difficult for consumers to shop around for legal services. If consumers cannot compare the prices for legal services there is little incentive for lawyers to compete on price."<sup>90</sup> Improvements have been made since but there are gaps in the transparency of information on costs and other aspects of the services provided in the

<sup>90</sup> Competition in Professional Services, Solicitors and Barristers, The Competition Authority, 2006, p. vii.

context of litigation. In the UK, the Competition and Markets Authority also concluded that consumers of legal services “generally lack the expertise and information they need to find their way around the legal services sector and to engage with providers. Consumers find it hard to make informed choices because there is little transparency about price services and quality.”<sup>91</sup> It has been pointed out that: “information plays a direct role in driving competition as consumers need to have access to accurate information on price, service and quality to make informed decisions. If this competitive process works well it can lead, for example, to lower prices, higher quality, and greater innovation...Studies over a number of years have shown that knowledge and awareness of the legal services sector is low.”<sup>92</sup>

In our analysis of the options in terms of their impact on enhancing competition, Indecon’s assessment is that binding maximum costs, Option 2, would be the least beneficial from a competition perspective. This is because of the risk of tacit collusive behaviour whereby some providers would charge the same prices, i.e., prices in line with the binding table of charges. In Indecon’s opinion this judgement is aligned with the assessment of the Competition Consumer Protection Commission who cautioned that binding maximum tables present a greater risk of detriment caused by collective behaviour than by non-binding guidelines. Hence a zero score is provided for binding maximum charges on this criterion. A very low rating on competition grounds is also given to binding maximum charges for non-complex personal injury cases. However, as this would only be confined to certain cases, a slightly higher rating of 1 is provided. For Option 1, i.e., non-binding table of charges, we allocated a score of 1 on competition grounds. This relatively low rating is because we believe there would be a danger that such non-binding charges would not impact pricing behaviour and would not constitute a significant change and could mislead consumers. This is particularly the case given the level of information asymmetry which exists in client- lawyer interactions. A score of 5 has been provided for Option 3. The high rating for non-binding guidelines with additional transparency measures is, however, dependent on ensuring that effective transparency measures are implemented in a way which reduces information asymmetry. A summary of the scores is shown in Table 6.1.

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<sup>91</sup> Competition and Markets Authority. Legal Services Market Study, Final Report, 15 December 2016.

<sup>92</sup> Competition and Markets Authority, Legal Services Market Study (2016), op cited page 8.

| Table 6.1: Indecon Ranking of Reform Options on Enhancing Competition – Scoring and Rationale |           |   |                            |  |  |
|---|-----------|---|----------------------------|--|--|
| Policy Objectives   |           | Option Scores (0-5)   |                            |  |  |
|   |           | Non-binding Guidelines  | Binding Maximum Guidelines | Non-binding Guidelines (with additional transparency measures) | Binding Maximum Guidelines (only for non-complex personal injury below €30,000 settlement) |
| Enhancing Competition   | Score     | 1   | 0                          | 5  | 1  |
|   | Rationale | Price Transparency is critical to enhancing competition and Option 3 has therefore been given the highest rating on this criterion. Binding maximum guidelines have the greatest risk of price collusion and this has been taken into account in our scoring. |                            |  |  |
| Source: Indecon   |           |   |                            |  |  |

## 6.4 Impact of Options on the Cost of Litigation

The research completed for this review has indicated that there is no one database that provides a robust and complete evidence base to assess the current levels of litigation costs in Ireland. However, there are a number of different sources that provide various insights into levels of costs, and important research has been completed by the Central Bank which would not have been available to the Kelly Review Group. Indecon would also point out that the costs of litigation will be influenced by whether the measures enhance competition as discussed above. In considering the impact on the cost of litigation, it is useful to analyse the potential costs under the various options using a number of different assumptions. This shows that the impact on litigation costs will depend on the levels at which any guidelines are set. For example, if guidelines are set at the current average or mean costs, there would be a significant reduction in litigation costs for cases where costs are above the mean, but costs would rise to the mean for an even higher number of cases. This highlights the complexity involved in setting price guidelines. Evidence (see Table 6.2) from the ILCA database shows that the legal costs associated with the majority of cases are below the mean.

**Table 6.2: Scenario Analysis of Impact of Legal Reforms (ILCA data)**

|                       | Scenario Description   | Professional Fee | Senior Counsel Fee | Junior Counsel Fee | % of Cases Impacted |
|-----------------------|--|------------------|--------------------|--------------------|---------------------|
| Change in total costs | Scenario 1 – All fees above the mean are reduced to the mean | -44%             | -37%               | -47%               | 26%                 |
|                       | Scenario 2 – all fees below the mean increase to the mean    | 44%              | 37%                | 47%                | 74%                 |

**Note:** If the fees were reduced to the median, the % reductions for Scenario 1 would increase as the median cost is lower than the mean cost.

**Source:** Indecon analysis of ILCA data

The potential impact for guidelines depending on the nature of the reforms to influence the cost of litigation can be informed by evidence on what happened cases which went before the Office of the Legal Costs Adjudicator (OLCA). This shows that on average, a significant percentage of costs were disallowed. However, caution is needed in interpreting the data as only cases where there is a dispute that costs are too high would come before the OLCA and therefore could be seen as representative. The Office of the Legal Costs Adjudicator typically rules on around 100 cases per year. The assessment of costs is based on application of the principles set out in Schedule 1 of the Legal Service Regulation Act 2015. These rules typically set the precedent on the levels of litigation costs that will be allowable in other comparable litigation cases. Often cases before the OLCA will be settled based on a prior judgement.

**Table 6.3: Impact of OLCA Adjudication (2019-2021)**

| Type of Case                     | No. of Cases | Average Amount Allowed (€) | % Disallowed |
|----------------------------------|--------------|----------------------------|--------------|
| Road Traffic Accidents           | 76           | 51,509                     | 30%          |
| Other                            | 32           | 44,640                     | 32%          |
| Employer and Occupiers Liability | 39           | 41,619                     | 33%          |
| Medical Negligence               | 17           | 110,225                    | 42%          |
| Contract                         | 21           | 65,547                     | 34%          |
| Appeal - Court of Appeal         | 22           | 55,193                     | 41%          |
| Judicial Review                  | 19           | 88,382                     | 37%          |
| Probate Matters                  | 12           | 29,809                     | 17%          |
| Security for Costs               | 9            | 44,399                     | 29%          |



|   |    |         |     |
|---|----|---------|-----|
| Commercial Court  | 10 | 544,038 | 35% |
| Motions Interlocutory   | 39 | 26,126  | 32% |
| Public Liability  | 14 | 106,564 | 29% |
| Appeal - Supreme Court  | 8  | 86,647  | 36% |
| Companies Act   | 10 | 10,320  | 27% |
| <b>Source: Indecon Analysis of OLCA Reports 2019, 2020 and 2021</b> |    |         |     |

A number of useful submissions were made to the Indecon Review Team by various interested stakeholders on the possible impact of each option on the cost of litigations. Some relevant extracts from these submissions are presented in this section. In relation to the possible impact of non-binding guidelines (Kelly Review Majority view), views of various stakeholders are shown below. These highlight the opposing views of the stakeholders with an interest in the insurance sector and the legal profession. All submissions to this review, as received by the Indecon Review Team, are included in the annexes.

| <b>Box 6.2: Stakeholders' Views on Impact of Non-Binding Controls on Costs</b>   |  |
|--|--|
| <b>Corporate Consumers and Wider Stakeholders</b>  |  |
| <i>"Non-binding controls do not have to be applied by the very nature of the controls, so this means that it is still open for costs to escalate. If legal costs are capped it is likely there will be an overall increase in costs to counteract the implementation of the binding guidelines."</i>   |  |
| <i>We believe that the establishment of non-binding guidelines on legal costs will have no impact: "Likely to be similar to current position."</i>   |  |
| <i>"Non-binding guidelines will be freely ignored by the courts and lawyers in the same way as the Book of Quantum and PIGC guidelines can be ignored now. Their introduction would be a waste of time."</i>   |  |
| <i>"It is evident from the review of both models in the Kelly Review Group report on the Administration of Civil Justice that there are more advantages and less disadvantages to implementing non-binding guidelines as opposed to a table of maximum costs" – EY Report on Legal Costs Commissioned by the Law Society and Bar Council</i> |  |
| <i>"While acknowledging that the proposed non-binding guidelines may improve transparency in costs and offer considerations for adjudicators, non-binding guidelines cannot guarantee the much needed reduction in legal expenses." – Insurance Ireland</i>  |  |
| <i>"The view of the Alliance is that non-binding guidelines would be a waste of time, serving to give a sense of progress while facilitating the opposite and adding significant delays to the process of reforming our access to justice" – Alliance for Insurance Reform</i>   |  |
| <b>Legal Practitioners</b>   |  |
| <i>"Not in the interest of overall efficiency of civil justice. Will favour the insurance companies because the guidelines will never be revised. The actual costs of the case must be paid by the client to their own lawyer. Scales only relate to the costs paid by the losing party."</i>  |  |
| <b>Source: Indecon Stakeholder Consultation</b>  |  |

In relation to the introduction of binding maximum costs (Kelly Review Minority view), there is a similar but opposite dichotomy of views in relation to the impact of binding maximum guidelines. Corporate consumers are typically of the views that the imposition of maximum binding guidelines will reduce the overall cost of litigation but highlight the potential unintended consequences of a

general move for all legal practitioners to charge at the maximum level. This point was also noted as a potential unintended consequence by Insurance Ireland in their submission to the Indecon Review Team.

| Box 6.3: Stakeholders' Views on Impact of Binding Maximum Guidelines on Costs  |  |
|--|--|
| Corporate Consumers and Wider Stakeholders   |  |
| <p><i>"It would depend on what the guidelines say. If they allow for high costs, then this may become a "target" leading to increased costs. But if they are low/reasonable then this would be beneficial."</i></p> <p><i>"A maximum mandatory cost table will make a huge difference in controlling legal costs. It will benefit competitiveness and assist doing business in Ireland."</i></p> <p><i>"We believe that "setting a table of maximum mandatory contentious costs in legal proceedings in Ireland" will have a positive impact as follows: Overall costs - Likely to be lower. Overall number of court cases - Likely to be lower. Percentage of cases resolved/settled prior to court -is likely to be higher than current position"</i></p> <p><i>"Setting a table of maximum costs would remove fee-seeking behaviour from the courts, would confine fee-earners to prioritise what had to be dealt with in court, and would also allow more defendant parties to potentially defend cases"</i></p> |  |
| Legal Practitioners  |  |
| <p><i>"Such a table would not cater for the really complicated cases where the work done might well outweigh the settlement value resulting in unfairness as to the level of professional fee."</i></p> <p><i>"The current position is the most efficient. The option of a table of maximum mandatory contentious costs will increase costs."</i></p> <p><i>"Strict maximum figures may make practitioners wary of taking on more complex cases. Whereas guidelines would make life easier for sole practitioners in charging fees and avoid time wasted negotiating costs with insurers."</i></p>   |  |
| Source: Indecon Stakeholder Consultation   |  |

Further views on the potential impact of binding maximum guidelines from the Alliance for Insurance Reform, Insurance Ireland and IBEC are shown in Box 6.4.

### Box 6.5: Stakeholder Views on Binding Maximum Guidelines

*"[We] would urge the Government to implement binding controls on legal fees in the Circuit and High Courts" – Alliance for Insurance Reform*

*"Insurance Ireland supports the views of the minority group. We fundamentally agree that procedural reforms alone would not suffice in allowing for predictability and competitiveness of legal costs. The majority view does not go far enough in its measures to effect real change to rising litigation costs and ultimately access to justice" – Insurance Ireland*

*"We do have concerns that a maximum figure could become a de minimis and, while the proposal would include the ability for parties to negotiate lower costs than those set out in the table, there is a concern that all claims could drift towards this maximum value. Insurance Ireland also recognise the potential danger of an environment developing where injury inflation could be promoted in order to step into the next level of fees" – Insurance Ireland*

*"IBEC would not rule this out, but we would caution against proceeding too quickly. Perhaps a limited scale pilot scheme could be run in the first instance" – IBEC*

**Source: Indecon Stakeholder Consultation**

The third option considered in this review relates to the creation of non-binding guidelines with enhanced transparency measures. Some potential benefits of this option, as identified by stakeholders, are shown in the box below.

### Box 6.6: Stakeholder Views of Non-Binding Controls with Enhanced Transparency

*"IBEC finds merit in this suggestion but cautions that careful design would be essential. If the related paperwork were viewed by practitioners as a move towards fixed cost budgeting, it could encourage unnecessary frontloading of legal work" – IBEC*

*"Price transparency enables parties... to make more informed decisions." – CCPC*

*"If any mechanism were to be introduced in an effort to control litigation costs, it should take the form of non-binding guidelines only" – The Bar Council of Ireland and the Law Society*

**Source: Indecon Stakeholder Consultation**

The final option that was analysed in detail by the Indecon Review Team relates to the imposition of maximum cost guidelines on specific types of cases below a certain award threshold. This is similar to the system that was introduced in England and Wales following the Jackson Review (2010). The views of various stakeholders in relation to this potential option are shown overleaf. Some stakeholders have highlighted some of the potential benefits of such an approach which targets cases that represent a relatively large amount of litigation cases that come before the civil justice system.

### Box 6.7: Stakeholders' Views on Impact of Binding Maximum Controls for Non-Complex PI cases on Costs

#### Corporate Consumers and Wider Stakeholders

*"It depends what the table says, but at this level of claim, assuming the costs would be low/reasonable, then this could have a significant positive impact."*

*"In this category having costs set to a maximum would drive the parties to reach a settlement as both sides would know their exposure. More settlements are likely, but I do think the amount of the costs would be higher than current levels."*

*"Maximum costs limits will be hugely helpful at controlling legal costs."*

#### Legal Practitioners

*"If the jurisdiction of the District Court in personal injuries actions was increased, then setting such maximum levels would introduce efficiencies. It may also discourage the issuing of proceedings in the Circuit Court, when proceedings should have been introduced in the District Court."*

*"We should be focusing on the minimum levels not maximum levels."*

*"If maximum figures were correctly set, costs would remain the same, but the system would be more efficient and the clarity on costs would assist early settlement. Any reduction in legal fees for this kind of work (the majority of PI claims) would be undesirable as due to court rules and front-loading of work required this kind of litigation is barely worth undertaking for barristers, and any reduction in fees would result in difficulty for litigants to obtain representation."*

**Source: Indecon Stakeholder Consultation**

Further views on this option from IBEC, the Alliance for Insurance Reform and the representative bodies for the legal profession are presented in the box overleaf.

### Box 6.8 :Stakeholders' Views on Impact of Binding Maximum Guidelines for Non-Complex PI Cases on Costs

*"IBEC believes this idea merits serious and urgent consideration...we would propose that the eligibility limit for fixed or capped fees should apply to rejected PIAB awards with general damages settlement values up to €35,000 so as to capture most of the PL cases and a good proportion of EL cases" – IBEC*

*"This is a partial measure and will not be as effective as Option 2 (Table of Maximum Costs). Additionally, it risks causing confusion and ultimately being unworkable unless the settlement levels were set to match the civil jurisdiction of the Circuit Court, limited to compensation claims not exceeding €75,000, or €60,000 in a claim for damages for personal injuries; and for actions involving real property with a market value of less than €3 million" –Alliance for Insurance Reform*

*"The actual work involved in any case may be vastly different to another of the same type being heard in the same court. In such circumstances, it might not be realistic to have a 'one price fits all' fee"*

**– The Bar Council of Ireland and the Law Society**

*"Such a table of maximum costs would require regular independent review and updates to ensure it did not lead to inequalities ... our experience with the District Court scale of fees is that ... despite a requirement to review the fees at regular intervals, no such reviews have taken place despite repeated requests from the professional bodies" – The Bar Council of Ireland and the Law Society*

**Source: Indecon Stakeholder Consultation**

Binding maximum costs seen by a larger number of corporate consumers as having an impact on costs but a majority also felt that non-binding controls could have an impact (see Table 6.4). Our survey of large corporate consumers also showed that the majority of respondents indicated that each of the four options could lead to a reduction in the overall cost of litigation. Wider stakeholders were strongly of the view that binding maximum guidelines were the only viable option to reduce the overall level of litigation costs. The majority of Legal practitioners who responded to the survey indicated that each option which involved non-binding guidelines would not reduce litigation costs. Because of the overall scale of the sample which involved a total of 39 responses, care should be taken in interpreting the precise percentages. However, they are useful as one input to inform the overall assessment.

| Table 6.4: Survey Analysis of Impact of Reforms on Costs   |                        |     |    |                            |     |      |  |     |    |  |     |     |
|--|------------------------|-----|----|----------------------------|-----|------|--|-----|----|--|-----|-----|
| Potential Benefits   | Non-binding Guidelines |     |    | Binding Maximum Guidelines |     |      | Non-binding Guidelines (with additional transparency measures) |     |    | Binding Maximum Guidelines (only for non-complex personal injury below €30,000 settlement) |     |     |
|  | CC                     | LP  | WS | CC                         | LP  | WS   | CC   | LP  | WS | CC   | LP  | WS  |
| % of respondents who indicated that Overall costs would be lower   | 58%                    | 25% | 0% | 67%                        | 55% | 100% | 58%  | 21% | 0% | 75%  | 35% | 43% |
| <b>Source: Stakeholder Responses to Indecon Survey</b><br><i>Note: CC=Corporate Consumers; LP=Legal Practitioners; WS=Wider Stakeholders</i> |                        |     |    |                            |     |      |  |     |    |  |     |     |

In our analysis of the options in terms of their impact on the cost of litigation, Indecon believes that Option 2, namely binding maximum costs would be the most beneficial but this would be critically determined by the level at which any guidelines would be set. There is potential for the reduction associated with binding maximum guidelines to be significantly reduced, or even reversed, if all legal practitioners decide to charge at this maximum level, or if the guidelines are set at too high a level. This could mean an increase in litigation costs for a large number of litigants. The other Kelly option (non-binding guidelines) is believed to, not surprisingly, change the current position and is therefore allocated a low score of 2 for the lowest score for impact on the cost of litigation. This is because under non-binding guidelines many practitioners would have little incentive to deviate from current litigation costing models. A higher score of 4 has been provided for Option 3. The higher rating for non-binding guidelines with additional transparency measures is dependent on ensuring that effective transparency measures are implemented in a way which reduces information asymmetry. The Indecon Review Team believes that the additional transparency measures could incentivise legal practitioners to offer reduced costs. These reduced costs could be in response to market pressures or due to the added scrutiny and additional reporting requirements concerning costs that are in excess of the non-binding guidelines. Option 4 is given a score of 4 which reflects the Indecon team's view that this option could reduce litigation costs for the selected type of case. The score is lower than Option 2 due to its application to a subset of the litigation market. However, this subset of the market is likely to be less complex and may offer a useful starting point in the move towards maximum binding costs. Again, this would be dependent on what level of guidelines were set at and that lower cost providers did not use as a signal to increase costs.

The respective scores, along with a summary of the overall rationale, for this policy objective are shown in Table 6.5.

| Table 6.5: Indecon Ranking of Reform Options on Costs – Scoring and Rationale |           |   |                            |  |  |
|---|-----------|---|----------------------------|--|--|
| Policy Objectives   |           | Option Scores (0-5)   |                            |  |  |
|   |           | Non-binding Guidelines  | Binding Maximum Guidelines | Non-binding Guidelines (with additional transparency measures) | Binding Maximum Guidelines (only for non-complex personal injury below €30,000 settlement) |
| Cost  | Score     | 2   | 5                          | 4  | 4  |
|   | Rationale | Option 2 receives a score of 5 since it could potentially have the biggest impact on costs assuming guidelines are set below the current average levels and assuming that it was feasible to introduce measures to prevent tacit collusion. However, it must be noted that each option has the potential to increase costs if the table of costs are set too high and they become the de facto minimum prices. Options 3 and 4 receive a score of 4 as both potentially could have higher impacts on reducing costs compared to Option 1. |                            |  |  |
| Source: Indecon   |           |   |                            |  |  |

## 6.5 Impact on Certainty of Legal Costs

An important policy objective of any reform relates to its impact on the certainty of litigation costs. This is needed to better inform consumers. The option which would likely have the greatest impact on certainty is binding guidelines. The views of stakeholders on the impact of maximum binding guidelines are set out in the box overleaf. The views of the legal profession suggests that binding guidelines may provide certainty but would be difficult to apply to complicated cases.

| <b>Box 6.11: Stakeholders' Views on Maximum Binding Guidelines on Certainty of Legal Costs of doing business in Ireland</b>  |  |
|--|--|
| <b>Corporate Consumer and Wider Stakeholders</b>   |  |
| <p><i>"Should give clarity and certainty to the litigant"</i></p> <p><i>"Some cases are not settled as the costs being offered in a settlement are low. If there were a table of maximum mandator contentious costs, then this could be factored into the settlement and more likely to resolve an issue without having to proceed to court."</i></p> <p><i>"A maximum mandatory cost table will make a huge difference in controlling legal costs. It will benefit competitiveness and assist doing business in Ireland."</i></p> <p><i>"Setting a table of maximum costs would remove fee-seeking behaviour from the courts, would confine fee-earners to prioritise what had to be dealt with in court, and would also allow more defendant parties to potentially defend cases."</i></p> |  |
| <b>Legal Practitioners</b>   |  |
| <p><i>"A table would not cater for the really complicated cases where the work done might well outweigh the settlement value resulting in unfairness as to the level of professional fee."</i></p> <p><i>"It would remove the process of adjudication and save time in negotiating costs after proceedings are resolved. It would also provide significant transparency for the general public."</i></p>   |  |
| <b>Views of The Bar Council of Ireland and the Law Society</b>   |  |
| <p><i>"The actual work involved in any case may be vastly different to another of the same type being heard in the same court. In such circumstances, it might not be realistic to have a 'one price fits all' fee" "Such a table of maximum costs would require regular independent review and updates to ensure it did not lead to inequalities ... our experience with the District Court scale of fees is that ... despite a requirement to review the fees at regular intervals, no such reviews have taken place despite repeated requests from the professional bodies."</i></p>  |  |
| <b>Source: Indecon Stakeholder Consultations</b>   |  |

Table 6.6 outlines the views of respondents to Indecon's survey in relation to the impact of each proposed option on the certainty of litigation costs. Option 2 is seen by each of the different groups as the option offers the greatest impact on certainty of litigation costs. The majority of corporate consumers believe that non-binding guidelines with additional transparency measures can achieve an improvement in the certainty of litigation costs. This is in contrast to non-binding guidelines as per the majority view in the Kelly Review.



| Table 6.6: Stakeholders' Views of Impact of Reforms on Certainty of Costs  |                                 |     |    |                       |     |      |  |     |    |  |     |     |
|--|---------------------------------|-----|----|-----------------------|-----|------|--|-----|----|--|-----|-----|
| Potential Benefits   | Non-binding Guidelines on Costs |     |    | Binding Maximum Costs |     |      | Non-binding Guidelines (with additional transparency measures) |     |    | Binding Maximum Guidelines (only for non-complex personal injury below €30,000 settlement) |     |     |
|  | CC                              | LP  | WS | CC                    | LP  | WS   | CC   | LP  | WS | CC   | LP  | WS  |
| % of respondents who indicated that the reform would lead to Improvement in the certainty of Litigation Costs                                | 45%                             | 47% | 0% | 75%                   | 47% | 100% | 64%  | 36% | 0% | 64%  | 64% | 29% |
| <b>Source: Stakeholder Survey Responses to Indecon</b><br><i>Note: CC=Corporate Consumers; LP=Legal Practitioners; WS=Wider Stakeholders</i> |                                 |     |    |                       |     |      |  |     |    |  |     |     |

Indecon's assessment of the likely impact of the options on the certainty costs of litigation are presented in the next table. We believe that Option 2 is likely to have the largest relative impact on the certainty of litigation costs. Hence a score of 5 is allocated to Option 2 (binding guidelines). We believe that non-binding guidelines will partially improve the certainty of litigation costs. However, as identified in our stakeholder consultation, there is a significant risk that non-binding guidelines will have little impact on the current market. A lower score of 3 has therefore been allocated to Option 1 in relation to its impact on the certainty of litigation costs. While this is the lowest score allocated to any option, a case could be made for applying an even lower score, but this would not change the overall ranking of the options in the MCA. A score of 4 has been provided for Option 3. The rationale for the higher score for Option 3 is that additional transparency measures would enhance certainty. Option 4 relates to non-complex personal injury cases. As discussed previously, these types of cases make up a significant share of the overall contentious litigation cases before the courts and binding guidelines for these cases are given a score of 4.

| Table 6.7: Indecon Ranking of Reform Options – Scoring and Rationale |           |   |                       |  |  |
|--|-----------|---|-----------------------|--|--|
| Policy Objectives  |           | Option Scores (0-5)   |                       |  |  |
|  |           | Non-binding Guidelines on Costs   | Binding Maximum Costs | Non-binding Guidelines (with additional transparency measures) | Binding Maximum Guidelines (only for non-complex personal injury below €30,000 settlement) |
| Certainty  | Score     | 3   | 5                     | 4  | 4  |
|  | Rationale | Binding controls have the greatest certainty on costs and non-binding guidelines without transparency measures the least impact. Option 4 has a lower score than Option 2 as it only relates to a specific subsection of contentious litigation cases |                       |  |  |
| Source: Indecon  |           |   |                       |  |  |

## 6.6 Impact on Transparency of Litigation Costs

A policy consideration of any reform in relation to litigation costs is how the reform impacts on transparency. The asymmetry of information between the consumer and providers of legal services is a potential market failure. Consumers are typically not well informed of the likely final costs associated with contentious litigation. Various stakeholders have highlighted the lack of transparency in relation to litigation costs as a concern for businesses and individuals involved with legal issues. All of the options identified would enhance transparency, but binding guidelines would potentially be one of the strongest reforms on this criterion. Option 3, which would incorporate specific additional transparency measures would also increase the transparency of litigation costs. Some of the views of interested stakeholders in relation to Option 3 are outlined in the box below. These highlight the importance of clear definitions in relation to any additional transparency measures. The legal profession also note the existing requirements under Section 150 of Legal Services Regulation Act 2015. While some stakeholders did not see how additional transparency measures would be defined, Indecon has identified a number of important components which would result in greatly enhanced transparency in Option 3, and which are designed to drive cost competitiveness in the market.

### Box 6.12: Stakeholders' Views on Non-Binding Guidelines with Enhanced Transparency on Transparency of Litigation Costs

#### Corporate Consumer and Wider Stakeholders

*"It depends on what is meant by transparency measures."*

*"Additional transparency measures" is meaningless without definition, and leaves in place the fact that such measures can be easily circumvented by a sympathetic judiciary." - ISME*

#### Legal Practitioners

*"With Section 150 letter requirements I cannot see how it would be more transparent, I think it could be a barrier to justice as less solicitors are going to want to work for such a close margin which will affect rural practices considerably."*

*"The current position is the most efficient. The option introducing non-binding guidelines with additional transparency measures will increase costs."*

**Source: Indecon Stakeholder Consultations**

Option 4 is also likely to provide additional transparency for cases as there will be a fixed maximum litigation cost associated with this option. As noted in the stakeholder views below, this would only refer to a subset of all contentious litigation cases.

### Box 6.13: Stakeholders' Views on Maximum Guidelines for Non-Complex Personal Injury Cases on Transparency of Litigation Costs

#### Corporate Consumers and Wider Stakeholders

*"It depends what the table says, but at this level of claim, assuming the costs would be low/reasonable, then this could have a significant positive impact."*

*"Could provide some clarity in certain cases."*

*"This is a partial measure and will not be as effective as Option 2 (Table of Maximum Costs). Additionally, it risks causing confusion and ultimately being unworkable unless the settlement levels were set to match the civil jurisdiction of the Circuit Court, limited to compensation claims not exceeding €75,000, or €60,000 in a claim for damages for personal injuries; and for actions involving real property with a market value of less than €3 million" – Alliance for Insurance Reform*

*"The actual work involved in any case may be vastly different to another of the same type being heard in the same court. In such circumstances, it might not be realistic to have a 'one price fits all' fee" – The Bar Council of Ireland and the Law Society*

*"This option would have the perverse outcome of encouraging all cases to become "complex" in the same way as damages are always sought at the maximum of a court's jurisdiction. That is why this option is not advisable, even though it appears reasonable." - ISME*

#### Legal Practitioners

*"If maximum figures were correctly set, costs would remain the same, but the system would be more efficient and the clarity on costs would assist early settlement. Any reduction in legal fees for this kind of work (the majority of PI claims) would be undesirable as due to court rules and front-loading of work required this kind of litigation is barely worth undertaking for barristers, and any reduction in fees would result in difficulty for litigants to obtain representation. "*

**Source: Indecon Stakeholder Consultations**

Table 6.8 outlines the views of respondents to Indecon's survey in relation to the impact of each proposed option on the transparency of litigation costs. Option 3 is viewed by corporate consumers as the option offers the greatest impact on the transparency of litigation costs. The majority of legal practitioners are of the opposite view. Binding maximum costs are seen by wider stakeholders as the best way to ensure price transparency. The survey suggests that corporate consumers believe that the application of additional measures to non-binding guidelines will have a larger impact on transparency than applying only non-binding guidelines (Kelly Review majority view). The wider stakeholder organisations included consumer representative organisations and organisations representing specific sectors such as childcare providers.

| Table 6.8: Stakeholders' Views of Impact of Reforms on Transparency of Costs   |                                 |     |    |                       |     |      |  |     |    |  |     |     |
|--|---------------------------------|-----|----|-----------------------|-----|------|--|-----|----|--|-----|-----|
| Potential Benefits   | Non-binding Guidelines on Costs |     |    | Binding Maximum Costs |     |      | Non-binding Guidelines (with additional transparency measures) |     |    | Binding Maximum Guidelines (only for non-complex personal injury below €30,000 settlement) |     |     |
|  | CC                              | LP  | WS | CC                    | LP  | WS   | CC   | LP  | WS | CC   | LP  | WS  |
| % of respondents who indicated that the option would lead to Improved Transparency of Litigation Costs                                       | 54%                             | 47% | 0% | 83%                   | 40% | 100% | 91%  | 36% | 0% | 82%  | 50% | 29% |
| <b>Source: Stakeholder Responses to Indecon Survey</b><br><i>Note: CC=Corporate Consumers; LP=Legal Practitioners; WS=Wider Stakeholders</i> |                                 |     |    |                       |     |      |  |     |    |  |     |     |

The scores that have been given to each of the options in relation to how they impact on the transparency of litigation costs are shown in Table 6.9. Indecon believes that each option is likely to have a positive impact on the transparency of litigation costs. Even if non-binding guidelines are ignored by legal practitioners, they will provide a useful guide to consumers on the average level of litigation costs. Such information does not exist under the current system.

Indecon's assessment of the impact of the options on transparency are presented in the next table. We believe that Options 2 and 3 are likely to have the largest relative impact on the transparency of litigation costs. Hence a score of 5 is allocated to these options. Similarly, we believe that non-binding guidelines could to some extent improve the transparency of litigation costs as it may provide evidence and guidance on the costs involved in a typical litigation case. A case could, however, be made for applying a lower score for Option 1 non-binding guidelines but this would not change the overall merits of the options. A score of 4 has been provided for Option 4 which reflects the fact that

this option only applies to a subset of cases. Thus, there would still be significant transparency issues relating to contentious litigation cases.

| Table 6.9: Indecon Ranking of Reform Options – Scoring and Rationale |           |  |                       |  |  |
|--|-----------|--|-----------------------|--|--|
| Policy Objectives  |           | Option Scores (0-5)  |                       |  |  |
|  |           | Non-binding Guidelines on Costs  | Binding Maximum Costs | Non-binding Guidelines (with additional transparency measures) | Binding Maximum Guidelines (only for non-complex personal injury below €30,000 settlement) |
| Transparency   | Score     | 4  | 5                     | 5  | 4  |
|  | Rationale | Non-binding guidelines may not be implemented and so would have the least impact on transparency of the options. However, each of the proposed options are likely to have a positive impact on transparency which reflects the relatively high scores for each option. |                       |  |  |
| Source: Indecon  |           |  |                       |  |  |

## 6.7 Impact of Options on Quality of Services

An important policy criterion relevant to any reform option is how it might affect the quality of service provided to consumers. The legal profession in Ireland offers a high-quality service to clients and it is important that this is maintained or ideally strengthened. This is reflected in the relatively low number of complaints that are made annually to the Legal Services Regulatory Authority (LSRA). The views of various stakeholders in relation to Quality of Service are outlined in the box below. These highlight a possible trade-off between quality of service and a reduction in the cost of litigation particularly if binding guidelines were introduced and set at too low a level. If, however, measures enhanced competition it could lead to service innovation.

| Box 6.14: Stakeholders' Views on Impact on Quality of Services  |
|---|
| <i>The CCPC recommended that "MCA/CBA should consider the potential for Option 2 (Binding Guidelines) to negatively impact on the quality of service provided to consumers. For example, maximum fee limits may prevent, for commercial reasons, and / or dis-incentivise legal practices from spending additional time or carrying out additional tasks on behalf of a client.</i> |
| <i>"The CCPC pointed out that "the OECD have noted that price competition may entail the risk of adverse selection rather than generating outcomes as long as mechanism to access and guarantee quality are not in place."</i>  |
| <i>[Binding controls] "will lead to a decline in quality of legal representation. Focus will be on 'churn' i.e. legal practitioners will seek to increase caseload to compensate for lower fees and quality of drafting and court work will decline with knock-on negative repercussions for administration of justice." – Legal practitioner.</i>                                  |
| Source: Indecon Stakeholder Consultations   |

In the next table we set out Indecon's assessment in relation to the likely impact of the various reform option on quality of service. As noted previously, it is likely that some of these options could

potentially either enhance or have a negative impact on quality of service. This is especially the case for Options 2 if the levels were set too low. While it is important not to overestimate the likely impact on service quality, it is an issue which should be considered. Options 1 and 4 also could potentially have an impact on quality of service. The Indecon Review Team believes that Option 3 is likely to be the best performing option in relation to quality of service. This relates to the fact that legal professionals would be free to charge in excess of the guidelines if they are able to provide justification to client for the additional work. This additional work would be undertaken with the agreement of the client.

| Table 6.10: Indecon Ranking of Reform Options on Quality of Service– Scoring and Rationale |           |   |                           |  |  |
|--|-----------|---|---------------------------|--|--|
| Policy Objectives  |           | Option Scores (0-5)   |                           |  |  |
|  |           | Non-binding Guidelines on Costs (1)   | Binding Maximum Costs (2) | Non-binding Guidelines (with additional transparency measures) (3) | Binding Maximum Guidelines (only for non-complex personal injury below €30,000 settlement) (4) |
| Maintaining or Improving Quality of Services   | Score     | 1   | 0                         | 3  | 1  |
|  | Rationale | If the levels of guidelines were set too low binding controls there is a risk of deterioration in service. Non-binding controls combined with enhanced transparency may drive service innovation and quality and provide flexibility on service levels and is given the highest score. Non-binding controls without additional measures would not change competitive forces and provide no incentive to enhance service innovation. |                           |  |  |
| Source: Indecon  |           |   |                           |  |  |

## 6.8 Impact on Access to Justice

Another policy objective of any reform relates to its impact on access to justice. This is not easily amenable to quantitative modelling or other analysis. Indecon believes that the stakeholder consultation and survey analysis are therefore helpful in the assessment of the impact of the various options. The findings to Indecon's survey of legal practitioners in relation to the possible impact of maximum binding guidelines are shown in the box below. These highlight the potential negative impacts of maximum binding on access to justice as certain legal professionals may not provide services in markets with fixed pricing structures.

**Box 6.15: Stakeholders' Views on Maximum Binding Guidelines on Access to Justice****Legal Practitioners**

*"The claimant must pay their legal costs. Scales regulate costs awarded by losing parties. Reductions in awarded costs mean the claimant has to make up the difference. This is unjust and provides a bonus to the wrongdoer."*

*"Such a table would not cater for the really complicated cases where the work done might well outweigh the settlement value resulting in unfairness as to the level of professional fee."*

*"The very opposite as defendants would have no incentive to settle and would use their economic power to bully the plaintiff financially."*

*"Highly likely this will lead to a decline in quality of legal representation. Focus will be on 'churn' i.e. legal practitioners will seek to increase caseload to compensate for lower fees and quality of drafting and court work will decline with knock-on negative repercussions for administration of justice."*

*"While it might lower costs and encourage early settlement, this is at the risk of denying access to justice to litigants in complex cases. (And early settlement might be in the interests of lawyers, not the client pressured to settle.)"*

*"Non-binding controls/guidelines would not assist, as it would discourage lawyers from taking on cases, on the ground that their costs would not be discharged in full. It would result in 'yellow pack' type litigation, where the best lawyers would simply not engage. The best lawyers will migrate to areas of law which do not have maximum mandatory costs."*

**Source: Indecon Stakeholder Consultation**

The views of stakeholders in relation to Option 4 (maximum costs for non-complex personal injury cases) are shown in the box overleaf. These views reflect some of the potential complexities with the implementation of this option and how it interacts with access to justice.

| <b>Box 6.16: Stakeholders' Views on Maximum Legal Costs for Non-Complex PI Cases on Access to Justice</b>   |  |
|---|--|
| <b>Corporate Consumers and Wider Stakeholders</b>   |  |
| <p><i>"It depends what the table says, but at this level of claim, assuming the costs would be low/reasonable, then this could have a significant positive impact." "Could provide some clarity in certain cases." –</i></p> <p><i>"In this category having costs set to a maximum would drive the parties to reach a settlement as both sides would know their exposure. More settlements are likely, but I do think the amount of the costs would be higher than current levels."</i></p> <p><i>"These proposals would be in the interest of businesses operating in Ireland as it would likely help discourage frivolous litigation, driven by plaintiff lawyers looking only for a settlement under which they can recover fees. If fees were capped or there were controls in place, the clients would maintain control over litigation rather than an overly incentivised plaintiff bar."</i></p> |  |
| <p><i>"This proposal would be unworkable unless the settlement levels were set to match the civil jurisdiction of the Circuit Court, limited to compensation claims not exceeding €75,000, or €60,000 in a claim for damages for personal injuries"</i></p> <p><i>"Maximum costs limits will be hugely helpful at controlling legal costs"</i></p> <p><i>"This option would have the perverse outcome of encouraging all cases to become "complex" in the same way as damages are always sought at the maximum of a court's jurisdiction. That is why this option is not advisable, even though it appears reasonable." - ISME</i></p>  |  |
| <b>Legal Practitioners</b>  |  |
| <p><i>"Not in the interest of justice. Wrongdoer does not have to pay the actual costs incurred by the victim. It is a win for the wrongdoer and insurance industry. Makes it very difficult for an injured party to pursue a legal remedy "</i></p> <p><i>"Any reduction in legal fees for this kind of work (the majority of PI claims) would be undesirable as due to court rules and front-loading of work required this kind of litigation is barely worth undertaking for barristers, and any reduction in fees would result in difficulty for litigants to obtain representation. "</i></p> <p><i>"There will be an exodus of lawyers from areas of law in which maximum legal costs are imposed."</i></p>   |  |
| <b>Source: Indecon Stakeholder Consultations</b>  |  |

Table 6.11 outlines the views of respondents to Indecon's survey in relation to the impact of each proposed option on access to justice issues. The majority of respondents believe that each of the options would not improve access to justice. While the small sample size means that caution should be exercised in interpreting the findings, they are consistent with the views provided to Indecon as part of the consultation process.



Table 6.11: Survey Analysis of Impact of Reforms on Access to Justice

| Potential Benefits  | Non-binding Guidelines on Costs |     |    | Binding Maximum Costs |     |      | Non-binding Guidelines (with additional transparency measures) |    |    | Binding Maximum Guidelines (only for non-complex personal injury below €30,000 settlement) |     |     |
|---|---------------------------------|-----|----|-----------------------|-----|------|--|----|----|--|-----|-----|
|   | CC                              | LP  | WS | CC                    | LP  | WS   | CC   | LP | WS | CC   | LP  | WS  |
| % of respondents who indicated that Access to Justice would Improve   | 27%                             | 13% | 0% | 25%                   | 20% | 100% | 27%  | 7% | 0% | 36%  | 21% | 29% |
| <b>Source: Stakeholder responses to Indecon survey</b><br>Note: CC=Corporate Consumers; LP=Legal Practitioners; WS=Wider Stakeholders |                                 |     |    |                       |     |      |  |    |    |  |     |     |

The Indecon Review Team believes that Option 3 may offer the best choice of the options in terms of access to justice but only marginally. This is because of the additional measures around reporting requirements and the publication of an annual report which would improve consumer awareness of the cost of litigation and may, combined with more competition and lower costs, enhance access to justice. Indecon would, however, caution against assuming any of the options would fundamentally change access to justice.

Table 6.12: Indecon Ranking of Reform Options – Scoring and Rationale

| Policy Objectives |           | Option Scores (0-5)   |                       |  |  |
|-------------------|-----------|---|-----------------------|--|--|
|                   |           | Non-binding Guidelines on Costs   | Binding Maximum Costs | Non-binding Guidelines (with additional transparency measures) | Binding Maximum Guidelines (only for non-complex personal injury below €30,000 settlement) |
| Access to Justice | Score     | 2   | 2                     | 3  | 2  |
|                   | Rationale | Options 1 and 2 receive a score of 2 since neither option is likely to have any significant impact on access to justice. It is possible that the score should be lower for Option 2 as legal professionals do not offer services in markets where the price is fixed in advance. Option 3 receives a score of 3 since it represents the best option to support access to justice through increased information on costings. |                       |  |  |
| Source: Indecon   |           |   |                       |  |  |

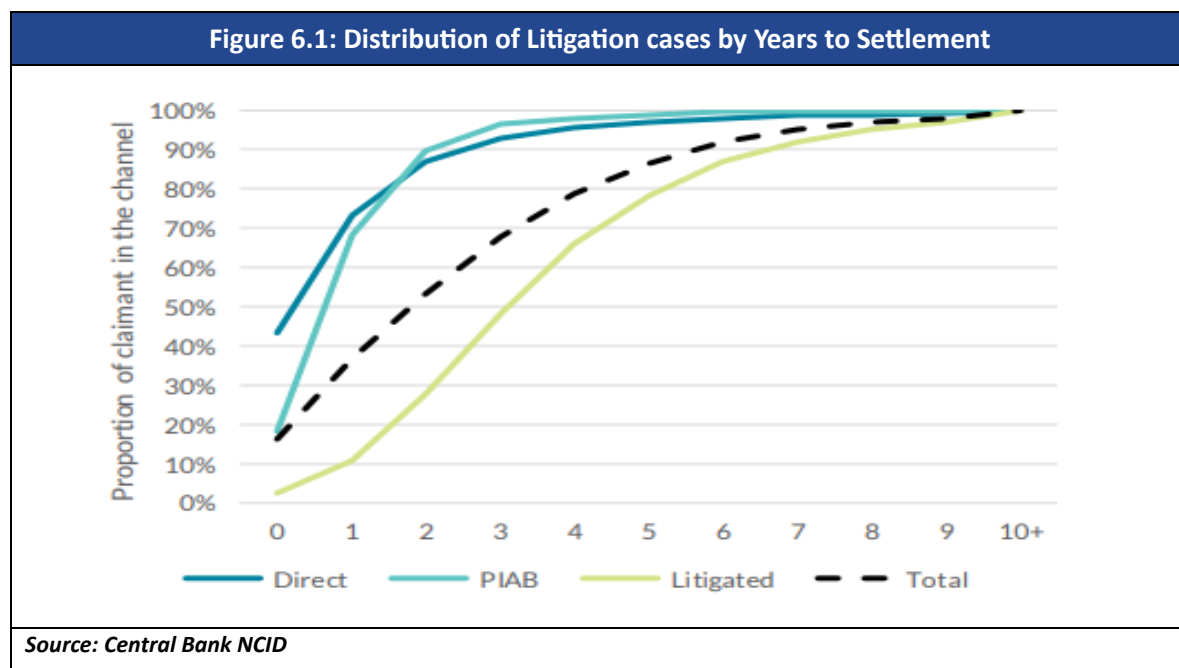
## 6.9 Impact of Options on Time involved in Litigation Cases

One of the clear findings of the recent Central Bank's National Claims Information database (NCID) in relation to cases that are litigated is how long these cases take. Similar conclusions can be drawn from the latest Courts Service annual report. These figures show that a typical litigation case before the High Court or Circuit Court can take over two years from when proceedings are initiated. The latest data from the NCID indicates that injury cases that are litigated take, on average, 4.5 years to reach final settlement. This compares with an average period of 1.7 years for claims that do not involve litigation. Also of note is that cases are likely to involve legal advice prior to litigation and this impacts on overall timelines.

| Table 6.13: Average Length of Civil Proceedings from Issue to Disposal (Days) |            |           |               |             |
|---|------------|-----------|---------------|-------------|
|   | High Court |           | Circuit Court |             |
|   | 2021       | 2020      | 2020          | 2019        |
| All Litigation cases  | 797 (2.2)  | 660 (1.8) | 740* (2.0)    | 725 (2.0) * |

**Source: 2021 Courts Service Annual Report**  
*\*Note: Excludes licensing. n/a = not applicable. Years in parentheses*

In designing any reform option it is useful to consider the distribution rather than just the average of time involved in litigation. The NCID data, for example, indicates that personal injury cases take on average around 4.5 years to settle when litigation is involved. The distribution between this figure is shown in Figure 6.1 which shows that around 50% of cases take three years to settle. The data indicates that around 20% of cases take at least five years to reach a settlement when they involve litigation.



The views of stakeholders on the potential impact of non-binding guidelines (Kelly Review Majority view) on the time taken to resolve litigation are shown in the box below.

| Box 6.17: Stakeholders' Views on Impact of Non-Binding Guidelines on Time   |
|---|
| <b>Corporate Consumers and Wider Stakeholders</b>   |
| <i>"It should lead to a reduction in time spent which would benefit the overall system."</i>  |
| <i>"Non-binding guidelines will be freely ignored by the courts and lawyers in the same way as the Book of Quantum and PIGC guidelines can be ignored now. Their introduction would be a waste of time."</i>  |
| <b>Legal Practitioners</b>  |
| <i>"Not in the interest of overall efficiency of civil justice. Will favour the insurance companies because the guidelines will never be revised. The actual costs of the case must be paid by the client to their own lawyer. Scales only relate to the costs paid by the losing party."</i> |
| <b>Source: Indecon Stakeholder Consultations</b>  |

In relation to Option 3, stakeholders views on the potential impact on the time needed to resolve a dispute are shown below and indicate that this proposed option may have some positive benefits in relation to the time taken to resolve litigation cases. In some cases stakeholders did not comment on certain of the options.

| Box 6.18: Stakeholders' Views on Impact of Non-Binding Guidelines with Additional Transparency Measures on Time  |
|--|
| <b>Corporate Consumers and Wider Stakeholders</b>  |
| <i>"We think that it depends on the complexity of the case, but it could improve efficiency in principle, depending on what the non-binding guideline are."</i>  |
| <i>"Similar to the courts PIAB non-binding guidelines, these guidelines on courts can also be disregarded, however, to put some structure on the costs would be good to set out the overall cost of a claim. This would make it more transparent from a business perspective. Ireland has too long been seen to be an easy target for a claim and large costs that follows"</i>                      |
| <i>"These proposals would be in the interest of businesses operating in Ireland as it would likely help discourage frivolous litigation, driven by plaintiff lawyers looking only for a settlement under which they can recover fees. If fees were capped or there were controls in place, the clients would maintain control over litigation rather than an overly incentivised plaintiff bar."</i> |
| <b>Source: Indecon Stakeholder Consultations</b>   |

Corporate consumers are more positive about the potential impact of Option 4. However, it is noted that the definition of "complex" may be open to interpretation which would significantly reduce the benefits of this option.

**Box 6.19: Stakeholders' Views on Maximum Legal Costs for Non-Complex PI Cases on Time****Corporate Consumers and Wider Stakeholders**

*"It depends what the table says, but at this level of claim, assuming the costs would be low/reasonable, then this could have a significant positive impact."* -

*"In this category having costs set to a maximum would drive the parties to reach a settlement as both sides would know their exposure. More settlements are likely, but I do think the amount of the costs would be higher than current levels."*

*"This option would have the perverse outcome of encouraging all cases to become "complex" in the same way as damages are always sought at the maximum of a court's jurisdiction. That is why this option is not advisable, even though it appears reasonable."* - ISME

**Legal Practitioners**

*"Would benefit efficiency if time limits became relevant once medical assessments were finalised."*

*"If the jurisdiction of the District Court in personal injuries actions was increased, then setting such maximum levels would introduce efficiencies. It may also discourage the issuing of proceedings in the Circuit Court, when proceedings should have been introduced in the District Court."*

**Source: Indecon Stakeholder Consultations**

As a result of these timeframes needed to progress litigation cases, the potential impact of each reform option is considered. Our survey analysis (see Table 6.14) suggests that Options 2 and 4 are likely to have the largest impact on reducing the time involved in litigation cases. However, this is based on the assumption that there are no challenges to the level of costs or the definition of complex.

The majority of respondents indicated that each option would not reduce the overall number of cases before the courts. Similarly, the majority of respondents indicated that Option 1 would have little impact on the time taken to settle cases. However, Options 2, 3, and 4 were viewed by the majority as potentially supporting the quicker resolution of litigation cases. (See Table 6.14.)

| Table 6.14: Stakeholders' Views of Impact of Reforms on Time taken to resolve cases   |                                 |     |    |                       |     |      |  |     |     |  |     |     |
|---|---------------------------------|-----|----|-----------------------|-----|------|--|-----|-----|--|-----|-----|
| Potential Benefits  | Non-binding Guidelines on Costs |     |    | Binding Maximum Costs |     |      | Non-binding Guidelines (with additional transparency measures) |     |     | Binding Maximum Guidelines (only for non-complex personal injury below €30,000 settlement) |     |     |
|   | CC                              | LP  | WS | CC                    | LP  | WS   | CC   | LP  | WS  | CC   | LP  | WS  |
| % of respondents who indicated that Less time and resources spent on arguing about legal costs  | 64%                             | 53% | 0% | 83%                   | 59% | 100% | 64%  | 37% | 0%  | 82%  | 56% | 14% |
| % of respondents who indicated that Claims would be settled quicker   | 36%                             | 31% | 0% | 75%                   | 31% | 100% | 54%  | 13% | 14% | 82%  | 40% | 14% |
| % of respondents who indicated that Overall number of court cases would be lower  | 33%                             | 21% | 0% | 50%                   | 35% | 100% | 42%  | 21% | 0%  | 50%  | 35% | 43% |
| <b>Source: Stakeholder Responses to Indecon Survey</b><br>Note: CC=Corporate Consumers; LP=Legal Practitioners; WS=Wider Stakeholders |                                 |     |    |                       |     |      |  |     |     |  |     |     |

Table 6.17 sets out Indecon's scores in relation to the likely impact of the various reform option on the time involved in the settlement of litigation cases. There is significant uncertainty involved in the impact of options on the timing of settlement of cases and a judgement is required. The main impact would arise because with some options the greater certainty on costs would mean that one contentious issue would be off the table. Each of the reform options would also require time to design the implementation of the reform. Once implementation issues are resolved, the Indecon Review Team believes that Option 4 could potentially be the best performing option in relation to time taken to resolve cases. This relates to the fact that these types of cases should be less complicated and there will be less contention over various aspects of the case. Option 2 and 3 are also likely to improve behaviour as they offer greater certainty on the typical costs involved in

different type of cases. Option 1 is given a lower score as this non-binding option may not influence current practices.

| Table 6.15: Indecon Ranking of Reform Options on Time involved in Litigation Costs – Scoring and Rationale |           |  |                           |  |  |
|--|-----------|--|---------------------------|--|--|
| Policy Objectives  |           | Option Scores (0-5)  |                           |  |  |
|  |           | Non-binding Guidelines on Costs (1)  | Binding Maximum Costs (2) | Non-binding Guidelines (with additional transparency measures) (3) | Binding Maximum Guidelines (only for non-complex personal injury below €30,000 settlement) (4) |
| Time   | Score     | 3  | 4                         | 4  | 5  |
|  | Rationale | Options 2 and 3 receive a score of 4 since both options are likely to reduce the time involved in disputes on cases. Binding maximum guidelines restricted to non-complex cases may have slightly higher rating as it is assumed that such cases would be less subject to challenge. Option 3 is given a slightly lower score as it may have less impact on the timing of settlement of cases. |                           |  |  |
| Source: Indecon  |           |  |                           |  |  |

## 6.10 Impact of Options on Effectiveness/Efficiency of the Legal System

Another important policy consideration is whether the reform options could impact on the efficiency and effectiveness of the civil legal system. Indecon believes there are likely to be only marginal differences between the options on the effectiveness/efficiency of the system. However, greater certainty on costs of binding controls and non-binding controls with enhanced transparency measures, could facilitate efficiency gains. Indecon notes that effectiveness/efficiency may overlap with some of the other objectives such as access to justice, quality of service and time taken to resolve cases. The views of various stakeholders in relation to the possible impact of options on overall efficiency differed. This is illustrated for Option 1 in the box overleaf.

| <b>Box 6.20: Stakeholders' Views on Impact of Non-Binding Controls on Efficiency and Effectiveness of the System</b>               |
|--|
| <b>Corporate Consumers and Wider Stakeholders</b>  |
| <i>"Depends on the complexity of the case but could improve efficiency in principle, depending on the non-binding guidelines."</i> |
| <i>"It should lead to a reduction in time spent which would benefit the overall system."</i>                                       |
| <b>Legal Practitioners</b>   |
| <i>"The current position is the most efficient. The option of controls and/or guidelines will increase costs."</i>                 |
| <b>Source: Indecon Stakeholder Consultations</b>   |

Stakeholder views in relation to the impact of maximum guidelines on the effectiveness and efficiency of the legal system are mixed. This was apparent in the Kelly Review where representatives of the legal profession were against the introduction of the binding maximum guidelines in relation to litigation costs. These views as articulated by various individual legal professionals are documented in the box below.

| <b>Box 6.21: Stakeholders' Views on Maximum Binding Guidelines on the interest of overall efficiency of civil justice in Ireland</b>   |
|--|
| <b>Corporate Consumers and Wider Stakeholders</b>  |
| <i>"These proposals would be in the interest of businesses operating in Ireland as it would likely help discourage frivolous litigation, driven by plaintiff lawyers looking only for a settlement under which they can recover fees. If fees were capped or there were controls in place, the clients would maintain control over litigation rather than an overly incentivised plaintiff bar."</i> |
| <i>"It should lead to a reduction in time spent which would benefit the overall system."</i>   |
| <i>"We believe that "setting a table of maximum mandatory contentious costs in legal proceedings in Ireland" will have a positive impact as follows: Overall costs - Likely to be lower. Overall number of court cases - Likely to be lower. Percentage of cases resolved/settled prior to court -is likely to be higher than current position"</i>  |
| <b>Legal Practitioners</b>   |
| <i>"It would not work. In a complex case, there could be thousands of documents discovered and perhaps 20 to 30 motions and perhaps 10 defendants, so setting an arbitrary maximum figure would be nonsensical."</i>   |
| <i>"Of course, it would be in the interest of overall efficiency of civil justice in Ireland and in the interest of competitiveness of doing business in Ireland. It is necessary to provide certainty on the potential costs. The other options would have little to no benefit."</i>   |
| <i>"Yes, it would be more efficient. It would remove the process of adjudication and save time in negotiating costs after proceedings are resolved. It would also provide significant transparency for the general public."</i>  |
| <i>"I think costs would be finalised quicker I don't think it would have any short-term effect on number of cases or settlement numbers."</i>  |

*“Highly likely this will lead to a decline in quality of legal representation. Focus will be on 'churn' i.e. legal practitioners will seek to increase caseload to compensate for lower fees and quality of drafting and court work will decline with knock-on negative repercussions for administration of justice.”*

*“While it might lower costs and encourage early settlement, this is at the risk of denying access to justice to litigants in complex cases. (And early settlement might be in the interests of lawyers, not the client pressured to settle.)”*

*“Non-binding controls/guidelines would not assist, as it would discourage lawyers from taking on cases, on the ground that their costs would not be discharged in full. It would result in 'yellow pack' type litigation, where the best lawyers would simply not engage. The best lawyers will migrate to areas of law which do not have maximum mandatory costs.”*

**Source: Indecon Stakeholder Consultations**

Survey evidence in relation to the impact of each proposed reform on the efficiency and effectiveness of the system is shown in Table 6.16. The survey evidence suggests that corporate consumers believe that each option may have positive benefits on business processes. It must also be noted that the majority of corporate consumers and legal professionals indicate that neither Kelly option (Options 1 and 2) would improve the effectiveness and efficiency of the system.

| Table 6.16: Survey Analysis of Impact of Reforms on Effectiveness/Efficiency of the System                     |                                 |     |    |                       |     |      |  |     |    |  |     |     |
|--|---------------------------------|-----|----|-----------------------|-----|------|--|-----|----|--|-----|-----|
| Potential Benefits   | Non-binding Guidelines on Costs |     |    | Binding Maximum Costs |     |      | Non-binding Guidelines (with additional transparency measures) |     |    | Binding Maximum Guidelines (only for non-complex personal injury below €30,000 settlement) |     |     |
|  | CC                              | LP  | WS | CC                    | LP  | WS   | CC   | LP  | WS | CC   | LP  | WS  |
| % of respondents who indicated that there would be Business process efficiencies                               | 60%                             | 47% | 0% | 75%                   | 53% | 100% | 45%  | 29% | 0% | 91%  | 57% | 14% |
| % of respondents who indicated that the reform option would Improve effectiveness and efficiency of the system | 45%                             | 27% | 0% | 50%                   | 20% | 100% | 64%  | 14% | 0% | 82%  | 29% | 14% |
| <b>Source: Stakeholder Responses to Indecon Survey</b>   |                                 |     |    |                       |     |      |  |     |    |  |     |     |
| Note: CC=Corporate Consumers; LP=Legal Practitioners; WS=Wider Stakeholders                                    |                                 |     |    |                       |     |      |  |     |    |  |     |     |



Indecon's assessment in relation to the likely impact of the various reform options on the effectiveness and efficiency of the system are shown in Table 6.17. In relative terms, there is little difference between these options in terms of their impact on effectiveness and efficiency.

| Table 6.17: Indecon Ranking of Reform Options – Scoring and Rationale |           |  |                            |  |  |
|---|-----------|--|----------------------------|--|--|
| Policy Objectives   |           | Option Scores (0-5)  |                            |  |  |
|   |           | Non-binding Guidelines   | Binding Maximum Guidelines | Non-binding Guidelines (with additional transparency measures) | Binding Maximum Guidelines (only for non-complex personal injury below €30,000 settlement) |
| Effectiveness and Efficiency  | Score     | 3  | 4                          | 4  | 3  |
|   | Rationale | By providing certainty on costs binding maximum costs or non-binding guidelines with additional transparency measures could enhance effectiveness / efficiency |                            |  |  |
| Source: Indecon   |           |  |                            |  |  |

### 6.11 Impact of Options on the Courts System

An issue of relevance is the impact of the options on the levels of litigation and on capacity issues in the courts systems. Recent analysis by the OECD suggests that Ireland, historically, spent less on its court systems than other OECD countries and a lower ratio of judges per capita. Indecon notes that recent Government decisions may impact on this, but capacity remains an issue. The views of stakeholders on the possible impact of non-binding guidelines on the courts system are shown in the next box.

**Box 6.22: Stakeholders' Views on Impact of Non-Binding Guidelines on Courts System****Corporate Consumers and Wider Stakeholders**

*"It is hard to see how non-binding will have any impact. The survey appears designed (at least where we are the defendant) around private citizens issuing proceedings. The most important case generally concerns corporates suing corporates and wasting vast sums in overpriced legal fees."*

*"It should lead to a reduction in time spent which would benefit the overall system."*

*"Non-binding guidelines will be freely ignored by the courts and lawyers in the same way as the Book of Quantum and PIGC guidelines can be ignored now. Their introduction would be a waste of time." – ISME*

**Legal Practitioners**

*"The current position is the most efficient. The option of controls and/or guidelines will increase costs."*

**Source: Indecon Stakeholder Consultations**

The next box sets out the views of stakeholders on the possible impact of setting maximum binding litigation cost guidelines. As consistent with some other policy objectives, there is a clear difference in views between corporate consumers and the legal profession.

**Box 6.23: Stakeholders' Views on Maximum Binding Guidelines on the Courts System****Corporate Consumers and Wider Stakeholders**

*"Should give clarity and certainty to the litigant"*

*"Some cases are not settled as the costs being offered in a settlement are low. If there were a table of maximum mandatory contentious costs, then this could be factored into the settlement and more likely to resolve an issue without having to proceed to court."*

*"We believe that "setting a table of maximum mandatory contentious costs in legal proceedings in Ireland" will have a positive impact as follows: Overall costs - Likely to be lower. Overall number of court cases - Likely to be lower. Percentage of cases resolved/settled prior to court - is likely to be higher than current position"*

*"Setting a table of maximum costs would remove fee-seeking behaviour from the courts, would confine fee-earners to prioritise what had to be dealt with in court, and would also allow more defendant parties to potentially defend cases" - ISME*

**Legal Practitioners**

*"Such a table would not cater for the really complicated cases where the work done might well outweigh the settlement value resulting in unfairness as to the level of professional fee."*

*"The very opposite as defendants would have no incentive to settle and would use their economic power to bully the plaintiff financially."*

*"Yes, it would be more efficient. It would remove the process of adjudication and save time in negotiating costs after proceedings are resolved. It would also provide significant transparency for the general public."*

*"I think costs would be finalised quicker I don't think it would have any short-term effect on number of cases or settlement numbers."*

*"The current position is the most efficient. The option of a table of maximum mandatory contentious costs will increase costs."*

**Source: Indecon Stakeholder Consultations**

Table 6.18 outlines the views of respondents to Indecon's survey in relation to the impact of each proposed option on the courts and whether the number of cases that proceed to court would be reduced under each of the options.

| Table 6.18: Survey Analysis of Impact of Reforms on Impact on the Courts System  |                                 |     |    |                       |     |      |  |     |    |  |     |     |
|--|---------------------------------|-----|----|-----------------------|-----|------|--|-----|----|--|-----|-----|
| Potential Benefits   | Non-binding Guidelines on Costs |     |    | Binding Maximum Costs |     |      | Non-binding Guidelines (with additional transparency measures) |     |    | Binding Maximum Guidelines (only for non-complex personal injury below €30,000 settlement) |     |     |
|  | CC                              | LP  | WS | CC                    | LP  | WS   | CC   | LP  | WS | CC   | LP  | WS  |
| % of respondents who indicated that there would be reduced number of cases proceeding to Court   | 36%                             | 33% | 0% | 58%                   | 47% | 100% | 36%  | 29% | 0% | 82%  | 57% | 29% |
| <b>Source: Stakeholder Responses to Indecon Survey</b><br><i>Note: CC=Corporate Consumers; LP=Legal Practitioners; WS=Wider Stakeholders</i> |                                 |     |    |                       |     |      |  |     |    |  |     |     |

Indecon's assessment of the options in relation to how they impact on the number of cases before the courts are shown in Table 6.19. We believe that Options 2 and 4 are likely to have a slightly greater impact on (reducing) the number of cases or the timing of cases before the courts. Hence a score of 5 is allocated to these options. Similarly, we believe that non-binding guidelines with enhanced transparency measures will reduce some litigation cases before the courts or less disputes on costs. A score of 4 has been provided for this option. The lower score is given to non-binding guidelines.

**Table 6.19: Indecon Ranking of Reform Options – Scoring and Rationale**

| Policy Objectives       |           | Option Scores (0-5)   |                            |  |  |
|-------------------------|-----------|---|----------------------------|--|--|
|                         |           | Non-binding Guidelines  | Binding Maximum Guidelines | Non-binding Guidelines (with additional transparency measures) | Binding Maximum Guidelines (only for non-complex personal injury below €30,000 settlement) |
| Impact on Courts System | Score     | 3   | 5                          | 4  | 5  |
|                         | Rationale | Non-binding guidelines likely to have somewhat lower impact in reducing pressures on the Court system |                            |  |  |
| Source: Indecon         |           |   |                            |  |  |

## 6.12 Ease of Implementation of Reform

The final policy objective considered as part of this multi-criteria analysis relates to the ease with which each proposed reform option could be implemented. Although this is not a core policy objective, it is important that this is considered to ensure that the analysis reflects any potential implementation issues involved with the different options. In our analysis of the options in terms of their ease of implementation, we believe that Option 2, namely binding maximum costs, would be the most difficult to implement. This is because of the complexity involved in setting these maximum costs across a large variety of litigation cases. There are also significant challenges around data availability to make informed decisions on binding guidelines. A score of 4 has been provided for Option 3. The rating for non-binding guidelines with additional transparency measures is, however, dependent on the complexity involved in implementing the additional reporting requirements. This will require resources for the OLCA to facilitate their annual report process. In relative terms, the introduction of non-binding guidelines would be the most straightforward in terms of implementation. However, there is still the complexity around how these guidelines are set and the underlying data that they are based on. A score of 5 has been allocated to this option. A score of 3 is given to binding maximum charges for non-complex PI cases. Illustrative views of individual legal practitioners on the difficulty with the implementation of maximum binding guidelines are set out overleaf.

**Box 6.24: Stakeholders' Views on Ease of Implementation of Maximum Binding Guidelines****Legal Practitioners**

*"It would not work. In a complex case, there could be thousands of documents discovered and perhaps 20 to 30 motions and perhaps 10 defendants, so setting an arbitrary maximum figure would be nonsensical."*

*"Such a table would not cater for the really complicated cases where the work done might well outweigh the settlement value resulting in unfairness as to the level of professional fee."*

*"Non-binding controls/guidelines would not assist, as it would discourage lawyers from taking on cases, on the ground that their costs would not be discharged in full. It would result in 'yellow pack' type litigation, where the best lawyers would simply not engage. The best lawyers will migrate to areas of law which do not have maximum mandatory costs."*

*"It would not work. In a complex case, there could be lots of documents discovered and perhaps motions and perhaps large number of defendants, so setting an arbitrary caps would be nonsensical."*

*"There is no such thing as a non-complex personal injury case. Again this is a fiction created by the insurance industry and only ever arises at the conclusion of a case."*

*"If maximum figures were correctly set, costs would remain the same, but the system would be more efficient and the clarity on costs would assist early settlement. Any reduction in legal fees for this kind of work (the majority of PI claims) would be undesirable as due to court rules and front-loading of work required this kind of litigation is barely worth undertaking for barristers, and any reduction in fees would result in difficulty for litigants to obtain representation."*

*"There will be an exodus of lawyers from areas of law in which maximum legal costs are imposed."*

**Source: Indecon Stakeholder Consultations**

The insurance industry is positive towards the imposition of maximum binding guidelines as shown in the box below.

**Box 6.25: Stakeholders' Views on Ease of Implementation of Binding Maximum Costs**

*"IBEC would not rule this out, but we would caution against proceeding too quickly. Perhaps a limited scale pilot scheme could be run in the first instance" – IBEC*

*"It allows for an independent litigation costs committee who would set the statutory table of costs to include non-legal members ... which removes the perception of bias in favour of the legal profession" – Insurance Ireland*

*"The Alliance could not envisage any circumstances under which either the Law Society or the Bar Council, representing as they do the commercial interests of lawyers, would support the imposition of binding controls on legal fees" – Alliance for Insurance Reform*

**Source: Indecon Stakeholder Consultations**

In relation to a potential partial option to test the feasibility of implementing binding maximum guidelines on a subset of the market, the views in relation to its implementation are mixed. Valid considerations around the exact definition of complex were noted in a submission by ISME. The Alliance for Insurance Reform also note the importance of the level at which the settlement is set. The representative bodies for the legal profession also note their experience with the scale of fees in the District Court which have not been reviewed at regular intervals.

### Box 6.26: Stakeholders' Views on Ease of Implementation of Maximum Binding Guidelines for non-complex Personal Injury cases

#### Corporate Consumers and Wider Stakeholders

*"This proposal would be unworkable unless the settlement levels were set to match the civil jurisdiction of the Circuit Court, limited to compensation claims not exceeding €75,000, or €60,000 in a claim for damages for personal injuries"*

*"This option would have the perverse outcome of encouraging all cases to become "complex" in the same way as damages are always sought at the maximum of a court's jurisdiction. That is why this option is not advisable, even though it appears reasonable." – ISME*

*"This is a partial measure and will not be as effective as Option 2 (Table of Maximum Costs). Additionally, it risks causing confusion and ultimately being unworkable unless the settlement levels were set to match the civil jurisdiction of the Circuit Court, limited to compensation claims not exceeding €75,000, or €60,000 in a claim for damages for personal injuries; and for actions involving real property with a market value of less than €3 million" – Alliance for Insurance Reform*

*"The actual work involved in any case may be vastly different to another of the same type being heard in the same court. In such circumstances, it might not be realistic to have a 'one price fits all' fee" – The Bar Council of Ireland and the Law Society*

*"Such a table of maximum costs would require regular independent review and updates to ensure it did not lead to inequalities ... our experience with the District Court scale of fees is that ... despite a requirement to review the fees at regular intervals, no such reviews have taken place despite repeated requests from the professional bodies"*

**– The Bar Council of Ireland and the Law Society**

#### Legal Practitioners

*"It would not work. In a complex case, there could be lots of documents discovered and perhaps motions and perhaps large number of defendants, so setting an arbitrary caps would be nonsensical."*

*"There is no such thing as a non-complex personal injury case. Again this is a fiction created by the insurance industry and only ever arises at the conclusion of a case."*

*"If maximum figures were correctly set, costs would remain the same, but the system would be more efficient and the clarity on costs would assist early settlement. Any reduction in legal fees for this kind of work (the majority of PI claims) would be undesirable as due to court rules and front-loading of work required this kind of litigation is barely worth undertaking for barristers, and any reduction in fees would result in difficulty for litigants to obtain representation."*

*"There will be an exodus of lawyers from areas of law in which maximum legal costs are imposed."*

**Source: Indecon Stakeholder Consultations**

In our analysis of the options in terms of their ease of implementation, we believe that Option 2, namely binding maximum costs would be the most difficult. This is because of the complexity involved in setting these maximum costs across a large variety of litigation cases. There is also the significant challenges around data availability to make informed decisions on binding guidelines. A score of 4 has been provided for Option 3. The rating for non-binding guidelines with additional transparency measures is, however, dependent on the complexity involved in implementing the additional reporting requirements. This will require resources for the OLCA to facilitate their annual report process. In relative terms, the introduction of non-binding guidelines would be the most

straightforward in terms of implementation. However, there is still the complexity around how these guidelines are set and the underlying data that they are based on. A score of 5 has been allocated to this option. A score of 3 is given to binding maximum charges for non-complex PI cases. As this would only be confined to certain cases, it would be more straightforward in terms of implementation. However, there are still certain practical issues, such as the maximum levels set and the definition of “non-complex” that would need to be resolved which could create implementation challenges. A summary of the scores is shown in Table 6.20.

| Table 6.20: Indecon Ranking of Ease of Implementation of Reform Options - Scoring and Rationale |           |   |                            |  |  |
|---|-----------|---|----------------------------|--|--|
| Policy Objectives   |           | Option Scores (0-5)   |                            |  |  |
|   |           | Non-binding Guidelines on Costs   | Binding Maximum Guidelines | Non-binding Guidelines (with additional transparency measures) | Binding Maximum Guidelines (only for non-complex personal injury below €30,000 settlement) |
| Ease of Implementation  | Score     | 5   | 1                          | 4  | 3  |
|   | Rationale | Option 2 receives a score of 1 since this option would be the most difficult to implement. Option 1 and Option 3 would be the easiest to implement. Option 4 would need some modification of the court rules. |                            |  |  |
| Source: Indecon   |           |   |                            |  |  |

### 6.13 Weightings in the Multi-Criteria Analysis

An issue is what weight to give to different policy objectives. While this is ultimately a matter for policymakers, a useful technical approach which can be used is what is called a pairwise approach. This is an attempt to compare options by pairs of objectives. However, we also later apply a simpler approach giving each option an equal weight. Weightings for the ten policy objectives based on a pairwise analysis are outlined below. This approach was detailed, alongside the approach to the MCA in Section 1.3. The following figure presents the results of this pairwise analysis. The highest rankings are assigned to the objective of reducing the cost of litigation (Objective 2). The next highest weightings are assigned to the objectives of increased certainty in relation to litigation costs and improving the quality of service. The remaining objectives are typically assigned equal weighting, and these weightings are reflected in the pairwise matrix.

Table 6.21: Pairwise Analysis of Policy Objectives

|              | Objective 1 | Objective 2 | Objective 3 | Objective 4 | Objective 5 | Objective 6 | Objective 7 | Objective 8 | Objective 9 | Objective 10 |
|--------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|--------------|
| Objective 1  | 1           | 0.3         | 1           | 1           | 1           | 1           | 0.5         | 1           | 2           | 1            |
| Objective 2  | 3           | 1           | 1           | 1           | 1           | 1           | 5           | 5           | 3           | 5            |
| Objective 3  | 1           | 1           | 1           | 1           | 0.3         | 3           | 3           | 1           | 3           | 3            |
| Objective 4  | 1           | 1           | 1           | 1           | 1           | 1           | 1           | 1           | 1           | 1            |
| Objective 5  | 1           | 1           | 3           | 1           | 1           | 3           | 1           | 1           | 1           | 1            |
| Objective 6  | 1           | 1           | 0.3         | 1           | 0.3         | 1           | 3           | 3           | 3           | 3            |
| Objective 7  | 2           | 0.2         | 0.3         | 1           | 1           | 0.3         | 1           | 1           | 1           | 1            |
| Objective 8  | 1           | 0.2         | 1           | 1           | 1           | 0.3         | 1           | 1           | 1           | 1            |
| Objective 9  | 0.5         | 0.3         | 0.3         | 1           | 1           | 0.3         | 1           | 1           | 1           | 1            |
| Objective 10 | 1           | 0.2         | 0.3         | 1           | 1           | 0.3         | 1           | 1           | 1           | 1            |

Source: Indecon analysis

Through the pairwise analysis the weights of each of these criteria are determined. These are calculated based on the geometric mean of the scores of each of the policy objectives. Table 6.22 below presents a summary of the weights. The highest weightings are assigned to the objectives of improving the certainty and cost of litigation. The calculation of the weightings for each of the policy objectives from the assessment matrix is shown in the following table.

Table 6.22: Multi-Criteria Analysis – Weighting of Policy Objectives

| Policy Objectives   | Product | Geometric Mean | Weighting (%) |
|---|---------|----------------|---------------|
| Objective 1: Enhancing competition                                    | 0.33    | 0.90           | 8.4           |
| Objective 2: Reduce the cost of litigation <sup>93</sup>              | 1126    | 2.02           | 19.0          |
| Objective 3: Provide certainty on litigation costs                    | 27.11   | 1.39           | 13.1          |
| Objective 4: Increase the transparency of litigation costs            | 1.00    | 1.00           | 9.4           |
| Objective 5: Maintain or improve quality of service                   | 9.01    | 1.25           | 11.7          |
| Objective 6: Improve access to justice for all citizens               | 9.10    | 1.25           | 11.7          |
| Objective 7: Reduce the time involved in litigation                   | 0.04    | 0.73           | 6.9           |
| Objective 8: Improve the effectiveness/efficiency of the legal system | 0.07    | 0.76           | 7.2           |
| Objective 9: Reduce pressure on the courts system                     | 0.018   | 0.67           | 6.3           |
| Objective 10: Ease of implementation of reform                        | 0.02    | 0.68           | 6.4           |
| Total   |         | 10.65          | 100%          |

Source: Indecon analysis

<sup>93</sup> The weighting is computed as follows:  $(1126^{1/10})/(10.65) \times 100 = 19.0$



## 6.14 Results of the Multi-Criteria Analysis

The next table presents the scoring of each criteria for the policy options examined. These scores have been assigned in line with the metrics outlined previously. The results show that Option 2 (binding guidelines) scores highly on providing certainty on litigation costs and we have also allowed a very high score to reducing the costs of litigation. This however is the subject to the caveat that this depends on the level of which the maximum guidelines are set and there is a potential for this option to actually increase costs for many litigants. Option 1 (non binding) guidelines scores poorly on enhancing competition or reducing the cost of litigation. While this Option is the easiest in terms of implementation it is not significantly different than the current position. Option 3 which is non binding guidelines but with greatly enhanced transparency measures scores highest on the impact of enhancing competition and also scores highly on other criteria including the cost of reducing litigation.

| Table 6.23: Multi-Criteria Analysis – Scoring                                |                     |          |          |          |
|--|---------------------|----------|----------|----------|
| Policy Objectives  | Option Scores (0-5) |          |          |          |
|  | Option 1            | Option 2 | Option 3 | Option 4 |
| <b>Objective 1:</b> Enhancing competition                                    | 1                   | 0        | 5        | 1        |
| <b>Objective 2:</b> Reduce the cost of litigation                            | 2                   | 5        | 4        | 4        |
| <b>Objective 3:</b> Provide certainty on litigation costs                    | 3                   | 5        | 4        | 4        |
| <b>Objective 4:</b> Increase the transparency of litigation costs            | 4                   | 5        | 5        | 4        |
| <b>Objective 5:</b> Maintain or improve quality of service                   | 1                   | 0        | 3        | 1        |
| <b>Objective 6:</b> Improve access to justice for all citizens               | 2                   | 2        | 3        | 2        |
| <b>Objective 7:</b> Reduce the time involved in litigation                   | 3                   | 4        | 4        | 5        |
| <b>Objective 8:</b> Improve the effectiveness/efficiency of the legal system | 3                   | 4        | 4        | 3        |
| <b>Objective 9:</b> Reduce pressure on the courts system                     | 3                   | 5        | 4        | 5        |
| <b>Objective 10:</b> Ease of implementation of reform                        | 5                   | 1        | 4        | 3        |
| <i>Source: Indecon</i>   |                     |          |          |          |

Table 6.24 shows the results of combining the individual scores with a pairwise weighting analysis. These results show that Option 3 (Non-binding guidelines with additional transparency measures) is the strongest performing option. Option 2 (binding maximum guidelines) and Option 4 (binding maximum guidelines to non-complex PI cases) are the next best options. Both of these options are giving a higher rating than Option 1 (non-binding guidelines).

**Table 6.24: Multi-Criteria Analysis – Scoring (Based on Rankings and Pairwise Analysis)**

|  | <b>Option 1</b> | <b>Option 2</b> | <b>Option 3</b> | <b>Option 4</b> |
|--|-----------------|-----------------|-----------------|-----------------|
| <b>Objective 1:</b> Enhancing competition                                    | 0.08            | 0.00            | 0.42            | 0.08            |
| <b>Objective 2:</b> Reduce the cost of litigation                            | 0.38            | 0.95            | 0.76            | 0.76            |
| <b>Objective 3:</b> Provide certainty on litigation costs                    | 0.39            | 0.65            | 0.52            | 0.52            |
| <b>Objective 4:</b> Increase the transparency of litigation costs            | 0.38            | 0.47            | 0.47            | 0.38            |
| <b>Objective 5:</b> Maintain or improve quality of service                   | 0.12            | 0.00            | 0.35            | 0.12            |
| <b>Objective 6:</b> Improve access to justice for all citizens               | 0.23            | 0.23            | 0.35            | 0.23            |
| <b>Objective 7:</b> Reduce the time involved in litigation                   | 0.21            | 0.28            | 0.28            | 0.34            |
| <b>Objective 8:</b> Improve the effectiveness/efficiency of the legal system | 0.22            | 0.29            | 0.29            | 0.22            |
| <b>Objective 9:</b> Reduce pressure on the courts system                     | 0.19            | 0.31            | 0.25            | 0.31            |
| <b>Objective 10:</b> Ease of implementation of reform                        | 0.32            | 0.06            | 0.26            | 0.19            |
| <b>Total</b>   | <b>2.51</b>     | <b>3.25</b>     | <b>3.94</b>     | <b>3.16</b>     |

*Source: Indecon analysis*

It is clear that there is significant uncertainty about how non-binding guidelines would be enforced and what impact (if any) they would have on the cost of litigation. There is potential that these non-guidelines will routinely be ignored, and little will change from the current system. For this reason, it is important to consider an alternative scoring model where policy objectives relating to cost are re-focused towards reform options with binding maximum guidelines. The policy objectives that directly relate to cost include reduce the cost of litigation, providing certainty on costs and increasing the transparency. Each of these policy objectives will be significantly impacted by whether cost guidelines are binding or non-binding. The alternative scores are highlighted in red in Table 6.25.

| Table 6.25: Multi-Criteria Analysis – Alternative Scenario 1 – Alternate Scoring on Cost-related objectives |                     |          |          |          |
|---|---------------------|----------|----------|----------|
| Policy Objectives   | Option Scores (0-5) |          |          |          |
|   | Option 1            | Option 2 | Option 3 | Option 4 |
| <b>Objective 1:</b> Enhancing competition   | 1                   | 0        | 5        | 1        |
| <b>Objective 2:</b> Reduce the cost of litigation   | 0                   | 4        | 1        | 3        |
| <b>Objective 3:</b> Provide certainty on litigation costs   | 1                   | 5        | 2        | 4        |
| <b>Objective 4:</b> Increase the transparency of litigation costs   | 2                   | 5        | 3        | 4        |
| <b>Objective 5:</b> Maintain or improve quality of service  | 1                   | 0        | 3        | 1        |
| <b>Objective 6:</b> Improve access to justice for all citizens  | 2                   | 2        | 3        | 2        |
| <b>Objective 7:</b> Reduce the time involved in litigation  | 3                   | 4        | 4        | 5        |
| <b>Objective 8:</b> Improve the effectiveness/efficiency of the legal system                                | 3                   | 4        | 4        | 3        |
| <b>Objective 9:</b> Reduce pressure on the courts system  | 3                   | 5        | 4        | 5        |
| <b>Objective 10:</b> Ease of implementation of reform   | 5                   | 1        | 4        | 3        |
| <i>Source: Indecon analysis</i>   |                     |          |          |          |

The overall impact on how each of the reform options of this alternative scoring model is shown in Table 6.26. The estimates from the Multi-Criteria Analysis (MCA) undertaken highlight little difference between Options 2, 3, and 4. Option 2 (binding maximum guidelines) is the strongest performing option. The same pairwise weighting approach as per the baseline model is applied to these alternative scores.

| <b>Table 6.26: Multi-Criteria Analysis – Alternative Scenario 1 – Alternate Scoring on Cost-related objectives</b> |                 |                 |                 |                 |
|--|-----------------|-----------------|-----------------|-----------------|
|  | <b>Option 1</b> | <b>Option 2</b> | <b>Option 3</b> | <b>Option 4</b> |
| <b>Objective 1:</b> Enhancing competition  | 0.08            | 0.00            | 0.42            | 0.08            |
| <b>Objective 2:</b> Reduce the cost of litigation  | 0.00            | 0.76            | 0.19            | 0.57            |
| <b>Objective 3:</b> Provide certainty on litigation costs  | 0.13            | 0.65            | 0.26            | 0.52            |
| <b>Objective 4:</b> Increase the transparency of litigation costs  | 0.19            | 0.47            | 0.28            | 0.38            |
| <b>Objective 5:</b> Maintain or improve quality of service   | 0.12            | 0.00            | 0.35            | 0.12            |
| <b>Objective 6:</b> Improve access to justice for all citizens   | 0.23            | 0.23            | 0.35            | 0.23            |
| <b>Objective 7:</b> Reduce the time involved in litigation   | 0.21            | 0.28            | 0.28            | 0.34            |
| <b>Objective 8:</b> Improve the effectiveness/efficiency of the legal system                                       | 0.22            | 0.29            | 0.29            | 0.22            |
| <b>Objective 9:</b> Reduce pressure on the courts system   | 0.19            | 0.31            | 0.25            | 0.31            |
| <b>Objective 10:</b> Ease of implementation of reform  | 0.32            | 0.06            | 0.26            | 0.19            |
| <b>Total</b>   | <b>1.68</b>     | <b>3.06</b>     | <b>2.93</b>     | <b>2.97</b>     |
| <i>Source: Indecon analysis</i>  |                 |                 |                 |                 |

Sensitivity analysis on the weighting system assumptions is shown in Table 6.27. This sensitivity assigns an equal weighting on each of the policy objectives. Under this analysis, Option 3 is the strongest performing option. These equal weights are applied to the baseline scoring as per Table 6.23.

**Table 6.27: Alternative Scenario 2 - Summary of Scoring (Equal Weights)**

|  | <b>Option 1</b> | <b>Option 2</b> | <b>Option 3</b> | <b>Option 4</b> |
|--|-----------------|-----------------|-----------------|-----------------|
| <b>Objective 1:</b> Enhancing competition                                    | 0.10            | 0.00            | 0.50            | 0.10            |
| <b>Objective 2:</b> Reduce the cost of litigation                            | 0.20            | 0.50            | 0.40            | 0.40            |
| <b>Objective 3:</b> Provide certainty on litigation costs                    | 0.30            | 0.50            | 0.40            | 0.40            |
| <b>Objective 4:</b> Increase the transparency of litigation costs            | 0.40            | 0.50            | 0.50            | 0.40            |
| <b>Objective 5:</b> Maintain or improve quality of service                   | 0.10            | 0.00            | 0.30            | 0.10            |
| <b>Objective 6:</b> Improve access to justice for all citizens               | 0.20            | 0.20            | 0.30            | 0.20            |
| <b>Objective 7:</b> Reduce the time involved in litigation                   | 0.30            | 0.40            | 0.40            | 0.50            |
| <b>Objective 8:</b> Improve the effectiveness/efficiency of the legal system | 0.30            | 0.40            | 0.40            | 0.30            |
| <b>Objective 9:</b> Reduce pressure on the courts system                     | 0.30            | 0.50            | 0.40            | 0.50            |
| <b>Objective 10:</b> Ease of implementation of reform                        | 0.50            | 0.10            | 0.40            | 0.30            |
| <b>Total</b>   | <b>2.70</b>     | <b>3.10</b>     | <b>4.00</b>     | <b>3.20</b>     |

*Source: Indecon analysis*

## 6.15 Summary of evaluation findings

This report analyses in detail four reform options designed to support the overall objectives of controlling litigation costs in Ireland. Our analysis has been informed by extensive analysis of available empirical evidence, a detailed review of the experience in other countries and a careful consideration of stakeholder views. Some limited new survey evidence was also completed. Our analysis suggests that Option 3 (non-binding guidelines with additional transparency measures) may be the strongest performing option under our baseline assumptions. Under alternative assumptions around the likely impact of cost-related policy objectives, the binding maximum guidelines also score highly.

## 7 Summary of Main Conclusions

### SUMMARY OF MAIN CONCLUSIONS

Indecon's independent conclusions on the potential for the reform of litigation costs based on the detailed analysis completed and the stakeholder consultations are presented in the table below.

| Table 7.1: Summary of Key Conclusions  |  |
|--|--|
| <b>1. LITIGATION COSTS IN IRELAND ARE SIGNIFICANT AND VARY BY SETTLEMENT CHANNEL</b>   | For employer liability injury settlement cases which were litigated, average legal costs accounted for 33% of total settlement costs. Where direct settlements are made, legal costs are lower at between 8-14%, and are much lower at between 2-4% when cases are dealt with by PIAB. There is also some evidence that litigation costs in other countries are lower than in Ireland although causation is difficult to determine.  |
| <b>2. MEASURES TO REDUCE LITIGATION COSTS HAVE BEEN IMPLEMENTED IN OTHER COUNTRIES</b>   | There is a lack of clear evidence of the precise impact of reforms in other countries in terms of reducing litigation costs or improving service quality. As a result there is no simple solutions which can be transposed to Irish circumstances. A number of the measures implemented in other countries, notably in the UK, however, appear to have had some impact on reducing costs.  |
| <b>3. DESPITE THE PROGRESS MADE IN RECENT YEARS IN COLLATING AND PUBLISHING DATA ON LEGAL COSTS, MAJOR GAPS IN INFORMATION ON THE COSTS OF LITIGATION STILL EXIST</b>  | Work by the Central Bank and other organisations has provided greater clarity on legal costs but significant gaps remain. The information gaps reflect a barrier to evidence-based policy and hinders transparency for users of legal services. Continued work on improving information is required.   |
| <b>4. THERE ARE ISSUES RELATING TO THE TWO MAIN OPTIONS WHICH HAVE PREVIOUSLY BEEN IDENTIFIED TO REDUCE LITIGATION COSTS NAMELY (I) NON BINDING GUIDELINES ON MAXIMUM LITIGATION COSTS AND (II) MAXIMUM LITIGATION COSTS</b>   | On the first option Indecon agrees with the conclusion of the Chair of the Review Group, the Hon. Mr. Justice Peter Kelly, that more radical measures than the introduction of non-binding guidelines will be needed if costs are to be reduced. Indecon also agrees with the conclusion of the Competition and Consumer Protection Commission that the option of non-binding guidelines does not constitute a significant change to the existing process. Indecon however believes that binding guidelines depending on how they are implemented and on what level they are set may not have the desired results. Indeed, while they have the potential to reduce costs there is a risk that if levels are set at average cost elements, costs would rise for most litigants. |
| <b>9. THERE IS MERIT IN CONSIDERING ALTERNATIVE NEW OPTIONS TO REDUCE LITIGATION COSTS IN PARTICULAR (I) NON-BINDING GUIDELINES ON LITIGATION COSTS BUT WITH SIGNIFICANTLY ENHANCED TRANSPARENCY MEASURES AND (II) BINDING MAXIMUM LITIGATION COSTS BUT ONLY FOR NON-COMPLEX PERSONAL INJURY CASES</b> | Both of these options would enable policy makers to secure additional information which would facilitate any future evidence-based policy reforms which may be needed. The option of non-binding guidelines with enhanced transparency measures would act as an incentive for cost reductions.   |
| <b>6. THE NEW OPTION OF NON BINDING GUIDELINES BUT WITH SIGNIFICANTLY ENHANCED TRANSPARENCY MEASURES SCORES MOST HIGHLY IN THE MULTI CRITERIA ANALYSIS</b>   | This option is likely to best facilitate the objectives of enhancing competition and is also likely to have significant potential impacts in terms of reducing the cost of litigation, maintaining the quality of service and meeting other policy objectives. It would also enable policymakers to have much greater access to information on aspects of the cost of litigation. Indecon believes this option merits careful consideration.   |
| <i>Source: Indecon analysis</i>  |  |

## **Annex 1 Levels of Award Amounts by Court**

### Levels of Award Amounts by Court

In examining litigation costs, it is useful to place these within the context of the levels of awards given by different courts. The variance in the levels of awards is noted in the table below which shows that the District Court tends to deal with proceedings with awards of less than €15,000 (99% of cases in 2021), although the Circuit Court also deals with some awards of this level.

| Table A1.1: District Court Cases by Award Amount |            |            |
|--|------------|------------|
| Personal Injuries Awards                         | 2020       | 2021       |
| €0 to €7,500                                     | 267        | 227        |
| €7,500 to €15,000                                | 230        | 245        |
| €15,000+   | 5          | 7          |
| <b>Total</b>                                     | <b>502</b> | <b>479</b> |
| <i>Source: 2021 Courts Service Annual Report</i> |            |            |

The next table shows that in 2021 the Circuit Court had 445 cases where awards given were €15,000 or less. In a large number of cases, awards worth more than €15,000 were awarded, most of which were less than €60,000.

| Table A1.2: Circuit Court Cases by Award Amount  |              |              |
|--|--------------|--------------|
| Personal Injuries Awards                         | 2020         | 2021         |
| €0 to €15,000                                    | 458          | 445          |
| €15,000 to €60,000                               | 650          | 741          |
| €60,000+   | 34           | 2            |
| <b>Total</b>                                     | <b>1,142</b> | <b>1,188</b> |
| <i>Source: 2021 Courts Service Annual Report</i> |              |              |

The High Court understandably deals with cases of a much larger magnitude. The next table shows that 17% at High Court cases had awards which exceeded €500,000 in 2021.

| Table A1.3: High Court Cases by Award Amount     |            |            |
|--|------------|------------|
| Amount   | 2020       | 2021       |
| €0 to €60,000                                    | 102        | 138        |
| €60,000 to €199,999                              | 130        | 118        |
| €200,000 to €499,999                             | 44         | 23         |
| €500,000+  | 52         | 57         |
| <b>Total</b>                                     | <b>328</b> | <b>336</b> |
| <i>Source: 2021 Courts Service Annual Report</i> |            |            |
| <i>Note: Includes medical negligence awards</i>  |            |            |



It is important to note that both the levels of awards and the costs of litigation vary significantly. In complex areas such as medical negligence, the nature of the issues involved often lead to high levels of awards. This is evident in the next table which shows High Court medical negligence awards. Negligence claims are claims for damages against a person or persons against whom it is alleged breached a duty of care owed to the claimant resulting in pecuniary loss. The time and specialised resources required to deal with such cases frequently result in high levels of litigation costs.

| Table A1.4: Medical Negligence High Court Cases by Award Amount |            |           |
|---|------------|-----------|
| Amount  | 2020       | 2021      |
| €0 to €60,000   | 26         | 20        |
| €60,000 to €199,999   | 22         | 19        |
| €200,000 to €499,999  | 20         | 7         |
| €500,000+   | 38         | 38        |
| <b>Total</b>  | <b>106</b> | <b>84</b> |
| <i>Source: 2021 Courts Service Annual Report</i>                |            |           |

The differences in the nature of cases and the resultant levels of awards is illustrated in the table below which presents data on the highest and lowest levels of award by court jurisdiction. This shows that awards in High Court cases ranged from as low as €2,154 to €30 million in 2021.

| Table A1.5: Highest, Lowest and Total Award Amounts by Jurisdiction |                     |                     |                    |                    |                   |                   |
|---|---------------------|---------------------|--------------------|--------------------|-------------------|-------------------|
|   | High Court          |                     | Circuit Court      |                    | District Court    |                   |
|   | 2020                | 2021                | 2020               | 2021               | 2020              | 2021              |
| <b>Lowest</b>   | €7,500              | €2,154              | €1,405             | €500               | €500              | €500              |
| <b>Highest</b>  | €22,500,000         | €30,000,000         | €75,000            | €64,441            | €20,000           | €17,500           |
| <b>Total</b>  | <b>€222,130,172</b> | <b>€281,832,361</b> | <b>€20,162,907</b> | <b>€21,949,204</b> | <b>€3,809,294</b> | <b>€3,662,251</b> |
| <i>Source: 2021 Courts Service Annual Report</i>                    |                     |                     |                    |                    |                   |                   |
| <i>Note: Includes medical negligence awards</i>                     |                     |                     |                    |                    |                   |                   |

## Annex 2 ILCA Data on Legal Costs

| Table A2.1: Analysis of ILCA Data on Legal Costs for Personal Injury Cases Settled in 2011                                  |           |                |            |                          |                  |   |                                |
|---|-----------|----------------|------------|--------------------------|------------------|---|--------------------------------|
| Background Details  |           |                |            | Legal Costs              |                  |   |                                |
| Case  | Duration  | Level of Award | Trial Days | Total Professional Costs | Solicitors Costs | Combined Junior and Senior Counsel Fees | Expert Witness and Other Costs |
| 1   | 69        | 40,000         | N/A        | 30,670                   | 23,980           | 6,690                                   | 4,703                          |
| 2   | 59        | 20,000         | 1          | 12,915                   | 11,377           | 1,538                                   | 4,620                          |
| 3   | 48        | 59,000         | 1          | 33,223                   | 27,234           | 5,989                                   | 5,445                          |
| 4   | 24        | 52,500         | N/A        | 21,300                   | 17,000           | 4,300                                   | 1,103                          |
| 5   | N/A       | 61,000         | 5          | 107,281                  | 82,718           | 24,563                                  | 22,248                         |
| 6   | N/A       | 123,000        | N/A        | 96,810                   | 61,720           | 35,090                                  | 1,550                          |
| <b>Max</b>  | <b>69</b> | <b>123,000</b> | <b>5</b>   | <b>107,281</b>           | <b>82,718</b>    | <b>35,090</b>                           | <b>22,248</b>                  |
| <b>Min</b>  | <b>24</b> | <b>20,000</b>  | <b>1</b>   | <b>12,915</b>            | <b>11,377</b>    | <b>1,538</b>                            | <b>1,103</b>                   |
| <b>Median</b>   | <b>54</b> | <b>55,750</b>  | <b>1</b>   | <b>31,947</b>            | <b>25,607</b>    | <b>6,339</b>                            | <b>4,661</b>                   |
| <b>Mean</b>   | <b>50</b> | <b>59,250</b>  | <b>2</b>   | <b>50,366</b>            | <b>37,338</b>    | <b>13,028</b>                           | <b>6,611</b>                   |
| <i>Source: Indecon Analysis of 129 ILCA Cases</i>   |           |                |            |                          |                  |   |                                |
| <i>Note: Counsel Fees include aggregation of Junior and Senior Counsel Fees. All data includes VAT. N/A – Not available</i> |           |                |            |                          |                  |   |                                |

| Table A2.2: Analysis of ILCA Data on Legal Costs for Medical Negligence Cases Settled in 2011           |            |                  |            |                          |                  |   |                                |
|---|------------|------------------|------------|--------------------------|------------------|---|--------------------------------|
| Background Details  |            |                  |            | Legal Costs              |                  |   |                                |
| Case  | Duration   | Level of Award   | Trial Days | Total Professional Costs | Solicitors Costs | Combined Junior and Senior Counsel Fees | Expert Witness and Other Costs |
| 1   | 55         | 140,000          | 1          | 115,926                  | 71,223           | 44,703                                  | 6,523                          |
| 2   | 65         | 3,750,000        |            | 653,938                  | 487,483          | 166,455                                 | 41,047                         |
| 3   | 45         | 564,000          | 1          | 250,802                  | 180,295          | 70,507                                  | 23,250                         |
| 4   | 125        | 75,000           | 1          | 71,967                   | 52,704           | 19,263                                  | 5,500                          |
| 5   | 19         | 900,000          | 1          | 356,911                  | 283,320          | 73,591                                  | 25,501                         |
| <b>Max</b>  | <b>125</b> | <b>3,750,000</b> | <b>1</b>   | <b>653,938</b>           | <b>487,483</b>   | <b>166,455</b>                          | <b>41,047</b>                  |
| <b>Min</b>  | <b>19</b>  | <b>75,000</b>    | <b>1</b>   | <b>71,967</b>            | <b>52,704</b>    | <b>19,263</b>                           | <b>5,500</b>                   |
| <b>Median</b>   | <b>55</b>  | <b>564,000</b>   | <b>1</b>   | <b>250,802</b>           | <b>180,295</b>   | <b>70,507</b>                           | <b>23,250</b>                  |
| <b>Mean</b>   | <b>62</b>  | <b>1,085,800</b> | <b>1</b>   | <b>289,909</b>           | <b>215,005</b>   | <b>74,904</b>                           | <b>20,364</b>                  |
| <i>Source: Indecon Analysis of 129 ILCA Cases</i>   |            |                  |            |                          |                  |   |                                |
| <i>Note: Counsel Fees include aggregation of Junior and Senior Counsel Fees. All data includes VAT.</i> |            |                  |            |                          |                  |   |                                |

| Table A2.3: Analysis of ILCA Data on Legal Costs for Personal Injury Cases Settled in 2012       |           |                |            |                          |                  |   |                                |
|--|-----------|----------------|------------|--------------------------|------------------|---|--------------------------------|
| Background Details   |           |                |            | Legal Costs              |                  |   |                                |
| Case   | Duration  | Level of Award | Trial Days | Total Professional Costs | Solicitors Costs | Combined Junior and Senior Counsel Fees | Expert Witness and Other Costs |
| 1  | 43        | 18,000         | 1          | 10,795                   | 8,397            | 2,399                                   | 1,759                          |
| 2  | N/A       | 58,000         | 1          | 22,817                   | 17,528           | 5,289                                   | 2,680                          |
| 3  | N/A       | 95,000         | 3          | 33,281                   | 26,505           | 6,776                                   | 2,805                          |
| 4  | N/A       | 100,000        | 3          | 60,046                   | 51,425           | 8,621                                   | 13,506                         |
| 5  | 34        | 125,000        | N/A        | 36,260                   | 31,857           | 4,403                                   | 4,119                          |
| <b>Max</b>   | <b>43</b> | <b>125,000</b> | <b>3</b>   | <b>60,046</b>            | <b>51,425</b>    | <b>8,621</b>                            | <b>13,506</b>                  |
| <b>Min</b>   | <b>34</b> | <b>18,000</b>  | <b>1</b>   | <b>10,795</b>            | <b>8,397</b>     | <b>2,399</b>                            | <b>1,759</b>                   |
| <b>Median</b>  | <b>39</b> | <b>95,000</b>  | <b>2</b>   | <b>33,281</b>            | <b>26,505</b>    | <b>5,289</b>                            | <b>2,805</b>                   |
| <b>Mean</b>  | <b>39</b> | <b>79,200</b>  | <b>2</b>   | <b>32,640</b>            | <b>27,142</b>    | <b>5,498</b>                            | <b>4,974</b>                   |
| Source: Indecon Analysis of 129 ILCA Cases   |           |                |            |                          |                  |   |                                |
| Note: Counsel Fees include aggregation of Junior and Senior Counsel Fees. All data includes VAT. |           |                |            |                          |                  |   |                                |

| Table A2.4: Analysis of ILCA Data on Legal Costs for Medical Negligence Cases Settled in 2012    |            |                |            |                          |                  |   |                                |
|--|------------|----------------|------------|--------------------------|------------------|---|--------------------------------|
| Background Details   |            |                |            | Legal Costs              |                  |   |                                |
| Case   | Duration   | Level of Award | Trial Days | Total Professional Costs | Solicitors Costs | Combined Junior and Senior Counsel Fees | Expert Witness and Other Costs |
| 1  | 33         | 105,000        | 1          | 81,239                   | 48,841           | 32,398                                  | 5,930                          |
| 2  | 130        | 750,000        | 11         | 147,600                  | 101,475          | 46,125                                  | 15,000                         |
| 3  | N/A        | 80,000         | N/A        | 56,023                   | 36,905           | 19,118                                  | 8,242                          |
| <b>Max</b>   | <b>130</b> | <b>750,000</b> | <b>11</b>  | <b>147,600</b>           | <b>101,475</b>   | <b>46,125</b>                           | <b>15,000</b>                  |
| <b>Min</b>   | <b>33</b>  | <b>80,000</b>  | <b>1</b>   | <b>56,023</b>            | <b>36,905</b>    | <b>19,118</b>                           | <b>5,930</b>                   |
| <b>Median</b>  | <b>82</b>  | <b>105,000</b> | <b>6</b>   | <b>81,239</b>            | <b>48,841</b>    | <b>32,398</b>                           | <b>8,242</b>                   |
| <b>Mean</b>  | <b>82</b>  | <b>311,667</b> | <b>6</b>   | <b>94,954</b>            | <b>62,407</b>    | <b>32,547</b>                           | <b>9,724</b>                   |
| Source: Indecon Analysis of 129 ILCA Cases   |            |                |            |                          |                  |   |                                |
| Note: Counsel Fees include aggregation of Junior and Senior Counsel Fees. All data includes VAT. |            |                |            |                          |                  |   |                                |

| Table A2.5: Analysis of ILCA Data on Legal Costs for Personal Injury Cases Settled in 2013              |           |                |            |                          |                  |   |                                |
|---|-----------|----------------|------------|--------------------------|------------------|---|--------------------------------|
| Background Details  |           |                |            | Legal Costs              |                  |   |                                |
| Case  | Duration  | Level of Award | Trial Days | Total Professional Costs | Solicitors Costs | Combined Junior and Senior Counsel Fees | Expert Witness and Other Costs |
| 1   | 33        | 110,000        | 3          | 52,248                   | 35,766           | 16,482                                  | 19,732                         |
| 2   | 21        | 13,000         | N/A        | 4,897                    | 3,667            | 1,230                                   | 572                            |
| 3   | 30        | 42,500         | N/A        | 8,761                    | 8,761            | N/A                                     | 1,056                          |
| 4   | 51        | 300,000        | N/A        | 81,970                   | 58,693           | 23,278                                  | 10,224                         |
| 5   | 26        | 20,000         | 1          | 7,073                    | 5,535            | 1,538                                   | 1,425                          |
| 6   | 21        | 20,000         | 1          | 12,146                   | 8,610            | 3,536                                   | 2,400                          |
| 7   | 60        | 15,000         | 2          | 19,256                   | 13,758           | 5,498                                   | 4,255                          |
| 8   | N/A       | 52,000         | N/A        | 19,250                   | 16,236           | 3,014                                   | 1,364                          |
| 9   | 52        | 57,500         | N/A        | 12,485                   | 10,455           | 2,030                                   | 2,508                          |
| <b>Max</b>  | <b>60</b> | <b>300,000</b> | <b>3</b>   | <b>81,970</b>            | <b>58,693</b>    | <b>23,278</b>                           | <b>19,732</b>                  |
| <b>Min</b>  | <b>21</b> | <b>13,000</b>  | <b>1</b>   | <b>4,897</b>             | <b>3,667</b>     | <b>1,230</b>                            | <b>572</b>                     |
| <b>Median</b>   | <b>32</b> | <b>42,500</b>  | <b>2</b>   | <b>12,485</b>            | <b>10,455</b>    | <b>3,275</b>                            | <b>2,400</b>                   |
| <b>Mean</b>   | <b>37</b> | <b>70,000</b>  | <b>2</b>   | <b>24,232</b>            | <b>17,942</b>    | <b>7,076</b>                            | <b>4,837</b>                   |
| <i>Source: Indecon Analysis of 129 ILCA Cases</i>   |           |                |            |                          |                  |   |                                |
| <i>Note: Counsel Fees include aggregation of Junior and Senior Counsel Fees. All data includes VAT.</i> |           |                |            |                          |                  |   |                                |

| Table A2.6: Analysis of ILCA Data on Legal Costs for Medical Negligence Cases Settled in 2013           |           |                |            |                          |                  |   |                                |
|---|-----------|----------------|------------|--------------------------|------------------|---|--------------------------------|
| Background Details  |           |                |            | Legal Costs              |                  |   |                                |
| Case  | Duration  | Level of Award | Trial Days | Total Professional Costs | Solicitors Costs | Combined Junior and Senior Counsel Fees | Expert Witness and Other Costs |
| 1   | 60        | 425,000        | 1          | 179,580                  | 129,150          | 50,430                                  | 35,121                         |
| 2   | 60        | 120,000        | N/A        | 74,108                   | 60,270           | 13,838                                  | 8,250                          |
| <b>Max</b>  | <b>60</b> | <b>425,000</b> | <b>1</b>   | <b>179,580</b>           | <b>129,150</b>   | <b>50,430</b>                           | <b>35,121</b>                  |
| <b>Min</b>  | <b>60</b> | <b>120,000</b> | <b>1</b>   | <b>74,108</b>            | <b>60,270</b>    | <b>13,838</b>                           | <b>8,250</b>                   |
| <b>Median</b>   | <b>60</b> | <b>272,500</b> | <b>1</b>   | <b>126,844</b>           | <b>94,710</b>    | <b>32,134</b>                           | <b>21,685</b>                  |
| <b>Mean</b>   | <b>60</b> | <b>272,500</b> | <b>1</b>   | <b>126,844</b>           | <b>94,710</b>    | <b>32,134</b>                           | <b>21,685</b>                  |
| <i>Source: Indecon Analysis of 129 ILCA Cases</i>   |           |                |            |                          |                  |   |                                |
| <i>Note: Counsel Fees include aggregation of Junior and Senior Counsel Fees. All data includes VAT.</i> |           |                |            |                          |                  |   |                                |

| Table A2.7: Analysis of ILCA Data on Legal Costs for Personal Injury Cases Settled in 2014              |           |                |            |                          |                  |   |                                |
|---|-----------|----------------|------------|--------------------------|------------------|---|--------------------------------|
| Background Details  |           |                |            | Legal Costs              |                  |   |                                |
| Case  | Duration  | Level of Award | Trial Days | Total Professional Costs | Solicitors Costs | Combined Junior and Senior Counsel Fees | Expert Witness and Other Costs |
| 1   | 33        | 7,500          | N/A        | 10,308                   | 8,642            | 1,667                                   | 750                            |
| 2   | 48        | 25,000         | 1          | 9,715                    | 7,162            | 2,552                                   | 760                            |
| 3   | 71        | 40,000         | N/A        | 20,888                   | 17,505           | 3,383                                   | 2,568                          |
| 4   | 23        | 16,000         | N/A        | 7,712                    | 6,267            | 1,445                                   | 2,095                          |
| 5   | 20        | 61,000         | N/A        | 17,257                   | 14,883           | 2,374                                   | 1,127                          |
| 6   | 38        | 50,000         | 4          | 45,940                   | 38,745           | 7,195                                   | 14,332                         |
| 7   | 54        | 300,000        | 1          | 80,106                   | 53,569           | 26,537                                  | 4,996                          |
| 8   | 57        | 900,000        | N/A        | 125,458                  | 101,596          | 23,862                                  | 13,425                         |
| 9   | 36        | 35,000         | N/A        | 17,817                   | 13,697           | 4,121                                   | 250                            |
| 10  | 22        | 30,000         | N/A        | 10,824                   | 9,533            | 1,292                                   | 1,867                          |
| 11  | 33        | 20,000         | N/A        | 7,946                    | 6,642            | 1,304                                   | 2,550                          |
| 12  | 4         | 22,500         | N/A        | 6,081                    | 4,500            | 1,581                                   | 2,230                          |
| <b>Max</b>  | <b>71</b> | <b>900,000</b> | <b>4</b>   | <b>125,458</b>           | <b>101,596</b>   | <b>26,537</b>                           | <b>14,332</b>                  |
| <b>Min</b>  | <b>4</b>  | <b>7,500</b>   | <b>1</b>   | <b>6,081</b>             | <b>4,500</b>     | <b>1,292</b>                            | <b>250</b>                     |
| <b>Median</b>   | <b>35</b> | <b>32,500</b>  | <b>1</b>   | <b>14,040</b>            | <b>11,615</b>    | <b>2,463</b>                            | <b>2,163</b>                   |
| <b>Mean</b>   | <b>37</b> | <b>125,583</b> | <b>2</b>   | <b>30,004</b>            | <b>23,562</b>    | <b>6,443</b>                            | <b>3,912</b>                   |
| <i>Source: Indecon Analysis of 129 ILCA Cases</i>   |           |                |            |                          |                  |   |                                |
| <i>Note: Counsel Fees include aggregation of Junior and Senior Counsel Fees. All data includes VAT.</i> |           |                |            |                          |                  |   |                                |

| Table A2.8: Analysis of ILCA Data on Legal Costs for Medical Negligence Cases Settled in 2014           |            |                |            |                          |                  |   |                                |
|---|------------|----------------|------------|--------------------------|------------------|---|--------------------------------|
| Background Details  |            |                |            | Legal Costs              |                  |   |                                |
| Case  | Duration   | Level of Award | Trial Days | Total Professional Costs | Solicitors Costs | Combined Junior and Senior Counsel Fees | Expert Witness and Other Costs |
| 1   | 40         | 150,000        | N/A        | 123,276                  | 81,293           | 41,983                                  | 13,166                         |
| 2   | 160        | 175,000        | 1          | 304,327                  | 198,930          | 105,396                                 | 17,346                         |
| 3   | 36         | 150,000        | N/A        | 122,231                  | 79,950           | 42,281                                  | 12,450                         |
| <b>Max</b>  | <b>160</b> | <b>175,000</b> | <b>1</b>   | <b>304,327</b>           | <b>198,930</b>   | <b>105,396</b>                          | <b>17,346</b>                  |
| <b>Min</b>  | <b>36</b>  | <b>150,000</b> | <b>1</b>   | <b>122,231</b>           | <b>79,950</b>    | <b>41,983</b>                           | <b>12,450</b>                  |
| <b>Median</b>   | <b>40</b>  | <b>150,000</b> | <b>1</b>   | <b>123,276</b>           | <b>81,293</b>    | <b>42,281</b>                           | <b>13,166</b>                  |
| <b>Mean</b>   | <b>79</b>  | <b>158,333</b> | <b>1</b>   | <b>183,278</b>           | <b>120,058</b>   | <b>63,220</b>                           | <b>14,320</b>                  |
| <i>Source: Indecon Analysis of 129 ILCA Cases</i>   |            |                |            |                          |                  |   |                                |
| <i>Note: Counsel Fees include aggregation of Junior and Senior Counsel Fees. All data includes VAT.</i> |            |                |            |                          |                  |   |                                |

| Table A2.9: Analysis of ILCA Data on Legal Costs for Personal Injury Cases Settled in 2015              |           |                |            |                          |                  |   |                                |
|---|-----------|----------------|------------|--------------------------|------------------|---|--------------------------------|
| Background Details  |           |                |            | Legal Costs              |                  |   |                                |
| Case  | Duration  | Level of Award | Trial Days | Total Professional Costs | Solicitors Costs | Combined Junior and Senior Counsel Fees | Expert Witness and Other Costs |
| 1   | 27        | 20,000         | N/A        | 8,322                    | 7,092            | 1,230                                   | 822                            |
| 2   | 62        | 66,500         | 7          | 44,042                   | 33,554           | 10,488                                  | 11,192                         |
| 3   | 67        | 75,000         | N/A        | 37,137                   | 29,172           | 7,964                                   | 3,619                          |
| 4   | 44        | 23,011         | 1          | 11,554                   | 9,279            | 2,276                                   | 2,828                          |
| 5   | 22        | 40,000         | N/A        | 30,873                   | 26,691           | 4,182                                   | 1,400                          |
| 6   | 75        | 230,000        | N/A        | 44,177                   | 43,501           | 677                                     | N/A                            |
| 7   | 36        | 15,500         | N/A        | 11,658                   | 9,260            | 2,399                                   | 3,205                          |
| 8   | 2         | 40,000         | N/A        | 6,458                    | 6,150            | 308                                     | 245                            |
| <b>Max</b>  | <b>75</b> | <b>230,000</b> | <b>7</b>   | <b>44,177</b>            | <b>43,501</b>    | <b>10,488</b>                           | <b>11,192</b>                  |
| <b>Min</b>  | <b>2</b>  | <b>15,500</b>  | <b>1</b>   | <b>6,458</b>             | <b>6,150</b>     | <b>308</b>                              | <b>245</b>                     |
| <b>Median</b>   | <b>40</b> | <b>40,000</b>  | <b>4</b>   | <b>21,266</b>            | <b>17,985</b>    | <b>2,337</b>                            | <b>2,828</b>                   |
| <b>Mean</b>   | <b>42</b> | <b>63,751</b>  | <b>4</b>   | <b>24,278</b>            | <b>20,587</b>    | <b>3,690</b>                            | <b>3,330</b>                   |
| <i>Source: Indecon Analysis of 129 ILCA Cases</i>   |           |                |            |                          |                  |   |                                |
| <i>Note: Counsel Fees include aggregation of Junior and Senior Counsel Fees. All data includes VAT.</i> |           |                |            |                          |                  |   |                                |

| Table A2.10: Analysis of ILCA Data on Legal Costs for Medical Negligence Cases Settled in 2015 |          |                |            |                          |                  |   |                                |
|--|----------|----------------|------------|--------------------------|------------------|---|--------------------------------|
| Background Details   |          |                |            | Legal Costs              |                  |   |                                |
| Case   | Duration | Level of Award | Trial Days | Total Professional Costs | Solicitors Costs | Combined Junior and Senior Counsel Fees | Expert Witness and Other Costs |
| 1  | 144      | 50,000         | N/A        | 100,711                  | 68,602           | 32,109                                  | 8,823                          |
| 2  | 72       | 100,000        | N/A        | 71,217                   | 47,724           | 23,493                                  | 2,402                          |
| 3  | 29       | 80,000         | N/A        | 58,170                   | 46,208           | 11,962                                  | 9,241                          |
| 4  | 65       | 250,000        | N/A        | 152,767                  | 100,553          | 52,214                                  | 20,828                         |
| 5  | 54       | 375,000        | N/A        | 141,966                  | 98,485           | 43,481                                  | 9,562                          |
| 6  | 25       | 55,000         | N/A        | 60,653                   | 45,278           | 15,375                                  | 7,200                          |
| 7  | 42       | 900,000        | 1          | 249,075                  | 181,425          | 67,650                                  | 20,350                         |
| 8  | 17       | 139,435        | 7          | 130,394                  | 70,825           | 59,569                                  | 20,543                         |

|   |            |                |          |                |                |               |               |
|---|------------|----------------|----------|----------------|----------------|---------------|---------------|
| <b>Max</b>  | <b>144</b> | <b>900,000</b> | <b>7</b> | <b>249,075</b> | <b>181,425</b> | <b>67,650</b> | <b>20,828</b> |
| <b>Min</b>  | <b>17</b>  | <b>50,000</b>  | <b>1</b> | <b>58,170</b>  | <b>45,278</b>  | <b>11,962</b> | <b>2,402</b>  |
| <b>Median</b>   | <b>48</b>  | <b>119,717</b> | <b>4</b> | <b>115,553</b> | <b>69,714</b>  | <b>37,795</b> | <b>9,401</b>  |
| <b>Mean</b>   | <b>56</b>  | <b>243,679</b> | <b>4</b> | <b>120,619</b> | <b>82,388</b>  | <b>38,231</b> | <b>12,369</b> |
| <i>Source: Indecon Analysis of 129 ILCA Cases</i>   |            |                |          |                |                |               |               |
| <i>Note: Counsel Fees include aggregation of Junior and Senior Counsel Fees. All data includes VAT.</i> |            |                |          |                |                |               |               |

| <b>Table A2.11: Analysis of ILCA Data on Legal Costs for Personal Injury Cases Settled in 2016</b>      |                 |                       |                   |                                 |                         |  |                                       |
|---|-----------------|-----------------------|-------------------|---------------------------------|-------------------------|--|---------------------------------------|
| <b>Background Details</b>   |                 |                       |                   | <b>Legal Costs</b>              |                         |  |                                       |
| <b>Case</b>   | <b>Duration</b> | <b>Level of Award</b> | <b>Trial Days</b> | <b>Total Professional Costs</b> | <b>Solicitors Costs</b> | <b>Combined Junior and Senior Counsel Fees</b> | <b>Expert Witness and Other Costs</b> |
| 1   | 74              | 45,000                | 1                 | 27,529                          | 21,164                  | 6,365  | 6,093                                 |
| 2   | 50              | 45,000                | 1                 | 25,765                          | 19,615                  | 6,150  | 5,318                                 |
| 3   | 125             | 8,500                 | 1                 | 9,468                           | 7,838                   | 1,630  | 3,524                                 |
| 4   | 65              | 190,000               | 5                 | 64,104                          | 50,717                  | 13,387   | 14,397                                |
| 5   | 36              | 65,000                | N/A               | 39,791                          | 28,522                  | 11,269   | 2,142                                 |
| 6   | 72              | 65,000                | N/A               | 81,444                          | 58,425                  | 23,019   | 8,426                                 |
| 7   | 48              | 50,000                | N/A               | 33,647                          | 25,195                  | 8,452  | 5,520                                 |
| 8   | 36              | 19,500                | N/A               | 7,749                           | 7,319                   | 431  | 2,371                                 |
| 9   | 36              | 26,000                | N/A               | 9,639                           | 6,500                   | 3,139  | N/A                                   |
| 10  | 70              | 50,000                | N/A               | 17,871                          | 12,500                  | 5,371  | 3,887                                 |
| 11  | 84              | 110,000               | N/A               | 37,741                          | 29,520                  | 8,221  | 13,526                                |
| <b>Max</b>  | <b>125</b>      | <b>190,000</b>        | <b>5</b>          | <b>81,444</b>                   | <b>58,425</b>           | <b>23,019</b>                                  | <b>14,397</b>                         |
| <b>Min</b>  | <b>36</b>       | <b>8,500</b>          | <b>1</b>          | <b>7,749</b>                    | <b>6,500</b>            | <b>431</b>                                     | <b>2,142</b>                          |
| <b>Median</b>   | <b>65</b>       | <b>50,000</b>         | <b>1</b>          | <b>27,529</b>                   | <b>21,164</b>           | <b>6,365</b>                                   | <b>5,419</b>                          |
| <b>Mean</b>   | <b>63</b>       | <b>61,273</b>         | <b>2</b>          | <b>32,250</b>                   | <b>24,301</b>           | <b>7,948</b>                                   | <b>6,520</b>                          |
| <i>Source: Indecon Analysis of 129 ILCA Cases</i>   |                 |                       |                   |                                 |                         |  |                                       |
| <i>Note: Counsel Fees include aggregation of Junior and Senior Counsel Fees. All data includes VAT.</i> |                 |                       |                   |                                 |                         |  |                                       |



**Table A2.12: Analysis of ILCA Data on Legal Costs for Medical Negligence Cases Settled in 2016**

| Background Details |            |                |            | Legal Costs              |                  |   |                                |
|--------------------|------------|----------------|------------|--------------------------|------------------|---|--------------------------------|
| Case               | Duration   | Level of Award | Trial Days | Total Professional Costs | Solicitors Costs | Combined Junior and Senior Counsel Fees | Expert Witness and Other Costs |
| 1                  | 84         | 630,000        | N/A        | 67,471                   | 46,247           | 21,224                                  | 10,989                         |
| 2                  | 120        | 175,000        | N/A        | 79,643                   | 64,575           | 15,068                                  | 7,966                          |
| 3                  | 41         | 150,000        | 1          | 127,582                  | 87,638           | 39,944                                  | 15,724                         |
| <b>Max</b>         | <b>120</b> | <b>630,000</b> | <b>1</b>   | <b>127,582</b>           | <b>87,638</b>    | <b>39,944</b>                           | <b>15,724</b>                  |
| <b>Min</b>         | <b>41</b>  | <b>150,000</b> | <b>1</b>   | <b>67,471</b>            | <b>46,247</b>    | <b>15,068</b>                           | <b>7,966</b>                   |
| <b>Median</b>      | <b>84</b>  | <b>175,000</b> | <b>1</b>   | <b>79,643</b>            | <b>64,575</b>    | <b>21,224</b>                           | <b>10,989</b>                  |
| <b>Mean</b>        | <b>82</b>  | <b>318,333</b> | <b>1</b>   | <b>91,565</b>            | <b>66,153</b>    | <b>25,412</b>                           | <b>11,560</b>                  |

*Source: Indecon Analysis of 129 ILCA Cases*

*Note: Counsel Fees include aggregation of Junior and Senior Counsel Fees. All data includes VAT.*

**Table A2.13: Analysis of ILCA Data on Legal Costs for Personal Injury Cases Settled in 2017**

| Background Details |            |                  |            | Legal Costs              |                  |   |                                |
|--------------------|------------|------------------|------------|--------------------------|------------------|---|--------------------------------|
| Case               | Duration   | Level of Award   | Trial Days | Total Professional Costs | Solicitors Costs | Combined Junior and Senior Counsel Fees | Expert Witness and Other Costs |
| 1                  | 31         | 12,500           | 1          | 11,238                   | 8,778            | 2,460                                   | 1,000                          |
| 2                  | 43         | 15,650           | 1          | 12,704                   | 9,967            | 2,737                                   | 860                            |
| 3                  | 42         | 1,200,000        | 1          | 218,295                  | 154,212          | 64,083                                  | 21,877                         |
| 4                  | 15         | 48,000           | N/A        | 9,594                    | 7,995            | 1,599                                   | 1,420                          |
| 5                  | 120        | 150,000          | N/A        | 34,599                   | 28,603           | 5,996                                   | 7,001                          |
| 6                  | 60         | 47,000           | 5          | 52,975                   | 34,802           | 18,173                                  | 21,916                         |
| 7                  | 48         | 20,000           | N/A        | 6,316                    | 4,840            | 1,476                                   | 2,427                          |
| 8                  | 14         | 50,800           | N/A        | 11,378                   | 8,610            | 2,768                                   | 2,038                          |
| 9                  | 60         | 96,000           | N/A        | 18,754                   | 16,250           | 2,504                                   | 1,680                          |
| 10                 | 12         | 32,000           | N/A        | 10,266                   | 7,995            | 2,271                                   | 2,458                          |
| 11                 | N/A        | 45,000           | N/A        | 19,926                   | 16,298           | 3,629                                   | 2,233                          |
| <b>Max</b>         | <b>120</b> | <b>1,200,000</b> | <b>5</b>   | <b>218,295</b>           | <b>154,212</b>   | <b>64,083</b>                           | <b>21,916</b>                  |
| <b>Min</b>         | <b>12</b>  | <b>12,500</b>    | <b>1</b>   | <b>6,316</b>             | <b>4,840</b>     | <b>1,476</b>                            | <b>860</b>                     |
| <b>Median</b>      | <b>43</b>  | <b>47,000</b>    | <b>1</b>   | <b>12,704</b>            | <b>9,967</b>     | <b>2,737</b>                            | <b>2,233</b>                   |
| <b>Mean</b>        | <b>45</b>  | <b>156,086</b>   | <b>2</b>   | <b>36,913</b>            | <b>27,123</b>    | <b>9,790</b>                            | <b>5,901</b>                   |

Source: Indecon Analysis of 129 ILCA Cases

Note: Counsel Fees include aggregation of Junior and Senior Counsel Fees. All data includes VAT.

**Table A2.14: Analysis of ILCA Data on Legal Costs for Medical Negligence Cases Settled in 2017**

| Background Details |            |                |            | Legal Costs              |                  |   |                                |
|--------------------|------------|----------------|------------|--------------------------|------------------|---|--------------------------------|
| Case               | Duration   | Level of Award | Trial Days | Total Professional Costs | Solicitors Costs | Combined Junior and Senior Counsel Fees | Expert Witness and Other Costs |
| 1                  | 63         | 50,000         | N/A        | 28,176                   | 22,140           | 6,036                                   | 3,342                          |
| 2                  | 67         | 200,000        | N/A        | 162,590                  | 116,188          | 46,402                                  | 18,636                         |
| 3                  | 159        | 375,000        | N/A        | 273,213                  | 213,005          | 60,209                                  | 26,972                         |
| 4                  | 123        | 427,500        | N/A        | 139,510                  | 111,927          | 27,583                                  | 12,593                         |
| 5                  | 37         | 150,000        | N/A        | 76,371                   | 62,841           | 13,530                                  | 9,956                          |
| 6                  | 35         | 110,000        | 3          | 128,757                  | 77,855           | 50,902                                  | 16,267                         |
| <b>Max</b>         | <b>159</b> | <b>427,500</b> | <b>3</b>   | <b>273,213</b>           | <b>213,005</b>   | <b>60,209</b>                           | <b>26,972</b>                  |
| <b>Min</b>         | <b>35</b>  | <b>50,000</b>  | <b>3</b>   | <b>28,176</b>            | <b>22,140</b>    | <b>6,036</b>                            | <b>3,342</b>                   |
| <b>Median</b>      | <b>65</b>  | <b>175,000</b> | <b>3</b>   | <b>134,133</b>           | <b>94,891</b>    | <b>36,992</b>                           | <b>14,430</b>                  |

|   |           |                |          |                |                |               |               |
|---|-----------|----------------|----------|----------------|----------------|---------------|---------------|
| <b>Mean</b>   | <b>81</b> | <b>218,750</b> | <b>3</b> | <b>134,769</b> | <b>100,659</b> | <b>34,110</b> | <b>14,628</b> |
| <i>Source: Indecon Analysis of 129 ILCA Cases</i>   |           |                |          |                |                |               |               |
| <i>Note: Counsel Fees include aggregation of Junior and Senior Counsel Fees. All data includes VAT.</i> |           |                |          |                |                |               |               |

| Table A2.15: Analysis of ILCA Data on Legal Costs for Personal Injury Cases Settled in 2018             |           |                |            |                          |                  |   |                                |
|---|-----------|----------------|------------|--------------------------|------------------|---|--------------------------------|
| Background Details  |           |                |            | Legal Costs              |                  |   |                                |
| Case  | Duration  | Level of Award | Trial Days | Total Professional Costs | Solicitors Costs | Combined Junior and Senior Counsel Fees | Expert Witness and Other Costs |
| 1   | 58        | 30,000         | N/A        | 21,508                   | 17,406           | 4,102                                   | 405                            |
| 2   | 68        | 45,000         | 2          | 26,916                   | 20,298           | 6,617                                   | 5,075                          |
| 3   | 42        | 45,000         | N/A        | 21,468                   | 18,052           | 3,416                                   | 5,007                          |
| 4   | 76        | 10,000         | 1          | 14,038                   | 11,363           | 2,675                                   | 1,065                          |
| 5   | 39        | 20,000         | 3          | 52,859                   | 23,985           | 28,874                                  | 975                            |
| 6   | N/A       | 88,000         | 1          | 27,570                   | 22,755           | 4,815                                   | 1,573                          |
| 7   | 36        | 70,000         | N/A        | 17,516                   | 15,025           | 2,491                                   | 492                            |
| 8   | 47        | 120,000        | N/A        | 42,491                   | 32,405           | 10,086                                  | 11,182                         |
| 9   | 41        | 45,000         | 1          | 21,740                   | 15,375           | 6,365                                   | 7,066                          |
| 10  | 59        | 170,000        | 1          | 54,200                   | 40,609           | 13,592                                  | 9,110                          |
| 11  | 48        | 40,000         | N/A        | 12,485                   | 10,763           | 1,722                                   | 1,292                          |
| 12  | 72        | 80,000         | N/A        | 49,784                   | 40,282           | 9,502                                   | 1,811                          |
| <b>Max</b>  | <b>76</b> | <b>170,000</b> | <b>3</b>   | <b>54,200</b>            | <b>40,609</b>    | <b>28,874</b>                           | <b>11,182</b>                  |
| <b>Min</b>  | <b>36</b> | <b>10,000</b>  | <b>1</b>   | <b>12,485</b>            | <b>10,763</b>    | <b>1,722</b>                            | <b>405</b>                     |
| <b>Median</b>   | <b>48</b> | <b>45,000</b>  | <b>1</b>   | <b>24,328</b>            | <b>19,175</b>    | <b>5,590</b>                            | <b>1,692</b>                   |
| <b>Mean</b>   | <b>53</b> | <b>63,583</b>  | <b>2</b>   | <b>30,215</b>            | <b>22,360</b>    | <b>7,855</b>                            | <b>3,754</b>                   |
| <i>Source: Indecon Analysis of 129 ILCA Cases</i>   |           |                |            |                          |                  |   |                                |
| <i>Note: Counsel Fees include aggregation of Junior and Senior Counsel Fees. All data includes VAT.</i> |           |                |            |                          |                  |   |                                |

| Table A2.16: Analysis of ILCA Data on Legal Costs for Medical Negligence Cases Settled in 2018 |          |                |            |                          |                  |   |                                |
|--|----------|----------------|------------|--------------------------|------------------|---|--------------------------------|
| Background Details   |          |                |            | Legal Costs              |                  |   |                                |
| Case   | Duration | Level of Award | Trial Days | Total Professional Costs | Solicitors Costs | Combined Junior and Senior Counsel Fees | Expert Witness and Other Costs |
| 1  | 48       | 330,000        | 1          | 169,847                  | 117,941          | 51,906                                  | 22,277                         |
| 2  | 46       | 675,000        | N/A        | 214,635                  | 166,050          | 48,585                                  | 13,640                         |
| 3  | 27       | 525,000        | N/A        | 198,639                  | 140,469          | 58,170                                  | 17,946                         |

|   |    |         |   |         |         |        |        |
|---|----|---------|---|---------|---------|--------|--------|
| Max   | 48 | 675,000 | 1 | 214,635 | 166,050 | 58,170 | 22,277 |
| Min   | 27 | 330,000 | 1 | 169,847 | 117,941 | 48,585 | 13,640 |
| Median  | 46 | 525,000 | 1 | 198,639 | 140,469 | 51,906 | 17,946 |
| Mean  | 40 | 510,000 | 1 | 194,374 | 141,487 | 52,887 | 17,954 |
| <b>Source: Indecon Analysis of 129 ILCA Cases</b>   |    |         |   |         |         |        |        |
| <i>Note: Counsel Fees include aggregation of Junior and Senior Counsel Fees. All data includes VAT.</i> |    |         |   |         |         |        |        |

| <b>Table A2.17: Analysis of ILCA Data on Legal Costs for Personal Injury Cases Settled in 2019</b>      |                 |                       |                   |                                 |                         |  |                                       |
|---|-----------------|-----------------------|-------------------|---------------------------------|-------------------------|--|---------------------------------------|
| <b>Background Details</b>   |                 |                       |                   | <b>Legal Costs</b>              |                         |  |                                       |
| <b>Case</b>   | <b>Duration</b> | <b>Level of Award</b> | <b>Trial Days</b> | <b>Total Professional Costs</b> | <b>Solicitors Costs</b> | <b>Combined Junior and Senior Counsel Fees</b> | <b>Expert Witness and Other Costs</b> |
| 1   | 40              | 38,280                | N/A               | 9,838                           | 8,300                   | 1,538  | 406                                   |
| 2   | 34              | 53,968                | N/A               | 11,457                          | 9,366                   | 2,091  | 1,056                                 |
| 3   | 45              | 85,000                | N/A               | 23,964                          | 20,520                  | 3,444  | 2,333                                 |
| 4   | 44              | 30,000                | 1                 | 17,677                          | 11,835                  | 5,843  | 4,880                                 |
| 5   | 84              | 96,000                | N/A               | 39,637                          | 34,763                  | 4,874  | 7,851                                 |
| 6   | 43              | 100,000               | 1                 | 41,252                          | 31,842                  | 9,410  | 10,126                                |
| 7   | 20              | 30,000                | N/A               | 11,993                          | 9,840                   | 2,153  | 725                                   |
| 8   | 27              | 65,000                | 14                | 126,702                         | 68,880                  | 57,822   | 12,510                                |
| 9   | 51              | 60,000                | N/A               | 17,087                          | 15,611                  | 1,476  | 1,592                                 |
| 10  | 45              | 65,000                | N/A               | 45,085                          | 36,168                  | 8,918  | 7,258                                 |
| 11  | 24              | 67,500                | N/A               | 16,232                          | 13,680                  | 2,552  | 3,029                                 |
| 12  | 53              | 900,000               | N/A               | 211,965                         | 147,870                 | 64,095   | 24,210                                |
| 13  | 79              | 225,000               | N/A               | 110,362                         | 74,846                  | 35,516   | 25,987                                |
| 14  | 43              | 85,000                | N/A               | 12,072                          | 9,840                   | 2,232  | 2,882                                 |
| 15  | 18              | 37,500                | N/A               | 10,394                          | 9,225                   | 1,169  | 850                                   |
| 16  | 31              | 225,000               | N/A               | 39,750                          | 35,000                  | 4,750  | 6,091                                 |
| <b>Max</b>  | <b>84</b>       | <b>900,000</b>        | <b>14</b>         | <b>211,965</b>                  | <b>147,870</b>          | <b>64,095</b>                                  | <b>25,987</b>                         |
| <b>Min</b>  | <b>18</b>       | <b>30,000</b>         | <b>1</b>          | <b>9,838</b>                    | <b>8,300</b>            | <b>1,169</b>                                   | <b>406</b>                            |
| <b>Median</b>   | <b>43</b>       | <b>66,250</b>         | <b>1</b>          | <b>20,820</b>                   | <b>18,065</b>           | <b>4,097</b>                                   | <b>3,955</b>                          |
| <b>Mean</b>   | <b>43</b>       | <b>135,203</b>        | <b>5</b>          | <b>46,592</b>                   | <b>33,599</b>           | <b>12,993</b>                                  | <b>6,987</b>                          |
| <b>Source: Indecon Analysis of 129 ILCA Cases</b>   |                 |                       |                   |                                 |                         |  |                                       |
| <i>Note: Counsel Fees include aggregation of Junior and Senior Counsel Fees. All data includes VAT.</i> |                 |                       |                   |                                 |                         |  |                                       |

| Table A2.18: Analysis of ILCA Data on Legal Costs for Medical Negligence Cases Settled in 2019   |           |                   |            |                          |                  |   |                                |
|--|-----------|-------------------|------------|--------------------------|------------------|---|--------------------------------|
| Background Details   |           |                   |            | Legal Costs              |                  |   |                                |
| Case   | Duration  | Level of Award    | Trial Days | Total Professional Costs | Solicitors Costs | Combined Junior and Senior Counsel Fees | Expert Witness and Other Costs |
| 1  | 57        | 750,000           | N/A        | 250,367                  | 177,735          | 72,632                                  | 21,615                         |
| 2  | 37        | 45,500            | N/A        | 19,426                   | 16,097           | 3,329                                   | 603                            |
| 3  | 59        | 500,000           | N/A        | 206,363                  | 168,510          | 37,853                                  | 9,704                          |
| 4  | 16        | 595,000           | 1          | 325,431                  | 240,930          | 84,501                                  | 43,368                         |
| 5  | 38        | 11,000,000        | N/A        | 588,119                  | 442,610          | 145,509                                 | 54,325                         |
| 6  | 25        | 8,400,000         | 3          | 648,636                  | 466,719          | 181,917                                 | 50,272                         |
| <b>Max</b>   | <b>59</b> | <b>11,000,000</b> | <b>3</b>   | <b>648,636</b>           | <b>466,719</b>   | <b>181,917</b>                          | <b>54,325</b>                  |
| <b>Min</b>   | <b>16</b> | <b>45,500</b>     | <b>1</b>   | <b>19,426</b>            | <b>16,097</b>    | <b>3,329</b>                            | <b>603</b>                     |
| <b>Median</b>  | <b>38</b> | <b>672,500</b>    | <b>2</b>   | <b>287,899</b>           | <b>209,332</b>   | <b>78,566</b>                           | <b>32,491</b>                  |
| <b>Mean</b>  | <b>39</b> | <b>3,548,417</b>  | <b>2</b>   | <b>339,724</b>           | <b>252,100</b>   | <b>87,623</b>                           | <b>29,981</b>                  |
| <b>Source: Indecon Analysis of 129 ILCA Cases</b><br><i>Note: Counsel Fees include aggregation of Junior and Senior Counsel Fees. All data includes VAT.</i> |           |                   |            |                          |                  |   |                                |

## Annex 3 District Court Schedule of Costs

## Introduction

The tables below are the District Court Schedule of Costs. Each table outlines the guidelines for calculating solicitors' fees in a given case type. As per the Legal Services Regulation Act 2015 (Part 10), solicitors are required to disclose a detailed estimate of the costs they expect a client to pay before a case begins.<sup>94</sup> This is known as the Bill of Costs and will include the following:<sup>95</sup>

- Summary of legal services provided;
- Details and nature of charges incurred;
- VAT;
- Time spent;
- Financial outcome of the case; and
- Whether costs have been paid or are payable by another party.

The types of legal services can vary from case to case. The table below provides a list of potential service charges that may arise as a part of solicitors' fees.

| Indicative Solicitors' Costs  |
|---|
| (1) Taking instructions to sue, defend, counterclaim, appeal, seek leave to appeal, or oppose an application for leave to appeal or an appeal, or for any pleading, particulars of pleading, affidavit, preliminary act or a reference under Order 64, rule 46. |
| (2) Considering the facts and law.  |
| (3) Attending on and corresponding with client.   |
| (4) Interviewing and corresponding with witnesses and potential witnesses and taking proofs of their evidence.  |
| (5) Arranging to obtain reports or advice from experts and plans, photographs, and models.  |
| (6) Making search for relevant documents.   |
| (7) Inspecting any property or place material to the proceedings.   |

<sup>94</sup> <https://www.irishstatutebook.ie/eli/2015/act/65/section/138/enacted/en/html#part10>

<sup>95</sup> <https://www.lsra.ie/for-consumers/your-legal-bill-explained/>

|   |
|---|
| (8) Perusing pleadings, affidavits, and other relevant documents.   |
| (9) Where the cause or matter does not proceed to trial or hearing, work done in connection with the negotiation of a settlement. |
| (10) The general care and conduct of the proceedings (including Post-Trial Work).   |
| <b>Source: Courts Service<sup>96</sup></b>  |

Where the solicitor envisages a departure from the Bill of Costs, a cost notice or Section 150 notice is issued detailing the following:<sup>97</sup>

- Legal costs incurred to date;
- Legal costs fixed that are definite (e.g., property registration fee, stamp duty, etc.);
- If impractical for solicitor to certify legal costs, the basis on which they are to be charged should be outlined;
- VAT; and
- Set out the basis on which amounts are/were calculated by reference to the following criteria:
  - Complexity and novelty of issues involved.
  - Skills or specialised knowledge applied.
  - Time and labour reasonably spent.
  - Urgency attached by client to the matter.
  - Place and circumstances in which matter was transacted.
  - Number, importance, and complexity of documents.
  - Values of money property or an interest in property.
  - Whether or not there is an agreement to limit the liability of the solicitor.
  - Research or investigative work undertaken, and time spent.
  - Use and costs of expert witnesses and other expertise.

<sup>96</sup> <https://www.courts.ie/content/costs#Part%201:%20Scales%20of%20Costs>

<sup>97</sup> <https://www.lra.ie/for-law-professionals/your-legal-costs-duties/>



## District Court Schedule of Costs – Civil Debt

| Solicitors' costs in civil debt claims  |  |  |
|---|--|--|
| Amount due at date of issue of the claim notice   | If amount due is paid within ten days of service of claim notice | If amount due is not paid within ten days of service of claim notice |
|   | €  | €  |
| Not exceeding €3,000  | 78   | 130  |
| Exceeding €3,000 and not exceeding €6,000   | 156  | 260  |
| Exceeding €6,000 and not exceeding €9,000   | 234  | 390  |
| Exceeding €9,000 and not exceeding €12,000  | 312  | 520  |
| Exceeding €12,000 and not exceeding €15,000   | 390  | 650  |
| <p><b>Source: Courts Service</b></p> <p><i>Note: The above scale of costs is in every instance exclusive of and in addition to all actual and necessary outlay. If the claim notice is defended the costs of the successful party are in accordance with the contract, breach of contract and tort scale for assessment of damages.</i></p> |  |  |

### District Court Schedule of Costs – Contract, Breach of Contract, Tort Proceedings and Claims for Damages unconnected to Contract

| Solicitors' costs in contract, breach of contract and tort proceedings and in claims for damages unconnected with contract  |   |   |   |  |
|---|---|---|---|--|
| Amount due at the date of issue of claim notice or, (as the case may be) the amount decreed for debt  | Costs if settled without necessity for appearance | Costs of judgment (decree) if case not defended | Costs of judgment (decree) if case defended (assessment of damages) | Costs of judgment (decree/ dismiss) if case defended (liability) |
|   | €   | €   | €   | €  |
| Not exceeding €3,000  | 300   | 500   | 650   | 750  |
| Exceeding €3,000 and not exceeding €6,000   | 600   | 1,000   | 1,300   | 1,500  |
| Exceeding €6,000 and not exceeding €9,000   | 900   | 1,500   | 1,950   | 2,250  |
| Exceeding €9,000 and not exceeding €12,000  | 1,200   | 2,000   | 2,600   | 3,000  |
| Exceeding €12,000 and not exceeding €15,000   | 1,500   | 2,500   | 3,250   | 3,750  |
| <p><b>Source: Courts Service</b></p> <p><i>Note: The above scale of costs:</i></p> <ul style="list-style-type: none"> <li>- is in every instance exclusive of and in addition to all actual and necessary outlay.</li> <li>- applies to actions for wrongful detention brought by virtue of Section 33(3) of the Courts (Supplemental Provisions) Act 1961, according to the value of the goods as determined by the Court.</li> <li>- applies to actions for wrongful detention arising out of a hire-purchase transaction.</li> </ul> |   |   |   |  |

## District Court Schedule of Costs – Landlord and Tenant Proceedings

| Solicitors' costs in landlord and tenant (ejectment) proceedings [as amended by S.I. No. 123 of 2016]   |   |   |   |  |
|---|---|---|---|--|
| Annual Rent   | Costs if settled without necessity for appearance | Costs of judgment (decree) if case not defended | Costs of judgment (decree) if case defended (assessment of damages) | Costs of judgment (decree/ dismiss) if case defended (liability) |
|   | €   | €   | €   | €  |
| Not exceeding €3,000  | 180   | 300   | 390   | 450  |
| Exceeding €3,000 and not exceeding €6,000   | 360   | 600   | 780   | 900  |
| Exceeding €6,000 and not exceeding €9,000   | 540   | 900   | 1,170   | 1,350  |
| Exceeding €9,000 and not exceeding €12,000  | 720   | 1,200   | 1,560   | 1,800  |
| Exceeding €12,000 and not exceeding €15,000   | 900   | 1,500   | 1,950   | 2,250  |
| <p><b>Source: Courts Service</b></p> <p><i>Note: The above scale of costs</i></p> <ul style="list-style-type: none"> <li>- is in every instance exclusive of and in addition to all actual and necessary outlay</li> <li>- does not apply to ejectment proceedings brought before the Court by summons pursuant to Section 15 of the Summary Jurisdiction (Ireland) Act 1851; Section 10 of the Summary Jurisdiction (Ireland) Amendment Act 1871 or Sections 81, 84, 85 and 86 of the Landlord and Tenant (Ireland) Act 1860</li> <li>- in such proceedings costs shall be in the discretion of the Court and shall not exceed €110 in any case unless the Court shall, for special reason, otherwise order</li> </ul> |   |   |   |  |

- applies to ejectment proceedings brought before the Court on civil summons pursuant to Section 82 of the Civil Bill Courts (Ireland) Act 1851 as applied to the District Court by Section 17 of the Courts of Justice Act 1928.

### District Court Schedule of Costs – Enforcement of Court Order Acts

| Solicitors' costs in proceedings under the Enforcement of Court Orders Acts 1926 to 2009                                    |   |
|---|---|
| Costs in relation to Instalment Orders  |   |
| Amount due  | €   |
| Not exceeding €3,000  | 150   |
| Exceeding €3,000 and not exceeding €6,000   | 300   |
| Exceeding €6,000 and not exceeding €9,000   | 450   |
| Exceeding €9,000 and not exceeding €12,000  | 600   |
| Exceeding €12,000 and not exceeding €15,000   | 750   |
| Exceeding €15,000   | 825 or such greater amount as the Court thinks proper |
| <b>Source: Courts Service</b>   |   |
| <i>Note: The above scale of costs is in every instance exclusive of and in addition to all actual and necessary outlay.</i> |   |

### District Court Schedule of Costs – Compensation Proceedings under Section 15 of Housing Act

| Solicitors' costs in proceedings for compensation under Section 15 of the Housing (Private Rented Dwellings) Act 1982 |                            |                        |
|---|----------------------------|------------------------|
| Amount of compensation awarded or, in case of dismiss, amount of compensation claimed                                 | Costs if case not defended | Costs if case defended |
|   | €                          | €                      |
| Not exceeding €3,000  | 441                        | 735                    |
| Exceeding €3,000 and not exceeding €6,000   | 882                        | 1,470                  |
| Exceeding €6,000 and not exceeding €9,000   | 1,323                      | 2,205                  |
| Exceeding €9,000 and not exceeding €12,000  | 1,764                      | 2,940                  |

|   |       |       |
|---|-------|-------|
| Exceeding €12,000 and not exceeding €15,000   | 2,205 | 3,675 |
| <b>Source: Courts Service</b>   |       |       |
| <i>Note: Amounts are exclusive of and in addition to all actual and necessary outlay.</i> |       |       |

### District Court Schedule of Costs – Recovery of Possession under Section 16 of Housing Act

| Solicitors' costs in proceedings for recovery of possession under Section 16 of the Housing (Private Rented Dwellings) Act 1982 |   |                            |                        |  |
|---|---|----------------------------|------------------------|--|
| Annual rent   | Costs if settled without necessity for appearance | Costs if case not defended | Costs if case defended | Costs of judgment for respondent (dismiss) |
|   | €   | €                          | €                      | €  |
| Not exceeding €3,000  | 113   | 270                        | 450                    | 450  |
| Exceeding €3,000 and not exceeding €6,000   | 225   | 540                        | 900                    | 900  |
| Exceeding €6,000 and not exceeding €9,000   | 338   | 810                        | 1,350                  | 1,350                                      |
| Exceeding €9,000 and not exceeding €12,000  | 450   | 1,080                      | 1,800                  | 1,800                                      |
| Exceeding €12,000 and not exceeding €15,000   | 563   | 1,350                      | 2,250                  | 2,250                                      |
| <b>Source: Courts Service</b>   |   |                            |                        |  |
| <i>Note: The above scale of costs is in every instance exclusive of and in addition to all actual and necessary outlay.</i>     |   |                            |                        |  |

### District Court Schedule of Costs – Malicious Injuries

| Solicitors' costs, where awarded under the Malicious Injuries Acts 1981 and 1986 to a respondent or to or against a ratepayer |       |
|---|-------|
| Amount of compensation claimed  | Costs |
|   | €     |
| Exceeding €125 and not exceeding €250   | 15    |
| Exceeding €250 and not exceeding €750   | 90    |
| Exceeding €750 and not exceeding €1,400   | 140   |
| Exceeding €1,400  | 230   |
| <b>Source: Courts Service</b>   |       |
| <i>Note: The above scale of costs is in every instance exclusive of and in addition to all actual and necessary outlay.</i>   |       |

## District Court Schedule of Costs – Recovery of Rates

| Solicitors costs in summary proceedings for the recovery of rates   |   |   |
|---|---|---|
| Amount sued for   | Costs if settled without necessity for appearance | Costs after hearing                                 |
|   | €   | €   |
| Not exceeding €1,100  | 26  | 52  |
| Exceeding €1,100 and not exceeding €2,200   | 33  | 66  |
| Exceeding €2,200 and not exceeding €3,300   | 55  | 110   |
| Exceeding €3,300 and not exceeding €5,500   | 66  | 132   |
| Exceeding €5,500 and not exceeding €11,000  | 87.5  | 175   |
| Exceeding €11,000   | 110   | 220 or such other amount as the Court thinks proper |
| <b>Source: Courts Service</b>   |   |   |
| <i>Note: The above scale of costs is in every instance exclusive of and in addition to all actual and necessary outlay.</i> |   |   |

## District Court Schedule of Costs – Miscellaneous Charges

| Miscellaneous additional charges                                  |       |
|---|-------|
|   | €     |
| Interim applications on notice (to include all Notices of Motion) | 500   |
| Applications under Section 63 of the Civil Liability Act 1961     | 600   |
| Rulings in respect of Injuries Board offers (e.g., minors)        | 1,000 |
| Each additional respondent (separately represented)               | 500   |
| <b>Source: Courts Service</b>                                     |       |

## District Court Schedule of Costs – Other

| Solicitors' costs in consent proceedings to which Section 4(c) of the Courts Act 1991 relates  |
|--|
| <p>Where proceedings of the kind mentioned in paragraph A of Section 77 of the Courts of Justice Act 1924 are brought before the District Court and:</p> <ul style="list-style-type: none"> <li>(i) the amount claimed in the proceedings exceeds €15,000, and,</li> <li>(ii) pursuant to the proviso to Section 77A of the Courts of Justice Act 1924 (inserted by Section 4(c) of the Courts Act 1991), the necessary parties to the proceedings sign the prescribed form of consent, and</li> <li>(iii) the Court in determining the proceedings awards an amount in excess of €15,000, the successful party may be allowed costs in accordance with the foregoing scales 1 to 9 in respect of the first €15,000 of the award and, in addition, a sum which represents 5% of the amount by which the award exceeds €15,000.</li> </ul> <p>Where the proceedings are dismissed, the defendant may be allowed costs similarly calculated on the amount claimed.</p> |
| <b>Source: Courts Service</b>  |

| Solicitors' costs in actions transferred from the High Court or the Circuit Court  |
|--|
| <p>Where an action, other than an action to which paragraph (2) relates, has been remitted or transferred to the District Court:</p> <ul style="list-style-type: none"> <li>(a) by the High Court pursuant to Section 25 of the Courts of Justice Act 1924, or</li> <li>(b) by the Circuit Court pursuant to Section 15(1) of the Courts Act 1991, and the Court, in determining the matter, makes an order in favour of the claimant, the claimant may not recover any greater costs than the appropriate costs as set out in the above scales which he or she would have been entitled to recover if the action had originally been commenced in the District Court.</li> <li>(c) If the claimant fails to prove the claim, the respondent is entitled, in addition to any costs which may be allowed to him or her under the above scales, to a minimum sum of €100.00 or such greater sum as the Judge may in the circumstances consider proper.</li> </ul> <p>Where an action so remitted or transferred is an action for unliquidated damages and the Court, pursuant to Section 15(2) of the Courts Act 1991 (as amended by Section 20 of the Courts and Civil Law (Miscellaneous Provisions) Act 2013), makes an order awarding to a party to the action an amount in excess of €15,000 but not exceeding €30,000, the successful party may be allowed costs in accordance with the above scales in respect of the first €15,000 of the award and, in addition, a sum which represents 5% of the amount by which the award</p> |



exceeds €15,000. Where such an action is dismissed, the respondent may be allowed costs similarly calculated on the amount claimed.

**Source: Courts Service**

| Schedule of outlays   |               |
|---|---------------|
| Miscellaneous outlays to include postage, photocopying, registered post, fax and sundries to be allowed in accordance with Order 53, rule 2.  |               |
| Amount due at the date of issue of claim notice   |               |
| <ul style="list-style-type: none"> <li>- in the case of debt claims</li> <li>- in the case of Instalment Orders</li> </ul>  |               |
| Amount awarded  |               |
| <ul style="list-style-type: none"> <li>- in cases of contract, breach of contract and tort proceedings and in claims for damages unconnected with contract</li> </ul>   |               |
| Annual rent   |               |
| <ul style="list-style-type: none"> <li>- in the case of landlord and tenant (ejectment) proceedings begun by claim notice</li> <li>- in proceedings for the recovery of possession under Section 16 of the Housing (Private Rented Dwellings) Act 1982</li> </ul> |               |
| Amount of compensation awarded  |               |
| <ul style="list-style-type: none"> <li>- in proceedings for compensation under Section 15 of the Housing (Private Rented Dwellings) Act 1982)</li> </ul>  |               |
| Amount of compensation claimed  |               |
| <ul style="list-style-type: none"> <li>- in cases under the Malicious Injuries Acts 1981 and 1986</li> </ul>  |               |
| Amount sued for   |               |
| <ul style="list-style-type: none"> <li>- in summary proceedings for the recovery of rates</li> </ul>  |               |
| Not exceeding €5,000  | €50 plus VAT  |
| Exceeding €5,000 and not exceeding €10,000  | €100 plus VAT |
| Exceeding €10,000 and not exceeding €15,000   | €150 plus VAT |
| <b>Source: Courts Service</b>   |               |

| Counsels' Fees  |       |
|---|-------|
| (1) in any defended case of contract, breach of contract, tort and claims for damages unconnected with contract   |       |
| (2) in any defended case of ejectment for overholding or non-payment of rent  |       |
| (3) where awarded under the Malicious Injuries Acts 1981 and 1986 to a respondent or to or against a ratepayer  |       |
| To the claimant's counsel when the amount recovered, or to the respondent's counsel when the amount claimed, in any defended case of contract, breach of contract, tort and claims for damages unconnected with contract— |       |
| To the claimant's or respondent's counsel when the annual rent in any defended case of ejectment for overholding or non-payment of rent—  |       |
| When the amount of compensation claimed under the Malicious Injuries Acts 1981 and 1986—  |       |
|   | €     |
| Exceeds €2,000 and does not exceed €3,000   | 500   |
| Exceeds €3,000 and does not exceed €4,000   | 550   |
| Exceeds €4,000 and does not exceed €5,000   | 600   |
| Exceeds €5,000 and does not exceed €7,000   | 750   |
| Exceeds €7,000 and does not exceed €9,000   | 800   |
| Exceeds €9,000 and does not exceed €11,000  | 850   |
| Exceeds €11,000 and does not exceed €13,000   | 950   |
| Exceeds €13,000 and does not exceed €15,000   | 1,050 |
| <b>Source: Courts Service</b>   |       |

## **Annex 4 Analysis based on application of current District Court Rates**

For each claim bucket outlined above, the average solicitor cost amounts to 18% of the claim. We apply this charge to average cost figures from the NCID database on employer liability, public liability and commercial property damage claims. This 18% figure is based on analysis of current legal costs in the district court.

| Average Solicitors' Cost for Settled Damage Claims (EL, PL & Commercial Property) 2015-2020  |       |       |        |       |       |        |
|--|-------|-------|--------|-------|-------|--------|
|  | 2015  | 2016  | 2017   | 2018  | 2019  | 2020   |
| Average Damage Claim Cost (€)  | 9,981 | 9,927 | 12,438 | 8,944 | 8,776 | 12,227 |
| Average Solicitor Cost (€)   | 1,797 | 1,787 | 2,239  | 1,610 | 1,580 | 2,201  |
| Source: Indecon Analysis of NCID data and District Court Schedule of Costs   |       |       |        |       |       |        |
| Note: Average solicitor cost is calculated by multiplying the average % solicitor cost fee as per the schedule of costs (18%) by the average damage claim cost |       |       |        |       |       |        |

We also apply the 18% solicitors' charge to the NCID data on motor damage claims.

| Average Solicitors' Cost for Settled Damage Claims (Motor) 2015-2021   |       |       |       |       |       |       |       |
|--|-------|-------|-------|-------|-------|-------|-------|
|  | 2015  | 2016  | 2017  | 2018  | 2019  | 2020  | 2021  |
| Average Damage Claim Cost (€)  | 2,052 | 2,148 | 2,258 | 2,256 | 2,460 | 2,525 | 2,343 |
| Average Solicitor Cost (€)   | 369   | 387   | 406   | 406   | 443   | 455   | 422   |
| Source: Indecon Analysis of NCID data and District Court Schedule of Costs   |       |       |       |       |       |       |       |
| Note: Average solicitor cost is calculated by multiplying the average % solicitor cost fee as per the schedule of costs (18%) by the average damage claim cost |       |       |       |       |       |       |       |

The average injury claim for cases between €0-15k is shown below by settlement channel. We apply the 18% solicitor fee to this average claim.

| Average Solicitors' Cost for Settled Injury Claims that are between €0-15k (EL, PL & Commercial Property) 2019-2020 |        |       |           |
|---|--------|-------|-----------|
|   | Direct | PIAB  | Litigated |
| Average Injury Claim Cost (€)   | 5,979  | 9,000 | 8,514     |

|  |       |       |       |
|--|-------|-------|-------|
| Average Solicitor Cost (€)   | 1,096 | 1,650 | 1,561 |
| <b>Source: Indecon Analysis of NCID data and District Court Schedule of Costs</b>  |       |       |       |
| <i>Note: Average solicitor cost is calculated by multiplying the average % solicitor cost fee as per the schedule of costs (18%) by the average injury claim cost for cases between €0-15k</i> |       |       |       |

| Estimated Average Solicitors' Cost for all Claims (Motor) 2009-2021  |                        |                            |
|--|------------------------|----------------------------|
| Year   | Average Claim Cost (€) | Average Solicitor Cost (€) |
| 2009   | 2,733                  | 492                        |
| 2010   | 2,482                  | 447                        |
| 2011   | 2,914                  | 525                        |
| 2012   | 3,084                  | 555                        |
| 2013   | 3,121                  | 562                        |
| 2014   | 3,471                  | 625                        |
| 2015   | 3,635                  | 654                        |
| 2016   | 3,866                  | 696                        |
| 2017   | 4,161                  | 749                        |
| 2018   | 4,151                  | 747                        |
| 2019   | 4,190                  | 754                        |
| 2020   | 4,365                  | 786                        |
| 2021   | 3,977                  | 716                        |
| <p><b>Source: Indecon Analysis of NCID data and District Court Schedule of Costs</b></p> <p><i>Note: Average solicitor cost is calculated by multiplying the average % solicitor cost fee as per the schedule of costs (18%) by the average claim cost</i></p> |                        |                            |

| Estimated Average Solicitors' Cost Claim Type 2009-2021 (Motor) |                       |                    |                        |                |
|---|-----------------------|--------------------|------------------------|----------------|
| Year  | Accidental Damage (€) | Fire and Theft (€) | Third Party Damage (€) | Windscreen (€) |
| 2009  | 325                   | 260                | 297                    | 43             |
| 2010  | 290                   | 223                | 275                    | 42             |
| 2011  | 283                   | 216                | 257                    | 41             |
| 2012  | 251                   | 190                | 253                    | 41             |

|      |     |     |     |    |
|------|-----|-----|-----|----|
| 2013 | 249 | 213 | 255 | 41 |
| 2014 | 263 | 246 | 275 | 40 |
| 2015 | 279 | 282 | 294 | 40 |
| 2016 | 275 | 280 | 308 | 40 |
| 2017 | 294 | 284 | 320 | 41 |
| 2018 | 313 | 339 | 341 | 42 |
| 2019 | 323 | 361 | 367 | 42 |
| 2020 | 370 | 379 | 407 | 46 |
| 2021 | 394 | 403 | 427 | 46 |

**Source: Indecon Analysis of NCID data and District Court Schedule of Costs**

*Note: Average solicitor cost is calculated by multiplying the average % solicitor cost fee as per the schedule of costs (18%) by the average claim cost*

Further to the above, we apply the 18% solicitor fee to the Courts Service data on the number of personal injury awards in each of the courts.

| Estimated Total Solicitor Fee by Court 2018-2021                                     |           |           |           |           |            |
|--|-----------|-----------|-----------|-----------|------------|
| District Court   |           |           |           |           |            |
|  | 2021      | 2020      | 2019      | 2018      | Total      |
| €0-€7,500  | 143,010   | 168,210   | 126,000   | 162,540   | 599,760    |
| €7,500-€15,000   | 496,125   | 465,750   | 386,775   | 619,650   | 1,968,300  |
| €15,000+   | 18,900    | 13,500    | 10,800    | 10,800    | 54,000     |
| Circuit Court  |           |           |           |           |            |
|  | 2021      | 2020      | 2019      | 2018      | Total      |
| €0-€7,500  | 280,350   | 288,540   | 298,620   | 282,870   | 1,150,380  |
| €15,000-€60,000  | 5,001,750 | 4,387,500 | 6,135,750 | 5,285,250 | 20,810,250 |
| €60,000+   | 21,600    | 367,200   | 75,600    | 97,200    | 561,600    |
| High Court   |           |           |           |           |            |
|  | 2021      | 2020      | 2019      | 2018      | Total      |
| €0-€60,000   | 745,200   | 550,800   | 804,600   | 783,000   | 2,883,600  |
| €60,000-€199,999   | 2,761,189 | 3,041,988 | 3,299,387 | 4,071,584 | 13,174,149 |
| €200,000-€499,999  | 1,448,998 | 2,771,996 | 2,078,997 | 3,464,995 | 9,764,986  |
| €500,000+  | 5,130,000 | 4,680,000 | 4,590,000 | 4,500,000 | 18,900,000 |
| Source: Indecon Analysis of Courts Service data and District Court Schedule of Costs |           |           |           |           |            |



## **Annex 5 Submissions to Indecon from Stakeholder Organisations**

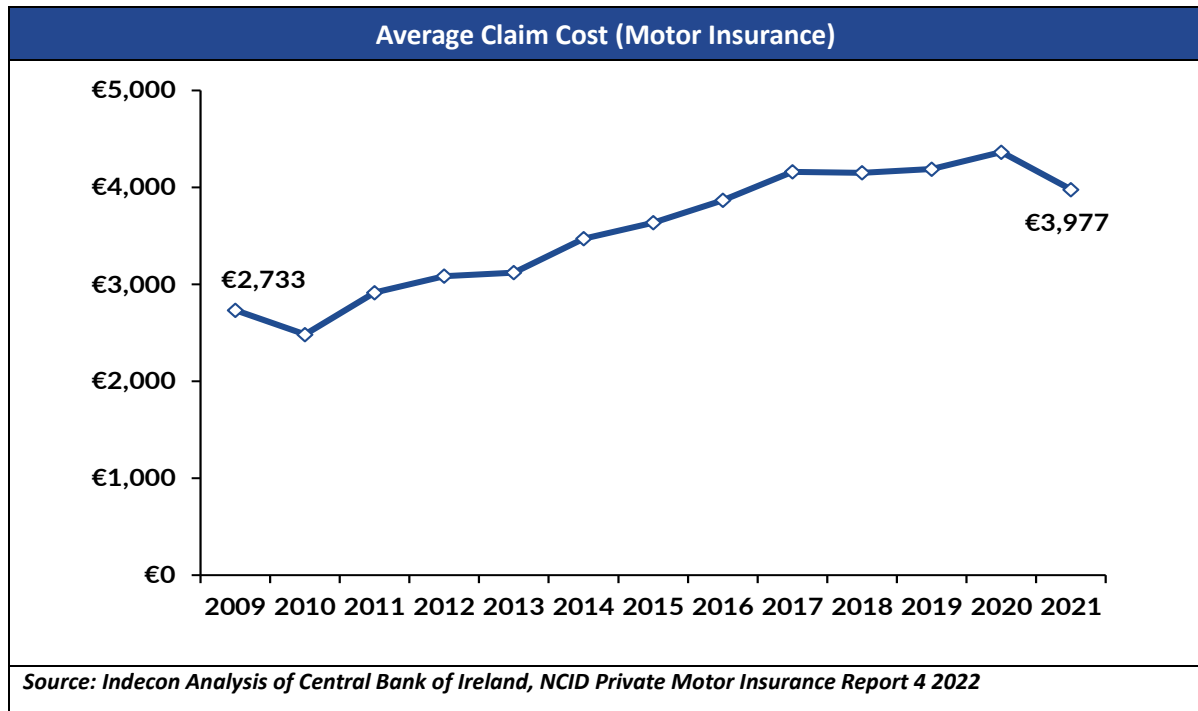
## Annex 6 Levels of Litigation Claim Costs in Ireland

## Introduction

In this annex, we examine the evidence on the level of litigation claim costs in Ireland. This is relevant to the overall costs of litigation in Ireland. While as noted in the Kelly Review, there is no database that provides the full definitive picture on the cost of litigation in Ireland, data availability has improved in recent years. For example, the Central Bank of Ireland has published helpful information in response to the recommendations of the Insurance Working Group. In this section, we bring together the evidence from a number of different sources on aspects of the costs of claims. Details on the legal costs element of litigation awards are discussed in Section 4 of this report. These vary considerably by type of case and great care is needed in interpreting any overall trends in the aggregate data.

## Motor Insurance, Employer Liability, and Public Liability Claims

As background context before considering how costs differ between those settled directly and cases which proceed via litigation, it is useful to consider the average claim costs arising from private motor insurance, employer liability, and public liability insurance claims. The National Claims Insurance Database (NCID) is prepared and collated by the Central Bank of Ireland. The NCID was established following recommendations by the Cost of Insurance Working Group (CIWG) in order to help identify the factors contributing to the high cost of insurance. This is based on data submitted by insurance companies as part of their regulatory requirements. The available evidence shows that while the number of private motor insurance claims decreased between 2009 and 2021, the average claim costs increased over the period. Between 2009 and 2021, the average claim costs increased from €2,733 to €3,977 (46%).

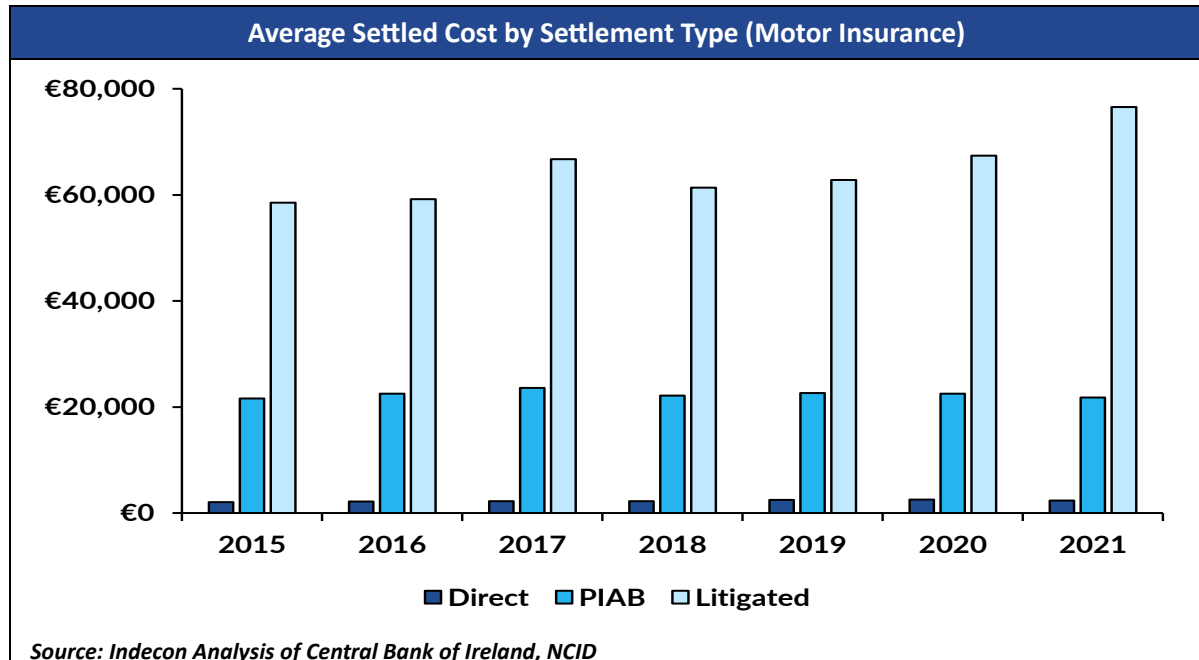


The highest average motor insurance claims relate to third party injury claims. The table overleaf shows that third party injury claims cost increased significantly between 2009 and 2021. All other claims have also increased during this period.

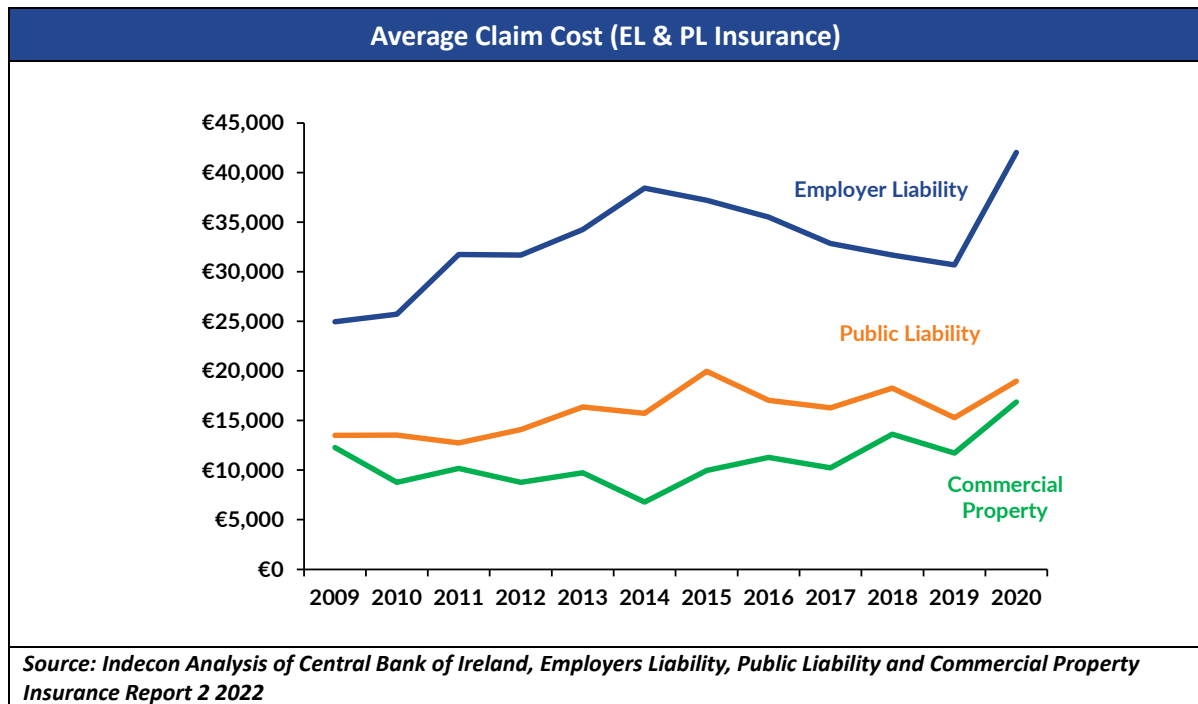
| Year | Third Party Injury | Accidental Damage | Fire and Theft | Third Party Damage | Windscreen |
|------|--------------------|-------------------|----------------|--------------------|------------|
| 2009 | €29,620            | €1,803            | €1,447         | €1,651             | €240       |
| 2010 | €29,417            | €1,613            | €1,241         | €1,529             | €232       |
| 2011 | €36,867            | €1,575            | €1,203         | €1,430             | €225       |
| 2012 | €35,295            | €1,393            | €1,055         | €1,407             | €229       |
| 2013 | €37,917            | €1,381            | €1,185         | €1,414             | €225       |
| 2014 | €39,275            | €1,463            | €1,368         | €1,528             | €222       |
| 2015 | €39,384            | €1,549            | €1,567         | €1,635             | €220       |
| 2016 | €40,452            | €1,525            | €1,553         | €1,710             | €222       |
| 2017 | €42,043            | €1,633            | €1,579         | €1,777             | €227       |
| 2018 | €43,841            | €1,739            | €1,882         | €1,895             | €234       |
| 2019 | €41,949            | €1,796            | €2,008         | €2,040             | €236       |
| 2020 | €49,930            | €2,056            | €2,104         | €2,259             | €257       |
| 2021 | €46,509            | €2,190            | €2,238         | €2,373             | €254       |

*Source: Indecon Analysis of Central Bank of Ireland, NCID Private Motor Insurance Report 4 2022*

Data on the average settlement costs for motor insurance claims show that where cases were litigated, these tend to have higher levels of settlement costs. This may be due to the nature of such cases, but the cost of litigation is also likely to influence the overall costs of settlements.



It is also interesting to examine developments in employer liability claims. Average employer liability (EL) claim costs reached an all-time high in 2020 after increasing 37%. This was after five years of consecutive negative growth in the average EL claim cost. Public liability (PL) claims also increased in 2020 by 24%.



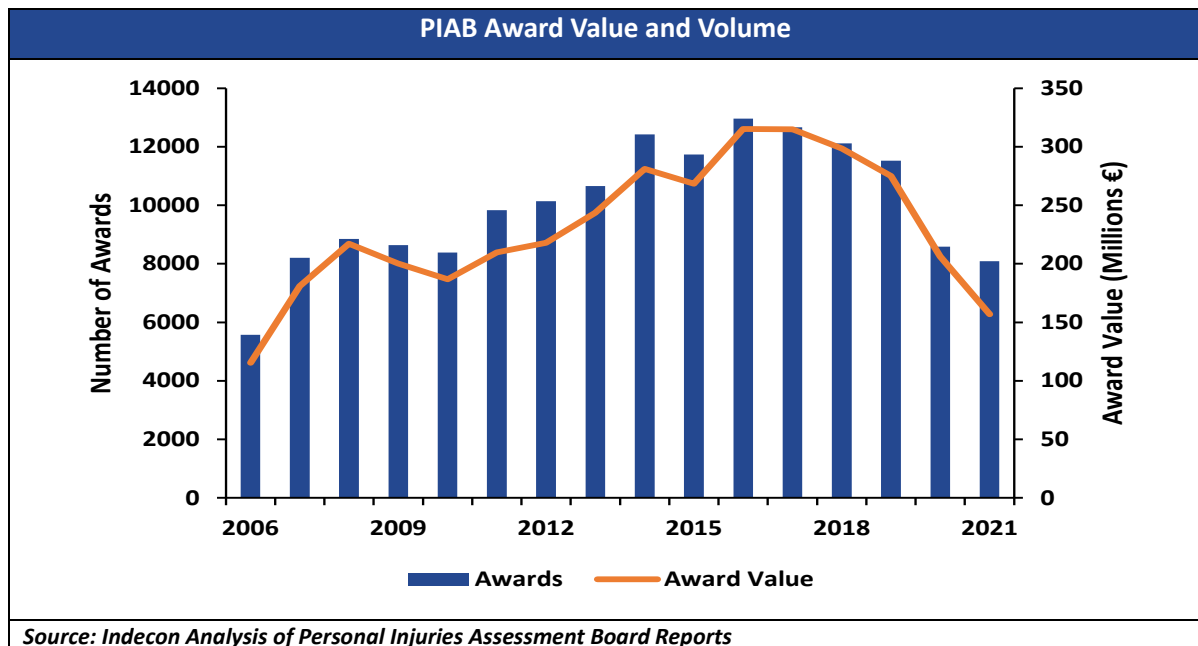
Of the EL and PL cases examined, bodily injury accounts for the majority of cases (68% yearly average 2015-2020) and the majority of claims costs (92% yearly average 2015-2020). In 2020, the average injury claim cost was €56,346. Litigated settlements have much higher average costs than PIAB and direct settlements. In 2020, an average EL injury claim that was settled through litigation had a claim cost of €114,288. This is almost three times greater than direct or PIAB settlements for the same liability. Similarly, in 2020, an average PL injury claim settled through litigation was over two times greater than direct or PIAB settlements for the same liability. Again, this may reflect the nature of the type of cases as well as the cost of litigation. This evidence is relevant as if reform measures on litigation costs which provide greater certainty and transparency result in a greater percentage of cases being settled without proceeding the Court, there are clear benefits for businesses, individuals and for the state in terms of lower overall costs.

| Average Claim Cost of Employer and Public Liability Injury Settlements (EL & PL Insurance)   |                    |          |         |          |          |          |          |
|--|--------------------|----------|---------|----------|----------|----------|----------|
| Liability  | Settlement Channel | 2015     | 2016    | 2017     | 2018     | 2019     | 2020     |
| Employer   | Direct             | €25,332  | €26,274 | €31,314  | €31,511  | €29,704  | €34,369  |
|  | PIAB               | €37,690  | €38,258 | €38,334  | €39,618  | €33,025  | €39,882  |
|  | Litigated          | €103,581 | €99,235 | €112,631 | €113,639 | €115,230 | €114,288 |
| Public   | Direct             | €19,615  | €20,472 | €19,311  | €19,965  | €22,549  | €22,844  |
|  | PIAB               | €28,473  | €28,664 | €30,377  | €30,674  | €29,136  | €31,666  |
|  | Litigated          | €60,739  | €68,728 | €61,288  | €63,749  | €61,285  | €70,903  |
| Source: Indecon Analysis of Central Bank of Ireland, Employers Liability, Public Liability and Commercial Property Insurance Report 2 2022 |                    |          |         |          |          |          |          |

### Cases handled by PIAB

Given the lower average claim costs of cases dealt with by the Personal Injuries Assessment Board (PIAB), this merits further consideration. PIAB is a public body established in 2004 to support the fair, prompt, and transparent resolution of personal injuries claims without the need for unnecessary litigation. The PIAB deals with injuries that are a result of motor, employer and public liability. All personal injuries claims must be submitted to PIAB unless they involve medical negligence or are settled by the parties involved at an early stage. Since its inception, the PIAB has used the Book of Quantum to determine personal injury awards. However, on the 24<sup>th</sup> of April 2021, a new series of personal injuries guidelines set out by the Judicial Council were implemented that determine the level of general damages to be awarded to various types of personal injury. This is currently subject to legal challenge in the Supreme Court. The conclusions of the Supreme Court will determine if these Judicial Council guidelines on personal injury awards are constitutional. This may be impacting on current cases where legal teams may be waiting for the Supreme Court judgement.

In 2021 there was a total of 8,093 awards made by PIAB, amounting to €157 million. There has been a recent decline in award values and volumes as can be seen in the table overleaf.



As of the 30<sup>th</sup> of June 2022, 9,161 cases (excluding fatal cases) have been assessed under the new personal injury guidelines. 2020 is the last full year in which the Book of Quantum was used so it serves as a useful comparison with the following years. Since the introduction of the new guidelines the proportions of each liability category have changed marginally. The proportion of motor liability cases has slightly decreased while the proportion of public liability cases has slightly increased. Meanwhile, employer liability cases consistently accounted for 13% of awards over the period.

| Proportion of Awards by Liability Category                         |       |                  |                    |
|--|-------|------------------|--------------------|
|  | Motor | Public Liability | Employer Liability |
| 2022 January - June  | 65%   | 22%              | 13%                |
| 2021 April – December<br>(Entry of New Personal Injury Guidelines) | 68%   | 19%              | 13%                |
| 2021 January - March   | 71%   | 16%              | 13%                |
| 2020   | 70%   | 17%              | 13%                |

*Source: PIAB Personal Injuries Award Values January 1<sup>st</sup> – 30<sup>th</sup> June 2022*  
*Note: New personal injury guidelines entered into effect in April 2021*

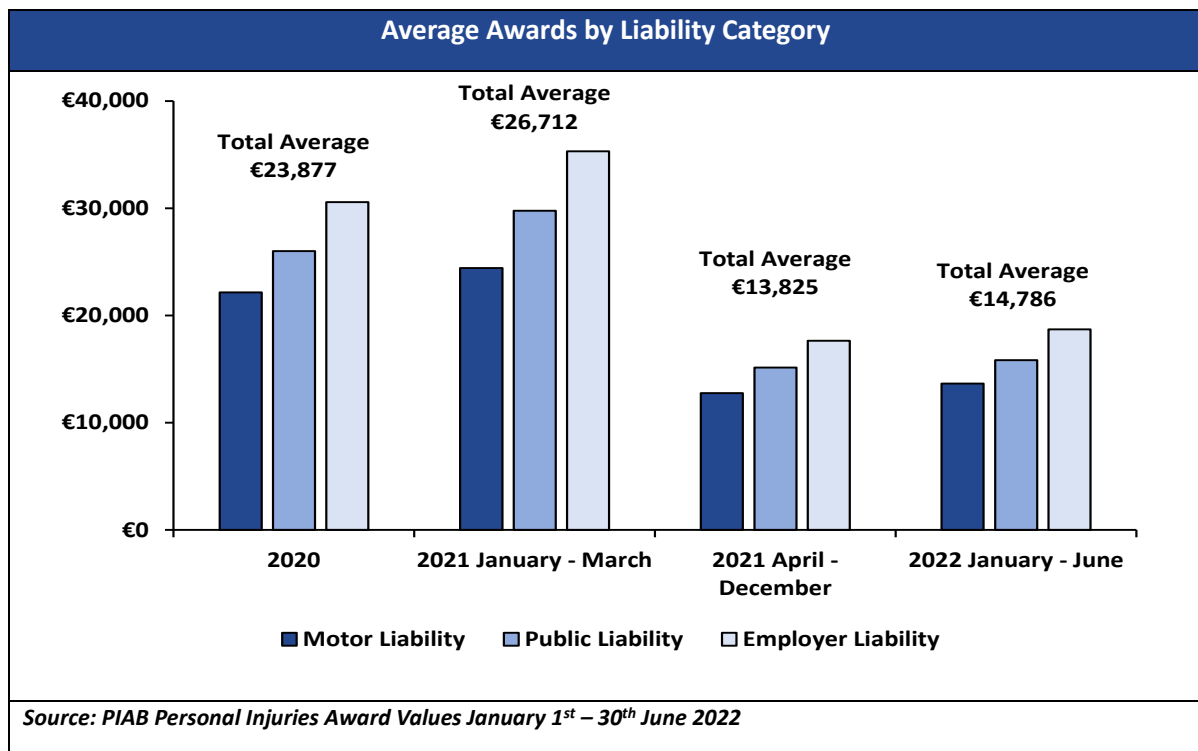
The number of cases under each liability category are shown below. There was a small decrease in the total number of awards in 2021 compared to 2020.



| Number of Awards by Liability Category                             |       |                  |                    |       |
|--|-------|------------------|--------------------|-------|
|  | Motor | Public Liability | Employer Liability | Total |
| 2022 January - June  | 2,880 | 975              | 576                | 4,430 |
| 2021 April – December<br>(Entry of New Personal Injury Guidelines) | 3,245 | 886              | 613                | 4,747 |
| 2021 January - March   | 2,361 | 547              | 438                | 3,346 |
| 2020   | 6,058 | 1,426            | 1,103              | 8,587 |

Source: PIAB Personal Injuries Award Values January 1<sup>st</sup> – 30<sup>th</sup> June 2022  
Note: New personal injury guidelines entered into effect in April 2021

Average awards have decreased under the new guidelines. Employer liability awards maintain the highest average, followed by public liability and motor liability awards.



In the first three months of 2021, the average award value across all liability categories was 12% greater than 2020. In contrast, following the introduction of the new guidelines in April 2021 to December 2021, we see a decrease in the average award value of 42%. Similarly, in the following year, 2022, between January and June, the average awards are 38% lower than the 2020 average award.

This may suggest that the new PIAB guidelines have reduced award values, but care is needed in interpreting the impact based on average awards given the differences in individual cases.

| Growth in Average Awards since 2020 by Liability Category   |                 |                  |                    |       |
|---|-----------------|------------------|--------------------|-------|
|   | Motor Liability | Public Liability | Employer Liability | Total |
| 2022 January - June   | -38%            | -39%             | -39%               | -38%  |
| 2021 April - December   | -42%            | -42%             | -42%               | -42%  |
| 2021 January - March  | 10%             | 14%              | 15%                | 12%   |
| <i>Source: PIAB Personal Injuries Award Values January 1<sup>st</sup> – 30<sup>th</sup> June 2022</i> |                 |                  |                    |       |

Following the introduction of the new PIAB guidelines, there has been a marked change in the dispersion of awards across a range of values. The table below shows a significant increase in the number of small award cases (<€10k). From January to June 2022, 53% of cases were awarded less than €10,000 compared to only 12% of cases in 2020. Similarly, 15% of cases were awarded more than €20,000 from January to June 2022, while in 2020, 44% of cases were awarded this amount.

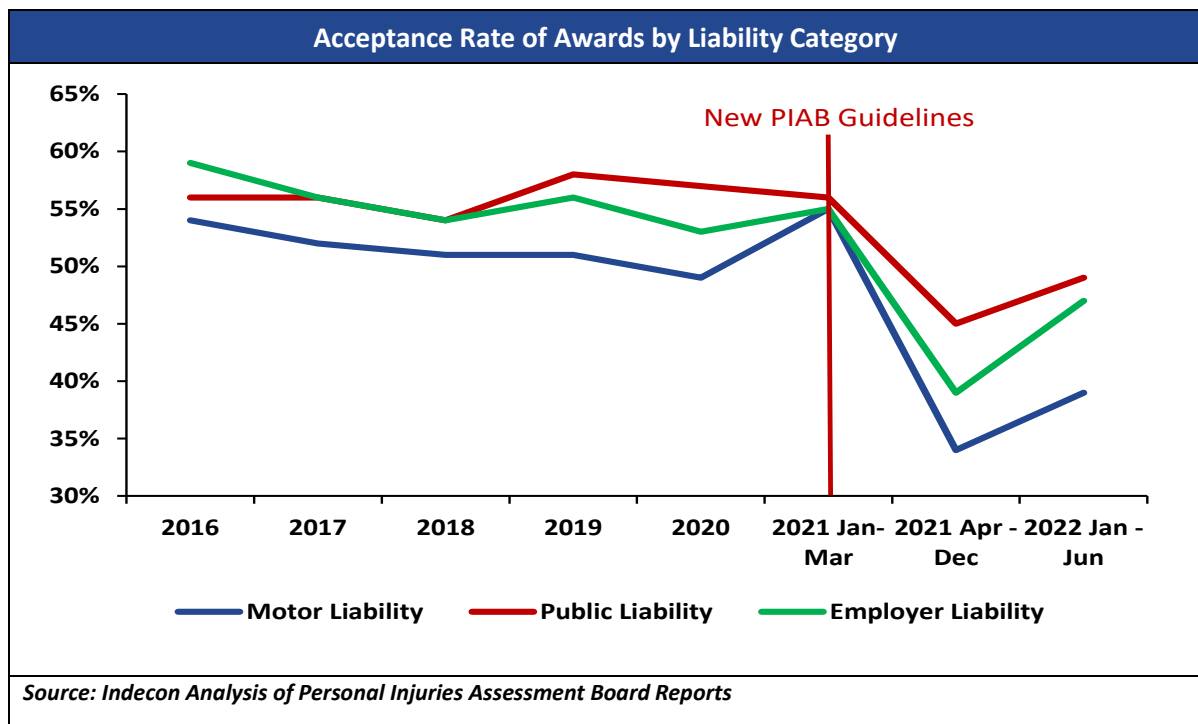
| Proportion of Awards by Range of Award Values   |       |            |            |       |
|---|-------|------------|------------|-------|
|   | <€10k | €10k-<€15k | €15k-<€20k | >€20k |
| 2022 January - June   | 53%   | 22%        | 10%        | 15%   |
| 2021 April - December   | 49%   | 23%        | 11%        | 17%   |
| 2020  | 12%   | 18%        | 26%        | 44%   |
| <i>Source: PIAB Personal Injuries Award Values January 1<sup>st</sup> – 30<sup>th</sup> June 2022</i> |       |            |            |       |

When the PIAB issues their assessment of damages, the claimant has 28 days to accept while the respondent/insurer has 21 days to accept. If both parties accept, the respondent/insurer is instructed to pay the award. If rejected, the claimant is allowed to pursue the case through litigation. The rates of acceptance are much higher amongst respondents/insurers than claimants. The table overleaf shows a decreased acceptance rate of PIAB awards. The PIAB states, “It is likely that the acceptance rate of PIAB cases is being impacted by the lack of comparable data through the other channels, in other words it is not yet evident that comparable awards through the courts and settlements with insurers will be the same.”<sup>98</sup>

<sup>98</sup> <https://www.piab.ie/eng/news-publications/Reports/PIAB-personal-Injuries-Award-Value-April-Sept-new.pdf>

| Award Acceptance Rate by Liability Category                                   |                 |                  |                    |         |
|---|-----------------|------------------|--------------------|---------|
|   | Motor Liability | Public Liability | Employer Liability | Overall |
| 2022 January - June   | 39%             | 49%              | 47%                | 42%     |
| 2021 April - December   | 34%             | 45%              | 39%                | 37%     |
| 2021 January - March  | 55%             | 55%              | 56%                | 55%     |
| 2020  | 49%             | 53%              | 57%                | 51%     |
| 2019  | 51%             | 56%              | 58%                | 52%     |
| 2018  | 51%             | 54%              | 54%                | 52%     |
| 2017  | 52%             | 56%              | 56%                | 53%     |
| 2016  | 54%             | 59%              | 56%                | 55%     |
| 2015  | 57%             | 60%              | 59%                | 58%     |
| <i>Source: Indecon Analysis of Personal Injuries Assessment Board Reports</i> |                 |                  |                    |         |

The table below shows the combined acceptance rate, i.e., the overall rate of acceptance from claimants and respondents. There is a clear fall in acceptance from the introduction of the new guidelines. However, the rates of acceptance are showing signs of recovery in H1 2022. This is particularly important for the efficiency of the overall litigation system. Low acceptance rates are likely to lead to higher levels of litigation. This fall in acceptance rates has been not visible in the Courts data as of yet.



### Summary of Findings

- Where motor insurance cases are litigated, these tend to have higher levels of settlement costs. This may be due to the nature of such cases, but the cost of litigation is also likely to influence the overall costs of settlements.
- An analysis of employer and public liability cases also shows that litigated cases have a much higher level of settlement than cases negotiated directly or handled by the PIAB. There has been a recent decline in award levels and also a decline in the volume of cases settled by the PIAB. There are also concerns about the acceptance rate with regard to PIAB decisions.

## **Annex 7 Role and Function of Department of Justice and other Key Organisation**

### **Department of Justice**

Among the Department of Justice's key responsibilities is the widening of access, and identification and removal of barriers to the justice system. Within this remit, objectives include modernising the courts and legal system to improve the fair and speedy conduct of court proceedings. The Department also seeks to implement reforms to the administration of civil justice. These, *inter alia*, involves consideration of policy measures impacting on the costs of civil litigation, which is the focus of this study. Litigation in Ireland is handled by an independent judiciary.

There are a number of civil justice bodies under the aegis of the Department. Those of most relevance to this report are as follows:

- Courts Service
- Insolvency Service of Ireland
- Judicial Council
- Legal Aid Board
- Legal Services Regulatory Authority

One of key functions of the Department of Justice in relation to the Civil Courts system is the drafting of new legislation that is required to implement change. Legislation requires a number of steps before it is approved by the Oireachtas. An illustrative example of such a process is the recent review of the Defamation Act 2009 undertaken by the Department of Justice. While defamation only represents a very small percentage of cases, the process is one illustrative example of what is required. This involved analysis of the issues raised by the review, identification of a range of options for reform, and recommendations for action.<sup>99</sup> Among the main concerns raised in submissions to that review were the high levels of damages awarded in some defamation cases. These were viewed as disproportionate to the levels of awards for serious personal injuries and to defamation awards in comparable jurisdictions. The Department also introduced the Legal Services Regulatory Bill 2015 which led to the establishment of the Legal Services Regulatory Authority (LSRA) and the Office of the Legal Costs Adjudicators (OLCA).

The Department of Justice mentions the need to improve procedures and reduce litigation costs and delays in its Statement of Strategy and within its Civil Justice Efficiencies and Reform Measures document.<sup>100</sup> The Department recognises the need to provide a more cost-effective regime and it outlines several measures which may be taken to achieve this. It should be noted that significant reforms to litigation have already been implemented by the Department. Also of note is that the

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<sup>99</sup> <https://www.gov.ie/en/press-release/21b16-minister-mcentee-receives-cabinet-approval-to-reform-irish-defamation-law/>

<sup>100</sup> [https://ipo.gov.ie/en/JELR/Department\\_of\\_Justice\\_Strategy\\_Statement\\_2021\\_-\\_2023.pdf/Files/Department\\_of\\_Justice\\_Strategy\\_Statement\\_2021\\_-\\_2023.pdf](https://ipo.gov.ie/en/JELR/Department_of_Justice_Strategy_Statement_2021_-_2023.pdf/Files/Department_of_Justice_Strategy_Statement_2021_-_2023.pdf)

<https://assets.gov.ie/225582/f246a2cb-9282-49e9-9982-4df75937c6cc.pdf>

Department has outlined seven work streams, three of which mention the aim of reducing litigation costs. Firstly, the Department wishes to reform the system of Discovery so as to reduce the cost of litigation. Secondly, the Department wishes to introduce primary legislation for the granting of applications for judicial review with the aim of cost effectiveness. Lastly, the Department seeks to consider and advance measures to reduce the costs of litigation in the State. These aims can be achieved through various means which are outlined below, one of which includes the commissioning of this report on the analysis of cost control models on litigation costs.

- Funding received by the Courts Service for its Modernisation Programme aims to enable the delivery of reduced costs.
- Full use should be made of the powers conferred by the conduct of trials rules in the High Court to contain the time and expense incurred in adducing of expert evidence and to impose timetables on the successive stages of the trial process. Orientation on those rules should be included in the continuing professional development programmes of both branches of the legal profession and in the programme of judicial studies.
- The Kelly Review Group is aware that due to the lack of an index of health care sector inflation, periodic payment orders are not in practice being sought by plaintiffs. The Review Group recommends that an assessment be carried out to create replacement index to the Harmonised Index of Consumer Prices.
- Commission an economic analysis of cost control models on litigation costs and seek legal analysis of same. Based on the legal and economic research findings, and the considerations of the Review Group majority and minority reports, sub-group to develop proposals.
- The Legal Services Regulation Act 2015 should be amended to require that bills of costs be delivered to the party liable for the costs within three months of perfection of the court order awarding costs or ruling a settlement in which liability for costs has been agreed.
- The Legal Services Regulation Act 2015 should be amended to provide that, where the party due costs, having furnished the bill to the party liable for the costs, fails to apply for their adjudication within such period as may be specified in rules of court, the party liable should be entitled to present the bill for adjudication.
- A time limit should be imposed for setting the bill down for taxation through an amendment to the relevant practice direction requiring that a party due costs, as a condition of receiving an interim payment on account of costs, undertake to lodge an application for adjudication of the costs within, say, one month of a failure to agree the amount of costs to be paid following delivery of the bill to the party liable.
- The power to limit Counsels' fees in personal injuries actions to the fees for one senior and one junior counsel falls within the remit of Ministerial regulations under S.5 of the Courts Act 1988. Action here is to review the setting of such limits in the context of findings arising from research on cost control models for litigation costs.

### **Role of the Judiciary**

In Ireland the judiciary includes the District Court, the Circuit Court, the High Court, the Commercial Court, the Court of Appeal, and the Supreme Court. The judiciary is independent of the executive arm of the State. The Courts Service supports the judiciary.

### **District Court**

The District Court is a court of local and limited jurisdiction that can only hear civil cases where the requested damages or compensation is less than €15,000.<sup>101</sup> These may include cases related to contracts, hire purchase, credit sale and consumer hire agreements, personal injury, evictions, and actions for the wrong detention of goods. It may also hear civil cases related to family law, enforcing judgements, and licensing. The District Court consists of 64 judges including a President. The country is divided into 23 districts with one or more judges permanently assigned to each district and the Dublin Metropolitan District.<sup>102</sup> Generally, the venue at which a case is heard depends on where an offence was committed or where the defendant resides or carries on business or was arrested. Each District Court office (with the exception of the Dublin Metropolitan District Court) deals with all elements of the work of the District Court. Claimants may choose a particular District Court depending on the type of case. For example, in proceedings based on contract, this will be where the contract was made, whereas personal injury cases may be heard where the injury is alleged to have occurred. The Court can hear cases in excess of €15,000 if both parties sign a prescribed form of consent either before or at any time during the hearing, but a claim cannot be divided into two or more claims. If the claim is more than the jurisdiction of the Court, the claimant may waive the excess by stating this in the claim.

Important context to this current study is the District Court rules, especially 2014 Rule on Costs. As per S.I. No 17 of 2014, the District Court has followed a schedule of costs which is revised no less than once every three years. The costs outlined in the schedule are the only lawful costs unless special circumstances are found by the court in which case they may be diverged from. The costs in the schedule are exclusive of and in addition to any sum allowed as recovery of VAT and all actual and necessary outlay is allowed. The full schedule of costs is outlined in the Annex 3.

### **Circuit Court**

The civil jurisdiction of the Circuit Court is limited to a claim not exceeding €75,000, or €60,000 in the case of personal injury, and for actions involving real property<sup>103</sup> with a market value of less than €3

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<sup>101</sup> <https://www.courts.ie/what-happens-district-court>

<sup>102</sup> <https://www.courts.ie/district-court>

<sup>103</sup> Real property is a parcel of land and everything that is permanently attached to the land. The owner of real property has all of the rights of ownership, including the right to possess, sell, lease, and enjoy the land.



million.<sup>104</sup> The Circuit Court consists of the President, 37 ordinary judges and six specialist judges. The President of the District Court is, by virtue of their office, an additional judge of the Circuit Court.<sup>105</sup> The country is divided into eight circuits with one judge assigned to each circuit except in Dublin where 10 judges may be assigned, and Cork, where there is provision for three judges. The parties to an action may however agree to lifting these limits by agreeing to unlimited jurisdiction. As well as hearing personal injury cases, the Circuit Court also deals with Civil Bills related to equity, ejectment, landlord and tenant, succession and testamentary, as well as Ordinary Civil Bills which relate to breaches of contract. In addition, the Court hears appeals from the District Court. Order 66 of the Circuit Court outlines the rules with respect to granting or withholding costs of any party to any proceeding in the court.<sup>106</sup> For example, where costs or expenses are awarded, Order 66 states that the party to whom such costs or expenses have been awarded shall deliver a bill of such costs or expenses and give at least seven days' notice of taxation for a day and hour to be fixed (generally or specially) by the County Registrar.

### **High Court**

The High Court has full jurisdiction to determine all civil matters, meaning there is no limit on the amount that can be awarded by the Court in compensation or damages.<sup>107</sup> The Court acts as an appeal court from the Circuit Court in civil matters and may also provide rulings on questions of law submitted by the District Court. The High Court is comprised of the President and 36 ordinary judges, with the Chief of Justice, President of the Court of Appeal and President of the Circuit Court, additional judges of the High Court. The High Court sits in Dublin to hear original actions but may also hear personal injury and fatal injury cases in Cork, Galway, Limerick, Waterford, Sligo, Dundalk, Kilkenny, or Ennis at particular times of the year. It may also sit in one of these locations to hear Circuit Court appeals related to civil and family law matters. In certain civil cases, such as defamation, assault and false imprisonment, a judge will sit with a jury in the High Court. In all cases, a majority vote of nine of the 12 jurors is sufficient to determine the verdict.

### **Commercial Court**

The Commercial Court is a division of the High Court which deals with all types of business disputes. These include breach of contract, tort, property, trust and probate, corporate mergers and investment disputes, among others. Proceedings dealt with by the Commercial Court must have a commercial dimension and must generally have a value of not less than €1 million. The judge of the Commercial Court will normally encourage and take reasonable steps to facilitate alternative dispute resolution,

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<sup>104</sup> <https://www.courts.ie/what-happens-circuit-court-civil>

<sup>105</sup> <https://www.courts.ie/circuit-court>

<sup>106</sup> <https://www.courts.ie/rules/costs-0#:~:text=An%20award%20of%20costs%20or,3>.

<sup>107</sup> <https://www.courts.ie/high-court>

especially mediation. Court fees are fixed by the Minister for Justice and are currently set at €5,000 for the party seeking entry to the Court.<sup>108</sup>

### **Court of Appeal**

The jurisdiction of the Court of Appeal has been conferred both by aspects of the Constitution and by legislation.<sup>109</sup> It has jurisdiction to hear appeals in civil proceedings from the High Court which, prior to the third-part amendment of the Constitution, would have been heard by the Supreme Court, among other areas. The Court is composed of a President and 15 ordinary judges. The Chief Justice and the President of the High Court are *ex officio* judges of the Court of Appeal. Three judges sit for the hearing of a civil appeal, although the President of the Court, or a judge nominated by them, hears applications for orders which are not final orders. The Court also has the power to remit proceedings to the High Court or direct a new trial.

### **The Supreme Court**

The Supreme Court is the highest court in Ireland and the court of final appeals, as was formally established on 29<sup>th</sup> September 1961 under the terms of Article 34 of the Constitution of Ireland. The Supreme Court is comprised of the Chief Justice of Ireland, who is President of the Court of nine ordinary judges.

### **Courts Service**

The Courts Service is responsible for the administration and management of the courts in Ireland.<sup>110</sup> Its primary functions include supporting the judges, providing information on the courts system to the public and providing court buildings and facilities for court users. Over 1,100 staff work across the nationwide network of offices and court venues, with offices supported by directorates to facilitate the work of the Supreme Court, Court of Appeal, High Court, Circuit Court, and District Court.<sup>111</sup> In 2020, the Courts Service adopted a 10-year Modernisation Programme aimed at improving access to justice, part of which aims to bring new technology and modern ways of working to the administration of justice. Reflecting this, the Strategy and Reform Directorate has been tasked with preparing proposals for modernising legislation on court administration and for modernising and simplifying court rules and terminology, among other responsibilities.<sup>112</sup>

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<sup>108</sup> <https://www.courts.ie/how-commercial-court-operates>

<sup>109</sup> <https://www.courts.ie/court-appeal>

<sup>110</sup> <https://www.courts.ie/about-us>

<sup>111</sup> [https://www.courts.ie/acc/alfresco/2e50ae1f-a154-4a3e-861a-7ff2bf3ebab1/CourtsService%20CorporateStratPlan2021\\_2023.pdf/pdf#view=fitH](https://www.courts.ie/acc/alfresco/2e50ae1f-a154-4a3e-861a-7ff2bf3ebab1/CourtsService%20CorporateStratPlan2021_2023.pdf/pdf#view=fitH)

<sup>112</sup> <https://www.courts.ie/content/strategy-and-reform-directorate>

**Statutory and Regulatory Bodies**

There are a number of statutory and regulatory bodies relevant to the reform of litigation costs in Ireland. These include the Office of the Legal Costs Adjudicator, the Personal Injury Assessment Board, the Legal Services Regulatory Authority, Insolvency Service of Ireland, the States Claims Agency, and the Central Bank.

**Office of the Legal Costs Adjudicator (OLCA)**

The main function of the OLCA is to provide an independent adjudication service where there is a dispute in relation to certain legal costs.<sup>113</sup> The Office is comprised of administrative staff, a Chief Legal Costs Adjudicator and two Legal Costs Adjudicators. It mainly deals with two types of disputes relating to legal costs as follows:

- Party and party costs: these are usually awarded by a Court at the end of, or during Superior Court litigation, i.e., High Court, Court of Appeal or Supreme Court. These reflect all the costs, charges, and expenses that are warranted for the purpose of the case.
- Costs between a legal practitioner and their client in relation to any matter. A legal practitioner can be either a solicitor or a barrister.

The Office also deals with other types of costs where provided for by statute, with Section 138 of the Legal Services Regulation Act 2015 defining the legal costs which are within the remit of the OLCA.

**Personal Injuries Assessment Board (PIAB)**

PIAB is an independent state body which assesses compensation in respect of personal injuries experienced by people in motor accidents, workplace accidents, and public liability accidents. All personal injury claims come through PIAB unless they are settled early between claimants and insurers/respondents.<sup>114</sup> Since 2004, the Board has assessed more than 130,000 cases of which 60% were accepted by claimants. Additional figures show that 26,009 applications were made in 2020 with 8,587 awards recorded in an average processing time of nine months. The total value of awards amounted to over €206 million. It is notable that medical negligence claims are not included in the Board's remit.

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<sup>113</sup> <https://www.courts.ie/acc/alfresco/da90a78e-861a-4652-87ed-4394da79156f/Guidelines%20on%20functional%20performance.pdf/pdf#view=fitH>

<sup>114</sup> <https://www.piab.ie/eng/about-piab/personal-injuries-assessment-board/>

**State Claims Agency**

The State Claims Agency resolves personal injury and third-party property damage claims against the State and State Authorities and manages claims for legal costs related to same.<sup>115</sup> Its remit covers a wide range of bodies involved in the provision of public services where the management of claims is delegated to the Agency, including Government Ministers and Departments, the Defence Forces, An Garda Síochána, the Health Services Executive, and Tusla, among others. It provides claims and risk management services through two State indemnity schemes: the General Indemnity Scheme and the Clinical Indemnity Scheme. The former covers personal injury and third-party property damage, while the latter relates to the provision of professional medical services. The General Indemnity Scheme provides for risks similar, but not identical, to those traditionally covered by employer's liability, public liability, and commercial third-party motor insurance.

**Legal Aid Board (LAB)**

The LAB is the independent statutory body responsible for the provision of civil legal aid and advice, family mediation, and vulnerable witness related services. A civil agency of the Department of Justice, the LAB is also responsible for the administration of a number of ad hoc legal aid schemes.<sup>116</sup> Its mission is to develop timely, effective, inclusive and just resolution of civil and family disputes to those most in need of assistance. Services for resolving disputes may be provided directly by staff or indirectly by funding cases dealt with through the private sector. Areas covered by the LAB's civil legal aid and advice include claims for damages due to personal injuries or breach of contract, employment disputes and family disputes.<sup>117</sup> The LAB does not deal with issues of defamation, alcohol licensing applications, or most property disputes. In addition to its advisory role, the LAB contributes to draft legislation, policies, and practices relevant to legal aid.

**Legal Services Regulatory Authority (LSRA)**

The LSRA is an independent regulator responsible for the oversight of both branches of the legal profession – solicitors and barristers.<sup>118</sup> It also accepts and investigates complaints which relate to the services provided by solicitors and barristers. Established under the Legal Services Regulation Act 2015, the LSRA has 11 general functions. These include promoting public awareness and disseminating information to the public in respect of legal services, including costs. Its other functions include maintaining a roll of practising barristers and undertaking research into the provision of legal services which may increase public awareness and promote an improvement in professional standards. Its work also involves making recommendations to the Minister for Justice where relevant.

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<sup>115</sup> <https://stateclaims.ie/about-us/who-we-are>

<sup>116</sup> <https://www.legalaidboard.ie/en/policy-and-guidance/our-strategies-2021-2023/statement-of-strategy-2021-2023.pdf>

<sup>117</sup> In relation to disputes with an employer, the LAB cannot provide legal aid before the Workplace Relations Commission or Labour Court - <https://www.legalaidboard.ie/en/our-services/legal-aid-services/>

<sup>118</sup> <https://www.lsr.ie/about-us/what-we-do/>

