



Irish Government Economic and Evaluation Service

Public Expenditure on Legal Services – *Avoid, Minimise, Recover*

Expenditure Report 2013

The analysis contained within this paper was carried out by members of the Irish Government Economic and Evaluation Service (IGEES). Those views contained within do not necessarily represent those of the Department, the Minister for Public Expenditure and Reform or the Government.



Summary

Public expenditure on legal services is a significant draw on exchequer resources. Positive steps have been taken in recent years to reduce spending in this area, and the provisions of related policy initiatives such as the *Legal Services Regulatory Bill* and the *Working Group on Efficiencies in the District and Circuit Courts* will make important contributions to enhancing competitiveness, transparency and value for money. In order to maximise the savings accruing to the Exchequer, this paper draws upon relevant international experience and set out ways in which expenditure could be *avoided* where possible, *minimised* where it must occur and *recovered* in relevant cases.

These Strategies can be assisted by greater use of alternative dispute resolution techniques, more widespread use of competitive tendering in some instances and the deployment of existing legal expertise within the State system to act as 'gatekeeper' to spending on legal services.

1. Introduction and Overview

Taken together, State bodies are the largest single consumer of legal services. It is therefore critical to ensure that maximum value for money is being achieved and that the State – as a consumer – is not acting to distort the market for legal services to the detriment of national competitiveness. While always an imperative, the need to attain maximum value for money is all the more immediate given the scale of the fiscal challenge.

This paper outlines some relevant issues in relation to public expenditure on legal services and articulates a set of principles to assist in achieving better value for money.

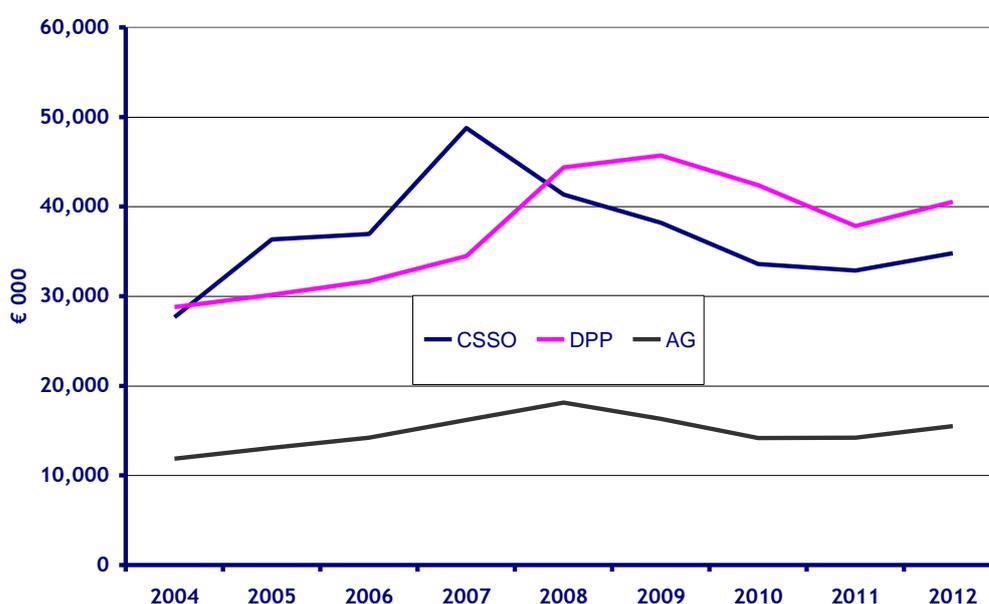
2. Public Expenditure on Legal Services

2.1 *The level of expenditure*

Establishing the actual level of public expenditure on legal services is not straightforward. 'Legal expenditure' potentially encompasses a wide variety of activities including day-to-day expenditure by Departments and Agencies on the services of barristers and solicitors, non-routine spending arising from tribunals and other enquiries and awards and payment of third party costs. Complexities associated with the breadth of these issues are compounded by the level of variability involved – there is no 'steady state' position. A final problem relates to the fact that expenditure on these categories is not generally recorded separately, leading to a lack of robust and comparable information.

Some detailed data are available however, in particular regarding the State's Central Legal Offices, namely; the Attorney General's Office (AGO), the Chief State Solicitor's Office (CSSO) and Office of the Director of Public Prosecutions (DPP). The State's primary interface with the legal system and core consumption of legal services is through these Offices. Together, they represent the nucleus of the State's day-to-day legal activities and account for just under €90 million in Voted Expenditure annually. Figure 1 below presents the trend over the past number of years.

Figure 1 Gross Expenditure by Central Legal Offices



Source: Revised Estimates for Public Services 2005 - 2012

Across each office, total expenditure is lower in 2012 than peak levels. Reductions in fees paid to legal counsel have been an important element of the observed consolidation. This is a positive development and reflects a more systematic approach to cost management in the relevant Offices; it could also suggest a level of expenditure in the past which was excessive and not firmly grounded in a market-based mechanism.

On a day-to-day basis, Government Departments and Agencies are also significant consumers of legal services. Systems for separately recording and monitoring this expenditure are not widespread or uniform and estimates of total spending vary.

2.2 Models of Procurement

There is also considerable variety in the approach to procuring legal services. Competitive tendering is employed in some areas while use of panels of service providers is more common.

The AGO select and brief counsel to appear in court on behalf of State parties. Counsel who wish to be considered are required to apply, detailing relevant skills and experience. Lists of counsel are reviewed once a year.

Cases prosecuted on behalf of the DPP are conducted by independent counsel. Counsel are engaged on a case by case basis, giving cognisance to the particular requirements of the case under consideration. All cases of a particular type attract the same level of fees unless a case is exceptionally demanding in which case a top-up fee may be applied. The DPP maintains a number of panels of counsel, each panel relating to a particular type of case to be tried.

2.3 Recent developments

Given challenges posed by broader fiscal conditions and lower level of expenditure available across all areas of Government activity, many Agencies and Offices have already taken steps to deliver better value for money and reduce spending on legal services. Initiatives in this regard include:

- The Financial Emergency Measures in the Public Interest (FEMPI) which imposed reductions on levels of professional fees, including legal fees.
- The State Claims Agency is reducing fees paid to barristers by 25 percent and is establishing a legal costs unit which will handle third party costs associated with the Mahon and Moriarty Tribunals.
- A range of Offices have unilaterally sought and achieved reductions in legal fees.

2.4 Ancillary Public Expenditure

In addition, considerable public resources are also committed to aspects of the running of the legal system. Net Exchequer expenditure on the Courts Service is estimated to be over €54 million in 2012. On top of this, public expenditure is incurred on Garda costs (including overtime), and costs in the probation and prison services. The Majority of these costs are unavoidable. It is nonetheless critical to ensure that systems are appropriately attuned and that there are no barriers to the smooth running of processes or impediments to efficiency.

Overtime payments arising from Garda attendance at Court are a very significant cost of the administration of Justice. The McCarthy Report estimated that 25 percent of Garda overtime was accounted for by court attendance.¹ While a certain level of this expenditure is probably unavoidable, the current outlay appears unreasonably large, notwithstanding that overtime costs in this area are being reduced.

¹ Department of Finance (2009) *Report of the Special Group on Public Service Numbers and Expenditure Programmes*. Volume II, Detailed Papers.

Similarly, there are draws on Prison Service resources associated with Court proceedings. This arises principally through the transit and accompanying of prisoners by prison officers. Analysis by the Department of Justice & Equality shows that this is a resource-intensive process, requiring staff to be diverted from duties within prisons. In the same way there are ancillary public expenditure implications for the Probation Service.

3. The Emerging Policy Context

The Programme for Government undertook to deliver a number of important changes to the way in which legal services are regulated as well as procured by State bodies. Through the Legal Services Regulatory Bill, the Government is pursuing a deep structural reform of the legal services sector which will have far reaching implications for citizens, businesses, Government Departments and Offices and the legal professions. Accompanying policy measures will assist in delivering enhanced value for money and operational efficiencies in the legal system.

3.1 Legal Services Regulatory Bill 2011

With a particular focus on ending restrictive practices and bringing greater transparency to legal costs, the Legal Services Regulatory Bill, 2011 is currently being progressed.

The Legal Services Regulation Bill

The Legal Services Regulation Bill and Explanatory Memorandum were published in late 2011 by the Minister for Justice, Equality and Defence. The Bill aims to implement key structural reforms set out in the Programme for Government and satisfies a number of the State's commitments in the EU/IMF Programme aimed at structural reform building on the recommendations of the Legal Costs Working Group and the Competition Authority.

Together, these provisions will

- promote competition and transparency in the organisation and provision of legal services in the State and in relation to legal costs,
- create a single and independent point of call for those who wish to make complaints about legal services, and
- better balance the respective interests of the public, consumers and legal professionals in their respective provision and consumption of legal services.

The Bill, which has its roots in the Government's *Programme for National Recovery*, gives effect to undertakings in the EU/IMF agreement. The Bill completed Second Stage in the Oireachtas in February 2012 and preparations are ongoing for Committee Stage hearing. It is expected to be passed into law early in 2014.

3.2 Cross-Agency Working Group on Efficiencies in the Circuit and District Courts

The Working Group is composed of representatives from all of the relevant public bodies responsible for the operation of the criminal courts system. The Group is expected to deliver its preliminary report to the Minister for Justice and the Chief Justice shortly. The preliminary recommendations are expected to point to:

- The piloting of a pre-trial procedure in Dublin. The procedure involves an early stage assessment of a case's readiness for trial and will generate savings and efficiencies by facilitating shorter trials.
- The use of video conferencing. Necessary facilities are now installed in all prisons and the main courthouses. This will obviate the need to transfer prisoners for trial.
- New procedures to deliver efficiencies in the Probation Service and deliver same day probation reports.

3.3 Official Circular on Legal Services Procurement

The Department of Public Expenditure & Reform is issuing a new Circular on Procurement of Legal Services and Managing Legal Costs. This Circular clarifies and underlines the importance of the obligations upon public bodies to comply with the procurement rules and guidelines in retaining legal services. The Circular outlines appropriate competitive procedures that can be used in the engagement of legal services and sets out a number of approaches and tools for public bodies to use in managing legal costs

4. International Practice and Procurement Models of Relevance to Ireland

Control and management of legal costs is a concern of governments across the world. A range of different policy approaches exist in attempting to enhance value for money. The sections below detail a number of pertinent issues which may be relevant in the case of Ireland.

4.1 Alternative Dispute Resolutions

Contentious legal matters are very expensive for the State for a number of reasons – the high cost of solicitors' and barristers' time; factors such as discovery and expert witnesses; delays experienced or the drain on employees' time; the range of costs associated with running the courts services. Alternative Dispute Resolution (ADR) mechanisms can help to alleviate all aspects of these costs, and the US Federal Government's experience in promoting the use of ADR mechanisms has shown that they hold many advantages over traditional litigation procedures. The service providers are generally cheaper, the process itself is more timely and requires less time intensive or expensive procedures, the solutions it provides are more durable, the parties more satisfied with the outcomes and there is no drain on court services.

The European Communities (Mediation) Regulations 2011 have placed mediation on a sound legal footing and there is a general recognition across Europe and the US that many cases would be more suitable to resolution by mediation than by litigation. In the UK, in the case of *Rolf v De Guerin* (2011), the Court of Appeal decided that the refusal by one party to enter mediation could be taken into account when awarding costs. While mediation is not mandatory in the UK, this decision should provide a significant incentive to parties when the Courts suggest mediation as an option.

In a speech in July of 2011 at the opening of the Cork Resolution centre, the head of the Commercial Court, Mr Justice Peter Kelly, said that many disputes could be resolved better and more cheaply through mediation than litigation. In his opinion, up to 70 percent of the cases brought before him could be resolved by mediation, which is generally much quicker, as parties do not have to wait for a hearing date, much less expensive, and led to an agreed rather than an imposed settlement.

4.2 The role of senior management and in-house legal teams

Practice in Australia recognises the importance of having senior management involved in the setting of legal service strategies. Key management decisions include which services to provide in-house, and which to procure externally.

In-house legal teams play an important role in both the delivery and the procurement of legal services in Australia. They can act in the first instance to decide which matters need to be dealt with by legal professionals, which can reduce costs both by recognising unnecessary actions early in the process and by identifying issues which may become problematic further down the line. In-house legal teams can also provide legal services directly, or can act as an informed purchaser of legal services, should that need arise.

4.3 Informed Purchasers

Again in Australia, a number of reports have reiterated the importance of having procurement processes for legal services managed by an experienced and informed individual. The 'informed purchaser' determines exactly what services need to be procured, how much should be paid for those services, and ensures that they are delivered in an efficient and effective manner. In Ireland it is often the case that the person in charge of procuring legal services for a Department or Agency may not be familiar with the operation of the market, or the legal system more generally

4.4 Counsel Panels in the UK and Canada

As is the case in Ireland, the UK operates panels of Counsel for both civil and criminal cases. Both jurisdictions fill the panels based on the general experience and competency of the counsel as well as specific expertise; both jurisdictions also acknowledge the desirability of

working for the State, both in terms of prestige and the certainty of payment and a reasonably certain level of work.

However, there are some differences in the operation of the panels. In the UK, the hourly rates payable to Counsel on civil panels are set, regardless of the nature of the case. Further, the Treasury Solicitors Department only recruit Junior Counsel to panels. Queens Counsel are only used in extraordinary circumstances, and must be approved by the Attorney General. Junior Counsel on the A Panel (the top panel), may regularly represent the state against a QC, but this is not a consideration when deciding on the experience of the States representative. In Ireland, Senior Counsel are used more frequently, especially in cases where the opposing side has retained an SC.

5. Guiding Principles: Avoid, Minimise, Recovery

Public spending on legal services and on the administration of the legal system is clearly a wide-ranging and complex area. In seeking to deliver enhanced value for money and realise expenditure savings a number of guiding principles are proposed, namely that expenditure should be avoided where possible, minimised where it must occur and recovered where relevant.

5.1 Avoid

The starting point is to ensure that all expenditure on legal services is warranted in the first instance. While this may not be a controversial sentiment, realising the goal is not straightforward for a number of reasons. For one, the legal sector is a classic example of a market characterised by imperfect information. Consumers are rarely as informed as producers and this can give rise to supplier-induced demand.

Some of the provisions of the Legal Services Regulatory Bill will address this issue to an extent. Public bodies can nonetheless go further. At any one time there are also a number of barristers and solicitors from the CSSO and AGO on secondment in Government Departments. In many cases, Departments and Offices have qualified barristers and solicitors among their staff. Where these resources are available they should be deployed to act as 'gatekeepers' or 'informed purchasers' for legal expenditure. Such a function can assist senior managers and decision-makers in making more informed decisions and understanding potential risks regarding pursuing particular courses of action.

On a related point more use can be made of alternative dispute resolutions techniques (ADR) to avoid civil court proceedings. Consulting with stakeholders from across the legal services market, D/PE&R has learned that ADR is rarely used in the Irish system. As noted above, the use of ADR in the first instance is compulsory in the United States. Greater use of these techniques should be explored in the case of Ireland and could lead to significant savings.

5.2 Minimise

As detailed, progress has been made in recent years in achieving lower levels of expenditure on legal services. While this is to be welcomed, it nonetheless points to a level of expenditure in the past beyond what may have been justified.

Within the legal profession, securing State work is seen as prestigious and is sought after given the reliability and certainty of receiving full and timely payment. These features have an economic value and it should be ensured that the State is doing everything possible to secure the best value attainable and capture the benefits of these factors.

More extensive use of competitive tendering should be used to assist in this process. This is by no means to say that the State should always award contracts on the basis of lowest prices only. Such an approach would fail to recognise the importance of service quality, the complexities of particular cases and potentially catastrophic consequences of the State not having the very best representation in certain limited circumstances. The procurement model employed must take appropriate account of the various concerns involved.

In addition, system changes can deliver major efficiencies to the administration of the courts system and reduce the very high levels of ancillary public expenditure involved. Small changes and process improvements, repeated daily across the courthouses of the State, offer major potential for savings over the medium-term.

5.3 Recover

In awarding costs arising from a case, the Taxing Master will examine the case file which has been maintained by the solicitor. The records in the file must show that all work being claimed for was actually done, and that it was necessary for the case. The fees charged must also be reasonable with respect to the prevailing level of fees in the market. A premium may be charged for complexity or urgency, but these must be reflected in the file.

To ensure that the state is able to claim the correct level of costs in Taxation, it is of paramount importance to ensure that the file is properly maintained, meaning adequate recording of all work done on the case. Regard must be given to amount of time expended on the case by the solicitor, but this is secondary to the amount of work done – higher fees cannot be charged for completing tasks unduly slowly. It has been recommended that solicitors employed by the State attend sessions of the Taxing Masters' Court to see at first hand what is required when proving costs.

6. Recap and Conclusions

Public expenditure on legal services is a significant draw on exchequer resources. Positive steps have been taken in recent years to reduce spending in this area, and the provisions of

related policy initiatives such as the Legal Services Regulatory Bill and the Working Group on Efficiencies in the District and Circuit Courts will make important contributions to enhancing competitiveness, transparency and value for money. This principles set out in this paper – that such expenditure should be avoided where possible, minimised where it must occur and recovered where relevant – should help to build upon this progress and allow for greater savings to be realised over future years.