A. Improving procedures and practices and removal of obsolete, unnecessary or over complex rules of procedure

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

(a) Non-compliance with section 8 of the Civil Liabilities & Courts Act, 2004

While section 8 of the 2004 Act provides that a plaintiff should send a letter of claim before the expiration of two months from the date of cause of action, or as soon as practical thereafter, it is the experience of the State Claims Agency that the provisions of the section are rarely adhered to. It is not unusual for a defendant to receive a section 8 letter when the Personal Injuries Summons has already issued and, in many cases, within days of service of the Summons. While section 8 does provide for potential cost penalties to the plaintiff as a result of non-compliance with the section 8, these penalties are discretionary and have failed to encourage plaintiffs to comply with the legislation.

The Legal Services Regulation Act 2015 (the 2015 Act) provides for the introduction of pre-action protocols in clinical negligence cases. It is submitted that any protocol introduced pursuant to the 2015 Act should oblige a plaintiff, when requesting his or her medical records from a healthcare provider, to confirm whether or not a claim in respect of clinical negligence is contemplated. It is further submitted that provision should be made to compel a plaintiff, who is contemplating a claim in respect of clinical negligence, and who has obtained an initial, supportive medical report dealing with breach of duty and/or causation, to send a formal Letter of Notification to a healthcare provider within 4 weeks of receipt of the medical records.

(b) Imprecise and unfocused pleadings

Notwithstanding the fact that a plaintiff in a clinical negligence case will almost always have a pre-existing medical condition of some description, it is the experience of the State Claims Agency that the particulars of personal injuries pleaded in a clinical negligence action frequently make little or no distinction between the plaintiff's pre-existing clinical history and the injuries which it is alleged were caused by the alleged negligence of the defendant.

The consequence of this failure to plead particulars of personal injury in a specific and targeted manner results in a defendant being obliged to issue lengthy Notices For Particulars in an effort to clarify the injuries for which it is alleged the defendant is liable to pay compensation.

The effect of excessively drafted pleadings is that cases take longer to resolve and are more expensive than they would otherwise be if it were clearly stated at the outset which injuries the plaintiff alleges are the result of the defendant's negligence as distinct from those which are the result of a pre-existing or on-going condition.

It is submitted that a possible solution to this problem is an amendment to section 10 of the Civil Liability & Courts Act, 2004, which at section 10(e) obliges the plaintiff to particularise the injuries alleged to have been caused by the wrong of the defendant. This could be amended to oblige a plaintiff to clearly identify and differentiate between the pre-existing clinical history and the alleged injuries which are caused by the alleged negligence of the defendant.

(c) Applications to Court to set aside renewal of a summons

In circumstances where a Personal Injuries Summons has been renewed, Order 8 Rule 2 of the Rules of the Superior Courts provides that it is open to a defendant, before entering an Appearance, to bring a Motion, on notice to the plaintiff, to set aside the Order renewing the Summons.

The difficulty which arises is that a defendant, when deciding whether such an application is appropriate, will need to consider the grounding affidavit and exhibit(s) which were filed in support of the plaintiff's ex parte application to renew the Summons. While most solicitors acting for plaintiffs will provide a copy of the relevant Motion papers on request, some will not. The defendant's solicitor may experience difficulties accessing the Motion papers from the Central Office as he or she will not yet have entered an Appearance.

It is submitted that were a plaintiff, when serving a Personal Injuries Summons which has been renewed pursuant to an Order of the Court, obliged to serve a copy of the Motion papers on foot of which the Order was granted, at the same time as service of the Personal Injuries Summons, unnecessary delay would be avoided.

(d) Amendment of pleadings without leave

Order 28 of the Rules of the Superior Courts provides for the possibility of amending pleadings without the necessity of an application to Court. However, the time periods in which amendment without leave is allowed are relatively strict.

An issue may arise where a party, who is outside the time period for amendment without leave, proposes to amend a pleading and the opposing party is willing to consent to the proposed amendment. In order to avoid an application to Court, it may be suggested that an application will be made to Court, at the trial of the action, to amend the pleading.

However, the practice of leaving over applications to amend, until the trial of the action, can give rise to difficulties when a party to the proceedings wishes to take some step which is contingent upon the acceptance of the amendment, for example where a defendant wishes to deliver a Defence to a draft amended Personal Injuries Summons, or where a request for Discovery arises on foot of a draft amended Defence.

It is submitted that provision could be made in the Rules to allow for amendment of a pleading without leave of the court on one occasion, at any time prior to trial, provided the parties are in agreement as to the nature of the amendment proposed.

(e) Unnecessary allegations of negligence

The issue at stake here was succinctly expressed by Ms Justice Irvine in her decision in *Wright v HSE* dated 19th July 2013, *'Just because a plaintiff has one good point they should not, to my mind, be permitted to litigate a myriad of others and have the court make an order requiring the successful defendant on such issues to pay for that luxury'*.

The court, in the *Wright* case, indicated that it was *'sorely tempted'* to make some type of costs order in favour of the defendant, to be set off against the plaintiff's costs. However, the court ultimately decided against this given that this had not been the practice to date in this type of litigation.

Regrettably, the principles established in the judgment in *Wright v HSE* have not, to date, been more widely applied in the Superior Courts. The practice of making numerous (and frequently contradictory) allegations continues.

Apart from the obvious financial cost implications which are visited upon a defendant trying to address myriad allegations of negligence, there is also an extremely important human cost. It is the State Claims Agency's experience that the practice of making unmeritorious/unsubstantiated allegations leads to distress on the part of clinicians whose conduct is impugned in clinical negligence cases. The same practice also inevitably leads to clinicians regarding the legal process with a degree of cynicism.

It is submitted in the interests of justice that a plaintiff should be penalised on costs if he/she pursues an allegation which is later found to be without merit. In this context, it is worth stating that in High Court cases the parties are obliged to exchange expert reports in advance of trial, which allows the plaintiff's legal advisors to assess or advise the plaintiff about the merits of pursuing a particular allegation in light of a review of both parties' expert reports.

(f) Claims for aggravated and/or exemplary damages

Closely related to the issue of unmeritorious/unsubstantiated allegations of negligence is the question of claims for aggravated and/or exemplary damages.

It is the State Claims Agency's impression that the practice of making claims for aggravated and/or exemplary damages are an increasing feature of clinical negligence litigation.

While there are clearly circumstances in which a claim for aggravated and/or exemplary can be properly maintained, it is the State Claims Agency's experience that deliberate dishonest or malicious behaviour on the part of clinicians is, thankfully, rare.

Claims for aggravated and/or exemplary damages cause huge distress to those clinicians whose actions are the subject of such claims. It is hard to avoid the conclusion that in many cases such claims are made for tactical reasons, in an effort to place pressure on the clinicians and or the hospital/healthcare provider. It is submitted that this is inappropriate. By way of analogy, recent decisions in relation to section 26 of the Civil Liability & Courts Act, 2004 have made it clear that a defendant runs a high risk of being penalised if it makes unmeritorious allegations of fraud or exaggeration against a plaintiff.

In the circumstances, it seems appropriate that a plaintiff should face penalties for inappropriately alleging malice (as opposed to negligence) against a defendant either in its conduct of the care of a patient or the aftermath of an adverse incident.

(g) Failure to particularise items of special damage

Section 10(e) of the Civil Liability & Courts Act, 2004 provides that a Personal Injuries Summons shall specify full particulars of all items of special damage in respect of which the plaintiff is making a claim. Notwithstanding the clarity of this provision, a Personal Injuries Summons rarely sets out full (or even any) particulars of special damage. In fact, particulars of special damages are often only provided very close to trial, which has clear implications in terms of delay and costs.

By way of a suggested solution, it is submitted that a simple remedy to this problem would be an amendment to Order 1(a), Rule 10 to provide that the time prescribed by the Rules for delivery of a Defence shall run from the date of delivery of, *inter alia*, Particulars of Special Damage. An analogous provision exists in respect of the requirement to provide affidavits of verification, which has proved extremely effective in ensuring that affidavits of verification are in fact provided. There does not appear to be any reason why our proposed amendment would not have a similar effect in relation to particulars of special damage.

For the avoidance of doubt, it should be noted that the suggestion made in the previous paragraph is not intended to limit the plaintiff to those items of special damage claimed in the Personal Injuries Summons. It is clearly reasonable, where items of special damage are continuing, that the plaintiff should have the right to serve further particulars, provided this is done in a timely manner. Rather, the purpose of this suggestion is to ensure that the defendant will be aware of all past items of special damage, together with the heads of claim for future special damage, at an early stage, so that it can investigate the claim in a speedy and cost-efficient manner.

(h) Excessively strict tender time limits

The basic rule under Order 22 provides that the defendant may make a lodgement/tender at the time of delivery of its Defence or within a period of four months from the date of Notice of Trial.

The difficulty with this time period is that the four-month window will often have expired long before the parties exchange reports pursuant to SI 391/1998. This usually means that the window for tender or lodgement has expired before the defendant is in a position to realistically assess the likely outcome of the case, in respect of liability and quantum, in order to make a tender.

While the Rules do provide for late lodgements/tenders to be made in certain circumstances, this requires an application to court and this facility is not frequently used.

The Rules also provide for the possibility of making lodgements/tenders outside the basic period referred to in paragraph (i) above. However, these provisions are only activated in specific circumstances, namely when the plaintiff serves unsolicited further Particulars, or where in excess of eighteen months has elapsed since the date of Notice of Trial.

In summary, having regard to the foregoing, it will be noted that the option of making a tender/lodgement pursuant to Order 22 is, for practical purposes, frequently unavailable in clinical negligence cases.

It is submitted that a solution to the problem identified in this section would be an amendment to Order 22 to provide that an additional lodgement/tender *'window'* would also operate for four weeks from the date of exchange of expert reports and the provision of full Particulars of Special Damage pursuant to section 45(1)(a) of the Courts and Court Officers Act, 1995 and Order 39, Rule 46 of the Rules of the Superior Courts.

(i) Case management

The Supreme Court has commented on the absence in Ireland of an effective regime for case management of clinical negligence cases. The Working Group on Clinical Negligence, chaired by Quirke J., subsequently recommended case management in conjunction with the court rules prescribing a pre-action protocol. Ideally, case management should apply in every clinical negligence action, however, if this is not feasible with the current Courts Services resources, it is submitted that case management should be available on the parties' application or the Court's own initiative where the case meets certain criteria including the complexity of the case, number of legal issues, number of parties and special circumstances.

It is further submitted that there should be a single case management conference for clinical negligence actions, as recommended by the Working Group, which would capture the purposes served by the initial directions hearing, case management conference and the pre-trial directions hearing in the Irish Commercial Court. The parties would be required to prepare a case booklet, case timetable and pre-trial questionnaire and if a party does not comply with the timelines, there should be access to the Court for directions.

Case management will, in addition to overall time spent on clinical negligence claims, reduce the court's time spent on expert evidence which will, in turn, reduce legal costs. It is submitted that once expert reports are exchanged, the parties should arrange for the experts, on whose evidence in the same field of expertise those parties intend to rely, to discuss, in the absence of solicitors/Counsel and without prejudice, the issues involved in the case with a view to identifying the agreed and disputed issues and thereafter providing a memorandum to the Court setting out the narrowed issues.

(j) Consistency in time limits for filing of pleadings

It is submitted that there should be greater consistency in the Rules concerning the various jurisdictions and different circuits. For example, there are presently different time limits for the filing of pleadings (for example in Circuit Court Personal Injury cases a defence must be filed within 6 weeks whereas it is 8 weeks in High Court) and before a Motion can be issued after a warning letter is sent in the Circuit Court and the High Court (for example it is 14 days in the Circuit Court and 28 days in the High Court). It would be of great assistance if all courts had the same time limits.

Furthermore, in relation to the drafting requirements for pleadings, it would be beneficial if all jurisdictions had the same drafting requirements (for example the format for Appearances differ between court jurisdictions)

(k) Consistency in requirements to file documents

Greater consistency required in relation to what documents are filed and what are not. For instance, generally a Notice to Produce is filed in the High Court but a Defence is not.

(l) Late letters for filing of pleadings

The necessity of obtaining a letter from the plaintiff consenting to the late filing of an Appearance in the Circuit Court should be removed. There is no requirement for this in the High Court, so it is unclear why it is required for the Circuit Court.

(m) Revert to list system and end the use of the tombola in personal injury cases

The lottery system for calling on personal injury cases should be discontinued and cases should instead take their place in the list. This would provide greater certainty in relation to the scheduling of witnesses for plaintiffs and defendants and it is hoped that this would lead to cost savings in relation to standby fees for experts, etc., and, consequently, legal costs, generally. At present, a case can be listed from Tuesday to Friday and if it is not pulled out of the tombola, it is adjourned to another day. This greatly increases the cost burden on parties in litigation and also creates considerable uncertainty. With a list system, the likelihood of the case being reached can be estimated and not all witnesses need to stay within the Four Courts awaiting the next draw from the tombola.

(n) Provision of electronic list of carried over personal injuries cases

For cases listed for hearing in the High Court, it would be of great assistance if an updated list of all the cases for hearing on a particular day, which includes cases that have rolled over from the previous day/days, was available online, on the courts.ie website on the morning of the hearing. Currently, this list is only available in hard copy from the Registrar just before Call-over. The only online list available on the courts.ie website contains only cases specifically listed on a particular day for hearing and it does not include cases that have been rolled over.

(o) Cases being remitted to the High Court

There is presently no need to bring a Motion to have a case adopted from the District Court to the Circuit Court. Therefore, why is there a need to do same when a case is remitted from the Circuit Court to the High Court?

(p) Taking up Orders

Presently, High Court Orders can be taken up from Highcourtbespeaks.ie and it is a very useful service. It can readily be seen from the High Court Search facility on the website when a particular Order has been perfected. It is also possible to see the initials of the Registrar in case the Order needs to be amended for some reason. Could this be extended to all the Courts?

(q) Cost penalties

There should be a penalty in relation to costs for a plaintiff where a defendant has sought to meet for settlement talks and a Plaintiff's solicitor refuses to do so, without sufficient reason, before a Defence is filed. The benefit for a plaintiff's solicitors in doing so is that he/she can claim greater costs. A defendant is often faced with such a scenario. Perhaps there may be some merit in introducing a scale of costs like that which presently operates in the District Court? The scale could be weighted towards encouraging, where possible, early settlement of cases so that there is no benefit in seeking a Defence from a defendant.

B. Reviewing the Law of Discovery

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

Discovery General:

(a) Discovery Pre-Defence

Presently, none of the court rules prescribe the earliest stage in the proceedings at which discovery may be sought. Consequently, the courts have filled this lacuna by providing a general rule in relation to the timing of an application for discovery (i.e. when pleadings are closed) along with a number of exceptions.

It is submitted that it should be more difficult for parties to refuse to provide discovery before a defence is filed and pleadings are closed in cases where there are issues regarding medical causation and/or an exacerbation of an injury.

It is submitted that if the parties can show that discovery is necessary and relevant to the proceedings in being, it should be provided/ordered regardless of what stage the proceedings are at.

As matters stand, a Defence could be served denying causation of the injuries complained of by the Plaintiff and, thereafter, an Affidavit of Verification sworn by the Defendant standing over this denial. However, oftentimes without sight of the Plaintiff's medical records, such a denial in a Defence is based on supposition rather than solid evidence. Consequently, it is submitted that the early discovery of medical records in such instances in advance of a defence been sworn would provide greater certainty and accuracy in relation to any such pleas/denials made by a Defendant.

(b) *Cost implications for failure to comply with an Order*

In the case of *Geaney –v- Elan Corporation PLC*, the Court found, in the Commercial Court, that the defendant had failed to make discovery of all the documents covered by the order he made after hearing a contested application some time previously. The trial Judge indicated his displeasure at the way in which the defendant had dealt with its obligations in swearing the Affidavit of Discovery and lifted the stay on execution of an Order for Costs that he had made against the defendant at the end of the original application for discovery and held that the defendant would have to pay the costs on a solicitor and client basis.

Perhaps such an order could be considered as an appropriate reprimand on a more general basis by all the courts, especially against plaintiffs, as there appears to be a general reluctance by the High Court, in particular, to dismiss a Plaintiff's claim for failure to comply with discovery. Such a practice could also prove to be a double edged sword for a Defendant who could obviously find themselves in a similar situation as that of Elan in the above case.

(c) *Cost budgeting*

In 2013 on foot of the Jackson reforms, a new rule 31.5 was introduced to the Civil Procedure Rules in the UK. One of the key components of these reforms was the introduction of cost budgeting within litigation.

It is submitted that such a reform could have far reaching benefits in attempting to control the escalating costs of discovery in the State.

It is submitted that when a Motion is brought before a court seeking Discovery that the respondent to the Motion should potentially be able to successfully oppose an application for a certain category (or categories) being granted if it believes and can prove that the costs involved in providing the Discovery sought would be excessive. The respondent to such an application could provide persuasive grounds to a judge of such an argument by providing a formalised costs budget (such a standard form could be provided for the in the court rules) estimating what could be spent if the respondent is ordered to carry out such a burdensome trawl. The budget would set out who is working on a file, the extent and scope of the documents to be reviewed, their hourly rate and how much work they will be doing at this stage of the litigation.

Whilst we are aware that there is already a practice in the Commercial Court where budgets are sometimes provided to Judges, we believe that it should be rolled out to all actions and jurisdictions.

The provision of such a budget shifts the focus of costs control from being retrospective to being prospective, with the court and the parties focusing upfront on how much should be spent (or at least recovered) in the litigation. For instance, in 2007 the Supreme Court overturned an Order for Discovery of a large volume of electronically stored data in the case of *Dome Telecom –v- Eircom plc* on the basis that the costs and burden of providing the discovery would be disproportionate to any litigious benefit that might accrue to the applicant. However, such decisions are not particularly the norm in personal injuries actions in the High Court. We suggest that perhaps the introduction of such a standardised practice/process would serve as an important reminder to all the parties that the Discovery process must be proportionate and should not really exceed the maximum amount claimed

It is also open for such an exercise to take place where a case is being case managed by a Court.

Discovery (Clinical Negligence Cases)

In the State Claims Agency's experience, the majority of clinical negligence claims are resolved before trial but not before the discovery of documents. It is also our experience that imprecise, unfocused and/or excessive pleadings, increases the volume of documents to be discovered with attendant increases in costs.

Certain categories of document are invariably the subject of a discovery request or Motion by a defendant in clinical negligence cases. These are a claimant's third party healthcare records such as those created by the claimant's general practitioner and/or any other healthcare provider from whom or where the claimant has received care in respect of his/her cause of action and/or any pre-existing medical disease or condition affected as a result of the cause of action.

We propose the following discovery plan, which we believe will limit delay and save costs:

a) A Letter of Claim served pursuant to Pre-Action Protocol regulations introduced pursuant to Part 15 of the Legal Services Regulation Act 2015, should be accompanied by an up-to-date, indexed and paginated copy of all healthcare records within the claimant's possession, custody or power, for a period commencing three years prior to the date of the incident giving rise to the cause of action;

b) A Letter of Response served by a defendant pursuant to the same regulations would be accompanied by an up-to-date, indexed and paginated copy of all documents upon which the defendant intends to rely in defence of the claim, other than proceedings and expert evidence;

c) Within 12 weeks of service of a Personal Injuries Summons, the parties should be obliged to agree any additional categories of document necessary and relevant to the matters at issue in the claim. Said Discovery to be made within 8 weeks;

d) In default of agreement, each party will be at liberty to make an application to Court in respect of Discovery.

C. Encouraging ADR

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

Under the new Mediation Act, *section 14* states that solicitors are required to provide a client with information in in respect of mediation services, including the names and addresses of persons who provide mediation services. However, in situations where litigants may not be able to afford the services of a solicitor or where they have not yet decided to take the route of litigation and therefore have not engaged the services of a solicitor, we believe that there could be greater publicity in relation to services offering mediation to such persons. For instance there could be a link in the courts.ie website to:

- The services supported by the Courts Service in conjunction with the Mediators Institute of Ireland which offers community mediation;

- The services offered by Community Law & Mediation. Community Law & Mediation is an independent, community-based organisation based in Dublin that works to empower individuals experiencing disadvantage by providing free legal information, free legal advice, education and mediation services.

In clinical negligence cases, ADR is an effective method to reach an early resolution in cases and a reduction in legal costs. However, it is underutilised and it appears that it is often not considered by plaintiff lawyers. If a pre-action protocol comes into force, it is envisaged that the claimant and respondent to the claim would explore ADR options, prior to the initiation of proceedings, and if proceedings issue, the parties may be required by the court to provide evidence of whether ADR was considered.

In addition to the obligations imposed by the Mediation Act 2017, it is submitted that a solicitor should, before serving notice of trial and/or obtaining a hearing date, write to the solicitor for the opposing party suggesting that an attempt be made to resolve the case by way of ADR, or alternatively, setting out why ADR would not be appropriate. This would oblige parties to consider the use of ADR at an early stage in the proceedings and avoid incurring the additional costs in proceeding to trial. It is further submitted that this correspondence should be brought to the court's attention before the court decides to fix the case for hearing.

Furthermore, Order 56A of the Superior Court Rules, which allows a party or the court of its own Motion to adjourn proceedings and invite parties to ADR, could be amended to include a provision obliging the court to consider whether Order 56A should be invoked before a hearing date is fixed.

D. Review of the Use of Electronic Methods of Communications Including E-Litigation and the possibilities for Making Court Documents (including Submissions of Pleadings) Available or Accessible on the Internet

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

It is submitted that the Courts website could be improved in many ways for two different types of users:

(1) Ordinary users and;

(2) Solicitors/barristers/law agents/ legal executives & legal secretaries.

(a) Website could be more user friendly

The courts.ie website could be better accessible and intelligible for non-lawyers/lay litigants. For instance:

a. The phrase '*lay litigant'* is not part of most ordinary persons vernacular. Perhaps changing the heading on the courts website to '*representing yourself*' or '*self-represented litigant'* and then providing an explanation of the lay litigant term, etc.

b. The current lay litigant page is text heavy and could be off putting for people using it for the first time and not familiar with the courts. We believe that more self-help information should be provided in easy and understandable language and format.

c. The website could have its own specific bookmark '*representing yourself'* on the homepage – rather than having it in the less visible task bar on the right hand side as it presently is.

d. There is currently no 'FAQ' section.

e. The website should provide a link to the Injuries Board website and explain that it is necessary for all personal injury claims to be sent to it for an assessment before proceedings can be initiated.

f. Provide a link for all the forms required in the various court jurisdictions on-line. Presently, only forms for the High Court are available through this specific section (although such forms are obviously available on the courts.ie website).

(b) Online account

Ability to set up an online account for solicitors/law agents, etc., where:

- Solicitors and law agents should be able to set up an online account to enable them track cases, etc. by way of a portal (See (e) below for more detail);

- A user ID and password would be required to access such an account.

(c) Track cases online

Ability to track cases online via the courts website:

- *'View my cases'/'Personal Case List'* which enables solicitors to quickly view cases and monitor progress of current cases;
- Only parties to the case can view it using this system;
- Notified of filings by way of email;
- Can flag important cases so they appear in a different list;
- Dashboard setting out cases due to be heard in date order/calendar order.

We believe that this would be a very beneficial feature on the courts.ie website particularly when one is monitoring numerous cases in many different provincial lists to see if they are due to appear on call-over lists, etc. It would be of great assistance and provide re-assurance that cases are not being missed and, consequently, been struck out for non-attendance at call-overs. We are aware of firms that offer such a service, but there is no reason why the courts.ie website cannot provide such a feature.

(d) File documents online

Ability to file court documents for District Court, Circuit Court, High Court, Court of Appeal and Supreme Court via the courts website:

- Such features are available on New York, Australian and UK websites;
- Generally done by way of a portal whereby one can log into one's account and upload a document through that;
- It is a more efficient and cost effective process and it can be done at any time by users;
- Ability to pay court fees by way of an online account or credit/debit card. However, there is no cost for the use of the portal itself;
- Download the processed filed document.

(e) E-filing

In allowing e-filing, the Courts can then gradually move towards having an electronic court file:

We believe that the benefits for the Court of an electronic court file could be as follows:

- Immediate access to the Court file, and the documents on it, by different authorised people within the Court at the same time;

- Increased efficiency in case management as the Court eliminates time spent retrieving court files or documents;

- Eliminating the opportunities for lost or incomplete paper files;

- Reduction in on-going storage and archiving costs as the Court is required to maintain certain Court records in perpetuity.

(f) Search function

Similar search options for District Court, Circuit Court, Court of Appeal and Supreme Court cases, such as what is for presently available for High Court cases under the ‘*’High Court Search’* feature on the courts website. It would be hugely beneficial to have one single online search system for all jurisdictions. Presently one has to enquire at the relevant courts office in relation to a specific case or check the courts’ legal diary to check for upcoming motion dates and trial dates.

(g) Mobile friendly function

The courts.ie website should adjust its view for mobile users:

- The website is presently not mobile friendly (i.e. it does not adjust to a view that is mobile screen compatible) Many users seek to access it on the go (i.e. on their way to court, etc. rather than through a desk-top computer). The view should fit the screen of the device that is accessing it. Many websites have this functionality.

(h) Online assistance

Realtime chat service to assist legal users:

- Rather than having to ring the Courts’ offices to clarify rules etc., it would be great if there was a facility to message the offices in real time about a query and hear back as soon as possible. Some Courts’ websites have this facility.

E. Achieving More Effective and Less Costly Outcomes for Court Users, Particularly Vulnerable Court Users

The State Claims Agency has identified the following Court Users' issues which, it is submitted, deserve consideration:

This submission focuses exclusively on the issue of lay litigants who come before the Courts. We are, however, aware that lay litigants may not strictly fall within the definition of a *'vulnerable court user',* as set out above.

We considered what assistance is presently available to such users in accessing the State's legal system and what further assistance could in fact be provided. However, we must state that the provision of such assistance is not intended to encourage litigants to represent themselves. However, as it is generally recognised that there are a growing number of individuals who wish to represent themselves, it is important that the system in place is a one that is readily accessible to all.

We also refer to **section (d)** where we made suggestions as to how the courts.ie website could be improved to enhance access for ordinary users and lay litigants.

We suggest the following:

- Firstly, to ease pressure on the Legal Aid Boards it is submitted that solicitor firms could be encouraged to take on more pro-bono work by introducing tax breaks for firms that choose to do so. A register could be maintained by the Courts Service whereby firms could be allocated such work if requested by them;

- The Legal Aid Boards require greater resources and perhaps their remit could also be broadened. Furthermore, there is a charge for the first consultation by a would be litigant with the Legal Aid Board and it is suggested that such a fee should be eliminated;

- We are aware that the former Chief Justice has asked that the Bar Council put together a panel of barristers to provide pro-bono legal advices to lay litigants who come before the Supreme Court. Perhaps it might be possible to put in place a similar pilot scheme for all court jurisdictions where a lay litigant can seek support and knowledge from a panel of volunteer solicitors and barristers to assist the litigant in complying with complex procedural requirements in a timely way and to enable the litigant to seek advice on how to progress his/her case. Furthermore, advice could be provided to the lay litigant on the likelihood of the success or otherwise of his/her case etc. how to address the Judge, Court protocol and to encourage alternative methods of resolution where applicable;

- Allocation of a specific clerk within the Central Office who can provide support and knowledge on the complex procedural forms that are required and general filing requirements. It would be beneficial if the lay litigant could make an appointment to meet with the clerk. This would avoid the lay litigant having to queue with other legal representatives, oftentimes for long periods, and, furthermore, would assist in reducing the time spent by other clerks in the general queuing system dealing with the very many queries that a lay litigant may have in relation to the form of their legal documents;

- A booklet similar to that prepared by judges in the UK which provides a general overview of the whole legal process and gives advice on how best to approach the general litigation process. A link to this booklet could be provided on courts.ie website. The lay litigant section of the website could also reflect some of this content itself.

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

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

(a) The Rules of the Superior Courts

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

(b) Order 99 R1 (3)

This gives legal effect to the principle that costs follow the event. The question as to what happens when there are many or multiple events has been addressed in ***Re Veolia Water UK plc –v- Fingal County Council (No2) [2006] IEHC 240***. Anomalies also arise when a party loses several substantive headings of claim but recoups full costs by virtue of the fact that such party succeeded on one element of the claim. There are other examples where, for instance, a party does not prove or withdraws a loss of earnings claim leaving a paying party to pick up the costs of accountancy and or actuarial fees on the "costs follow the event" basis. This imbalance was taken up in the Miller Report which advocated a more discerning approach including, inter alia, consideration as to the extent to which the successful party had been successful. The Legal Services Regulation Act 2015 (Sections 168 & 169) confirms the move away from the general

"costs follow the event" model. Formalisation of the concept of non-party costs orders should also be addressed. For example, recent cases such as ***Moorview Developments Limited –v- First Active [2011] IEHC 117*** recognise a feature of modern litigation that the real plaintiff and the person identified as such in any set of proceedings may be two entirely different persons or entities. In short, the simple *costs follows the event* formula lacks flexibility and is not fit for purpose in the context of modern litigation. Order 99R1(3) requires updating to reflect the much wider criteria applicable when carving out Costs Orders that do justice as between the parties.

(c) Order 99R5 (1)

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

(d) Order 99 R10 (2)

This rule underpins the party and party paradigm providing for the allowance of *all such costs as were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed.* The de minimis nature of party and party rules is important. There are lots of significant steps taken in litigation over which the losing party has no control and it would be inequitable to expect full indemnity. The escalation of legal costs levels in respect of smaller litigation is a concern. Proportionality is an important tool in maintaining affordability and or

containment of legal costs at reasonable levels for smaller litigation. The interim report of the Civil Courts Structure Review UK recognised that this is the case (per Briggs LJ at paragraph 5.23) *An imperfect system that reopens the doors to a greater number results in better justice than where many cannot afford the entry fee to ring the doorbell, which is no system at all.*

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

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

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

(e) Order 99 R14.

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

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

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

proceed then the paying party should be in a position to set down subject to the Taxing Masters entitlement to hear arguments as to why any such taxation at the request of the paying party might not proceed.

(g) Order 99 R29 (5)

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

(h) Order 99 R29 (6)

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

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

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

(j) Motion to transfer/Motion to adopt

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

(k) Order 36 R48.

Special damages claims have become more and more sophisticated and it is common to encounter a claim for the legal costs of representation of a pre litigation matter or phase

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

(l) ADR

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

(m) Counsels Brief Fees

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

(n) Tendering

The absence of a facility for tendering or lodgement of monies in the Superior Courts in respect of legal costs represents a major obstacle for defendant or paying parties in resolving legal costs disputes. There does not appear to be any logical reason why the practice of tendering in respect of legal costs is authorised under the Circuit Court Rules but not under the Rules of the Superior Courts. The Haran Reports recommended a facility for tendering or lodgement in satisfaction of party and party costs claims (Haran

Report at 7.20). This should be given effect. The Miller Report supported the use of tenders made within 21 days of receipt of a bill of costs. Draft bills, interim bills, and incomplete bills are likely to present difficulties in the application of tendering rules absent a flexible formula to capture such eventualities.

(o) Section 68 Solicitors Act 1994.

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

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

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

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

(p) Reserved Costs

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

(q) Economic Conditions

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

(r) Use of Comparators

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

(s) The Global Instructions Fee

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

(t) The Rule in Cronin and Astra Business Park

Section 14 of the Courts Act 1991 provides for statutory limitation of costs in respect of which proceedings are instituted in a Court higher than is necessary to obtain the relevant relief ultimately awarded. The receiving party is entitled to the costs applicable in the court below. The 1986 Rules incorporate this principle at O99 Rule 8 (4). The plaintiff party is effectively penalised for proceeding in the wrong court. The limitation has fallen almost totally redundant following the Supreme Court decision in Re Cronin –v-

Astra Business Services [2004] IESC 30. The effect of the decision is to dis-apply the limitation where a lodgement or tender is taken up and by extension settlements of claims in which the rationale is that the onus falls back on the paying party to incorporate such a limitation. The Haran Report (Para 8.15) recommends that steps be taken to remedy the difficulties caused by the fact that lodgements and settlements are not captured by any limitation on costs notwithstanding that the amounts involved fall into a lower jurisdiction.

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