

Submission to the Review of the Administration of Civil Service

By

Dr. Paul K Gorecki

Research Affiliate, Economic and Social Research Institute

Adjunct Lecturer, Department of Economics, Trinity College Dublin

14 February 2018

1. Introduction

- 1.1 I welcome the opportunity to make a submission to the Review of the Administration of Civil Justice on improving access to civil justice in the State.
- 1.2 My submission is in relation to area (d) that is being pursued by the Review Group: *“Reviewing the use of electronic communications including e-litigation and possibilities for making court documents (including submissions and proceedings) available or accessible on the internet.”*¹
- 1.3 My interest in access to submissions and a record of the proceedings is from the perspective of a commentator and scholar interested in competition and regulatory issues. In order to be able to assess and review a Court judgment in these areas it is essential to have access to submissions and proceedings.
- 1.4 It could, of course, be argued that attending the Court is case is sufficient. However, this is a fallacious argument. It is not possible by attending Court to capture all of the arguments and cases cited in an accurate manner that can then be relied upon.
- 1.5 Furthermore, while persons located in the Dublin region can attend the High Court, Court of Appeal and Supreme Court proceedings; those outside Dublin have no such opportunity. By making submissions, and where appropriate, Court transcripts available on the Internet restores geographic equity.
- 1.6 In my submission I briefly outline the degree to which there is currently access to submissions and proceedings, and make some suggestions as to what might develop in the future.

¹ As set out in *Irish Times*, 29 November 2017, Notice, ‘Submissions to the Review of the Administration of Civil Justice.’

2. Current Access to Submissions and Proceedings

- 2.1 At the present time there is very limited access to submissions and proceedings in civil court matters in Ireland. Furthermore, what limited access is available has been drastically reduced by the creation of the Court of Appeal
- 2.2 On 7 October 2013 the Supreme Court issued a Practice Direction, SC15, 'Written Submissions,' which outlined procedures by which a person might be able to access written submissions in cases before the Supreme Court.²
- 2.3 However, the implementation of the Practice Direction – as it applies to scholars, commentators and others who are not part of the legal fraternity – is not working well.
- 2.4 My experience in gaining access to the written submissions in *665/16 CRH PLC & ors v Consumer Protection Commission*: in order to gain access I had to visit the Four Courts, pay cash (no credit cards permitted, strictly cash, and not payable online either) at the stamp office, take a piece of paper demonstrating that I had paid the required sum to the Supreme Court Office. Later in the day I received the written submissions by email.
- 2.5 Even this limited access has been reduced by the creation of the Court of Appeal, which has taken cases that would have gone to the Supreme Court. However, in doing so the Court of Appeal has not followed the Supreme Court's practice of making submissions available to the public.
- 2.6 The Court of Appeal has set out its restrictive position as follows:³

There is no Practice Direction in place in the Court of Appeal which is similar to that which provides a facility for the availability of Supreme Court submissions. Therefore submissions lodged in an appeal to the Court of Appeal are not available from this office to persons who are not parties to the appeal.

While all proceedings in the Court of Appeal are recorded on the Digital Audio Recording system transcripts of appeal hearings are not ordinarily typed up even at the request of the parties.

I requested that the Court of Appeal reconsider its position to no avail.

²<http://www.courts.ie/Courts.ie/Library3.nsf/16c93c36d3635d5180256e3f003a4580/07951e8087c6b9ff802581210053330e?OpenDocument>

³ This was in response to a query. The email from the Court of Appeal is dated 6 November 2017.

3. A Way Forward

- 3.1 In my experience at the Competition Authority, between 2000 and 2008, bringing cases to the High Court and the Supreme Court the submissions of the parties were always available as a word or pdf document. In today's digital/information age making submissions available to the public on the Internet is a comparatively easy and inexpensive process.
- 3.2 Recently I was interested in accessing the written submissions in the case of the *State of Washington & State of Minnesota v. Trump* in the United States Courts for the Ninth Circuit with respect to the President's Travel Ban Executive Order. All the many submissions are readily available online. Why can't Ireland follow suit?
- 3.3 There are grounds for making submissions available beyond technological feasibility. In particular, Ireland has a well educated population that is increasingly interested in the verdicts and reasoning of the Courts, especially the High Court, the Court of Appeal and the Supreme Court. The availability of submissions contributes towards satisfying that interest.
- 3.4 I would ask you to consider mechanisms for:
- (i) at a minimum, making available submissions on the same basis as the Supreme Court throughout the Court system, but in a more accessible manner than the current somewhat antiquated procedures used by the Supreme Court; and, at a maximum, posting all submissions on the Internet; and,
 - (ii) if a transcript of the Digital Audio Recording of a case has been made, for a nominal sum, it should be made available on demand. If not made, the person requesting the transcript should pay for the transcription.

The increased availability of Court documents will result in greater openness and scrutiny of the justice system, leading to greater accountability and strengthening of our judicial system.