

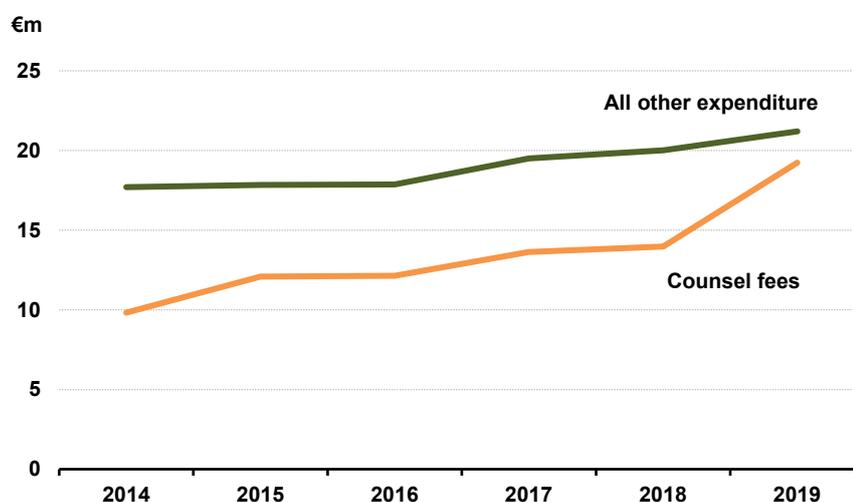
## 6 Delay in payment of counsel fees by the Chief State Solicitor's Office

- 6.1** The Chief State Solicitor's Office (CSSO) provides litigation, advisory and conveyancing services to government departments and offices and to certain other State agencies. The CSSO also provides solicitor services at tribunals of inquiry and commissions of investigation and represents Ireland at the Court of Justice of the European Union. While the CSSO is organisationally a constituent part of the Office of the Attorney General, it is funded through its own vote (Vote 6 Office of the Chief State Solicitor).
- 6.2** The CSSO responds to the demands of its client bodies for legal services as required. Expenses related to such services are usually borne by the CSSO and charged to the vote, without being recouped from the client body.<sup>1</sup> However, court awards against a client body, or the settlement expenses of a case, are met by the client body concerned.
- 6.3** The CSSO makes extensive use of the services of counsel to progress many of the legal cases it handles. Payments of fees to counsel in respect of such services increased from just under €10 million in 2014 to just under €20 million in 2019 (see Figure 6.1). The sharpest rise was in 2019 when spending on counsel fees increased by almost 38%.
- 6.4** Itemised claims for payment of fees (referred to as 'fee notes') are submitted to the CSSO periodically by counsel.
- 6.5** Fee notes received by the CSSO undergo a detailed evaluation process. The notes are first subjected to an internal approval process that examines the level of fees claimed. In certain cases, the fee notes can then be referred to a professional fees control group<sup>2</sup> and to the Office of the Attorney General for approval. In exceptional cases, where the fee notes exceed certain thresholds, they are sent to the Department of Public Expenditure and Reform for final sanction.

1 Exceptionally, in 2017, the Department of Finance agreed to meet 50% (€462,000) of counsel fees payable in the Apple case. The CSSO paid an equivalent amount which was charged to Vote 6 in 2017.

2 Meetings of the professional fees control group are attended by the Chief State Solicitor and/or a number of assistant chief state solicitors. The group reviews fee notes referred to it, along with related documentation, before issuing payment instructions with the aim of ensuring value for money, fairness and consistency. The group also reviews fees payable to legal cost accountants and makes decisions on the recovery of certain legal fees payable to the State.

**Figure 6.1 CSSO expenditure on counsel fees and on all other (non-counsel fee) items, 2014 to 2019**

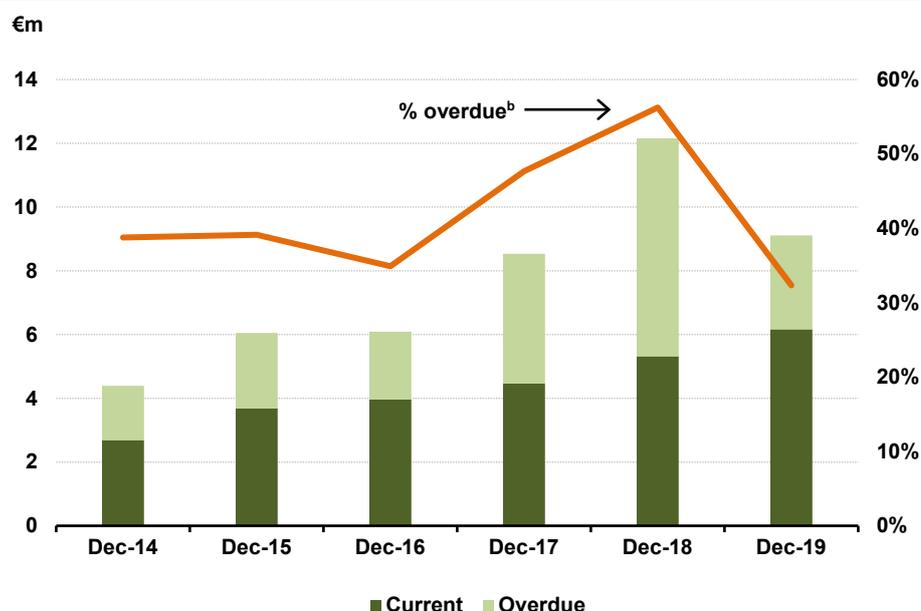


Source: Vote 6 appropriation accounts, 2014 to 2019

## Fee payment targets

- 6.6** The CSSO has agreed with the Bar Council to make payments in respect of fee notes by the end of the quarter after the quarter in which they are received. As a result, the CSSO could take up to six months to settle a claim, depending on when the fee note is received, and still be within the terms of the agreement.
- 6.7** In practice, the payment of counsel fees by the CSSO has drifted into a significant level of arrears (see Figure 6.2).<sup>1</sup> The total value of fee notes on hand at the end of 2014 was around €4.4 million. Of this, 39% was overdue for payment under the terms of the agreement with the Bar Council. At the end of 2018, fee notes to the value of around €12.2 million were on hand, with 56% of this amount being overdue. By the end of 2019 — following the approval of a supplementary estimate of €5 million to top up the original estimate of €13.5 million for the CSSO Vote — the outstanding claims had fallen to a total of around €9.1 million, of which almost one third was overdue for payment.

**Figure 6.2 Value of counsel fee notes on hand<sup>a</sup>, and percentage overdue, at year end 2014 to 2019**



Source: CSSO

- Notes:
- a Value on hand represents the aggregate gross value of fee notes on hand and awaiting payment processing at the end of December each year. The overdue fee notes are those that were received before 30 September in the relevant year.
  - b The line depicts the value of overdue fee notes as a percentage of all fee notes on hand at the end of December each year.

## Accounting for fee liabilities

<sup>1</sup> The Appropriation Account for the CSSO discloses details of all counsel fees, including fees for work done on behalf of the Criminal Assets Bureau. Figure 6.2 does not include outstanding fees for work done on behalf of the Criminal Assets Bureau.

- 6.8** Vote accounting is done on a cash basis, which means that transactions are recognised in the appropriation account in the period in which they occur, rather than in the period to which they relate. However, the standard accounting policies set by the Department of Public Expenditure and Reform require that any accrued liabilities of a vote (i.e. liabilities incurred but not yet paid) are recognised in the statement of financial position attached to the vote appropriation account.

- 6.9** The CSSO has a modified accounting policy in respect of counsel fee liabilities to the effect that it accrues any assessed fee notes outstanding at the year-end that get paid by the end of the following February. The CSSO has stated that this approach dates back to 2004 when the accounts function was taken back in-house from the Department of Finance. In the 2019 account, the amount accrued was €2.65 million (2018: €2.61 million). In practice, this substantially understates the level of liabilities at the reporting date. However, an additional note to the account (note 2.11) discloses the aggregate value of fee notes on hand at the year-end that are not recognised as accrued liabilities.

### Principle of payment of matured liabilities

- 6.10** Government departments and offices are expected to manage their operations within the level of funding voted for them by Dáil Éireann. If spending significantly above the approved allocation is required, then it is necessary for an application to be made for a 'supplementary estimate'. Exceeding the funding level approved for a service in a specific year — referred to as an 'excess vote' — very rarely occurs. When an excess vote does arise, it requires prompt explanations to be provided to the Committee of Public Accounts after the publication of the appropriation accounts, and an additional special vote of Dáil Éireann to approve the excess spending.
- 6.11** An important control over the expenditure of funds is that liabilities that are due are paid promptly and not allowed to accumulate and carry over from one accounting period to the next. This consideration is in addition to that of fairness to suppliers, who are entitled to be paid promptly when they have delivered required services (or goods) to an appropriate standard.
- 6.12** Vote accounting rules consider liabilities to be 'mature', and therefore payable, when services (or goods) have been provided, and the demand for payment has been properly made.<sup>1</sup> Where these conditions are met, payment procedures should be initiated, even at the risk of incurring an excess vote.

### Views of the CSSO Accounting Officer

- 6.13** Recent years have seen a marked increase in the complexity of work being handled by the CSSO, in areas such as commercial litigation and transactional work, procurement work, and advisory and litigation work resulting from our membership of the European Union and the implementation of directives in areas such as environmental law, planning, employment law and social welfare law.
- 6.14** Litigation is becoming increasingly challenging and complex with plaintiffs suing for multiple or alternative reliefs. There is an increasing challenge to the exercise of the power of the State and to constitutional norms.
- 6.15** As a result, a feature of payments made in recent years is the increase in payments at the upper end of the fee range — a direct consequence of the increase in complexity. The rolling twelve-month total of fee notes received are well in excess of €20 million.

<sup>1</sup> Department of Public Expenditure and Reform's *Public Financial Procedures* and Department of Finance Circular 32/95 *Payments (Matured Liabilities)*.

- 6.16** Meetings with the Department of Public Expenditure and Reform to discuss the payment of counsel fees commenced in November 2018 and continued through 2019. The initial meetings were arranged in order for the CSSO to brief the Department on the operation of the counsel fees process, to promote an understanding of the challenges involved in the management of the counsel fees budget, and to discuss any ongoing issues. For 2020, meetings are scheduled to occur at the end of each quarter.<sup>1</sup> The agenda for the meetings includes ongoing matters of mutual interest concerning counsel fees.
- 6.17** The nature of the payment agreement with the Bar Council inevitably means that some level of fees will always be carried over at year end. The volume and value of such fees will vary from year to year, depending on receipts in the last quarter. Part of the rationale for seeking a supplementary estimate in 2019 was to move the CSSO to a position whereby all outstanding fees 'due' to be paid during that year could be paid, thus allowing the CSSO to regularise overdue payments and to pay current fee notes as per the agreed payment schedule. The total figure estimated to achieve this in late 2019 was around €7.69 million. The amount ultimately approved by the Department of Public Expenditure and Reform and sanctioned by the Oireachtas was €5 million.<sup>2</sup>
- 6.18** Reducing the amount of fee notes that are 'overdue' has been achieved by a combination of the introduction of timelines for each stage of the processing of fee notes together with additional resourcing in the area. It is of course the case that many fee notes are paid much sooner than the 'due date' as per the agreed payment schedule. While the longer term aim is to move to true 'real time' processing — a position that would require a major change to the current system of fee note processing — the more immediate aim is to reach the situation where no fee note on hand for processing was received by the Office earlier than the previous quarter. Effectively, this would be 'real time' processing as per the agreed payment schedule.
- 6.19** While it is hoped to reach this position during 2020, we must reiterate that due to the demand-led nature of the service provided by this Office, coupled with the unpredictable nature of the volume and timing of the work, and consequently the receipt of fee notes relating to that work, it is not possible to guarantee that the Office will have sufficient funds, in any given year, to fully discharge all fees due for payment on time — in other words, to permanently sustain this form of real time processing and payment.
- 6.20** The CSSO is working to augment existing measures aimed at reducing expenditure in the area of counsel fees, while ensuring that the quality of the legal service provided is not adversely impacted. Working in conjunction with the Office of the Attorney General, the CSSO measures are aimed at targeting those areas of larger spend on behalf of clients, particularly in contentious matters, and include augmenting existing client early engagement and ongoing case management processes, with a view to reducing spend on counsel, where possible.
- 6.21** The Department of Public Expenditure and Reform has allowed an increase of €1.5 million in the estimate for the fees to counsel sub-head for 2020, bringing the total provision for this year to €15 million. The CSSO will make every effort to remain within this allocation. However, the demand-led nature of the service provided by the Office, and the unpredictable nature of the volume and timing of its work, remains a constant feature impacting this objective.

<sup>1</sup> The Department has stated that it instigated meetings in 2020 on foot of the supplementary estimate sanctioned for 2019 with the primary objective of reviewing actions put forward by the Chief State Solicitor to manage and control expenditure on the fees to counsel sub-head, in line with voted allocations.

<sup>2</sup> The Department has stated that, in addition, it sanctioned virement on an exceptional basis of some €737,277 to further offset accumulated counsel fee liabilities.

## Conclusions and recommendations

- 6.22** Prompt payment for services rendered and goods supplied is an important principle in ensuring that voted expenditure is properly reported and controlled. The progressive build-up of accrued counsel fee liabilities and the increase in the percentage of fees that are overdue indicates that services of counsel contracted for by the CSSO are not being paid for or recognised in the appropriation account for Vote 6 in a timely way. This results in a lack of transparency about how much is being spent on the services of counsel each year.
- 6.23** Normally, a payment processing target is expressed in terms of a specific period of time elapsing from the date of receipt of a claim for payment e.g. within 30 days, within 60 days, etc. In effect, the CSSO has committed to make counsel fee payments within 90-180 days of receipt of a payment claim. However, in a significant proportion of cases (as measured by value of payments), the CSSO has been failing to honour the implicit credit terms.
- 6.24** The CSSO accrues in the statement of financial position for counsel fee liabilities paid in the first two months after the end of the period of account. This is arbitrary.

### Recommendation 6.1

The CSSO should accrue for the value of all fee notes received and not yet discharged, adjusted for the estimated mark down of the fee notes based on historical mark down rates. While this involves an element of estimation, the amount reflected in the statement of financial position would better reflect the true value of the accrued liability.

#### Accounting Officer's response

Agreed.

Having considered the matter, we note that as the markdown applying to counsel fees can vary significantly, the true value of accrued liability of counsel fees cannot be easily determined, and therefore, the Office will include the value of all fee notes on hand at year end adjusted by an estimated markdown.

- 6.25** *Public Financial Procedures* requires departments and offices to monitor and manage their expenditure within the allocations approved by Dáil Éireann. Notwithstanding the accelerated level of payment of counsel fees by the CSSO in 2019 facilitated by a substantial supplementary estimate, the liability in respect of counsel fees accrued at the year-end has increased to represent a sizeable proportion of the annual estimate provision. In effect, this represents a substantial first charge on the following year's provision and raises the risk that the CSSO will seek further supplementary estimates or that an excess vote will be incurred.

