General Scheme of the Civil Reform Bill 2025

Oireachtas Joint Committee on Justice, Home Affairs and Migration

Submission from the Commercial Litigation Association of Ireland

5 February 2026

I. INTRODUCTION

1. The Commercial Litigation Association of Ireland (**"CLAI"**) was founded in 2010 to support the promotion of best practice in commercial litigation in Ireland and to provide legal education and training to commercial litigation practitioners. The CLAI's membership consists mainly of solicitors and barristers who specialise in commercial litigation. A list of the current members of the CLAI Committee is included at **Appendix B** to this document.

2. The CLAI's work includes participation in the Commercial Court Users' Group and the publication of its Good Practice Discovery Guide, now in its third edition[1]. The CLAI also provides a forum for practitioners to make representations in respect of matters of interest, in particular relating to civil procedure and the administration of justice in commercial litigation.

3. The CLAI made a submission in February 2018 to the Review of the Administration of Civil Justice Group ("**the Review Group**"), chaired by the Hon. Mr Justice Kelly, President of the High Court, focused on the reform of the law of discovery. That followed the establishment of a sub-committee of the CLAI comprising practitioners with extensive experience of discovery which prepared a discussion document identifying the main drivers of the costs and delays that arise in the discovery process and setting out possible solutions to those problems. The CLAI supports the aim of the Review of the Administration of Civil Justice Report (October 2020) (**"the Kelly Report"**), to improve access to justice for all by making it quicker, more efficient and cost-effective.

4. In its submissions to the Review Group, the CLAI identified possible ways in which discovery might be reformed. A summary of its submissions in this regard appears in Chapter 6 of the Kelly Report,[2] and aspects of those submissions were ultimately reflected in the recommendations made in the report.

---

[1] CLAI-Good-Practice-Guide-to-Discovery-3rd-edition-11-December-2025.pdf

[2] Kelly Report, Chapter 6, paragraph 3.3, pp. 168–169.

5. The proposals published in the General Scheme of the Civil Reform Bill 2025 (**"the General Scheme"**) are understood to be addressed to the implementation of recommendations of the Kelly Report. On the publication of the General Scheme, the CLAI set up a Working Group, comprising barristers and solicitors practising in commercial law, to consider the proposals from the perspective of commercial litigators. The CLAI welcomes many of the changes contained in the General Scheme which are consistent with the aim of improving access to justice by improving efficiency and reducing the cost of litigation. There are, however, certain proposals in the General Scheme which the CLAI believes raise significant issues of concern for the fair and efficient conduct of litigation, including commercial litigation, in Ireland and these are addressed further below.

II. EXECUTIVE SUMMARY

6. In this submission, the CLAI has set out on a Head-by-Head basis its response to the proposals in the General Scheme, which it hopes may be of assistance to the Joint Committee in its work.

7. As is explained below, there are a number of aspects of the Scheme which the CLAI welcomes, including:-

   7.1. The proposal to change existing discovery, inspection and production procedures. The CLAI has, however, serious and fundamental concerns about aspects of the current proposals as to how those procedures should change set out in Head 5.

   7.2. The provision at Head 15 for case conduct principles. The CLAI supports the principle of conducting proceedings in a manner which is just, expeditious and likely to minimise the costs of the proceedings, as well as the use of alternative dispute resolution procedures where appropriate.

   7.3. The proposed functions of the court in relation to case management provided for in Head 15, subject to the important point that for such provisions to be effective it will be essential that adequate resources are provided to the Courts Service and judiciary.

   7.4. The expansion of pre action protocols provided for in Head 19.

8. There are however a number of features of Head 5, which proposes reforms to the production of documents in civil proceedings, which, in the view of the CLAI, raise serious concerns and which:-

   8.1. reflect a material departure from the recommendations for reform of discovery made in the Kelly Report;

8.2. will result in substantially increased costs for parties in civil litigation;

8.3. impose unworkable obligations on parties at the initiating stage of litigation; and

8.4. will put Ireland out of step with other common law jurisdictions and have a chilling effect on the choice to litigate in Ireland contrary to the objectives of Ireland for Law – the Irish Government's initiative to promote Ireland as a leading global centre for international legal services.

9. The Kelly Report was very specific in recommending that primary legislation should not set out the details of any new documentary production process, but rather the primary legislation should only set out the high level principles. This point is made several times in the report, including at paragraphs 5.2.1 – 5.2.3.[3] The General Scheme goes very clearly beyond addressing only the policies and principles of discovery reform and provides instead for details of the actual procedure, including, for example, the points in time at which disclosure is to occur.

10. The CLAI is strongly of the view that there should be no departure from the Kelly Report recommendations in this regard. While the CLAI has engaged in this document with the detail of what is proposed, it strongly favours an approach whereby the detail of any proposed wide ranging reform in relation to production of documents in civil litigation is provided for by statutory instrument prepared by the Rules Committee.

11. In terms of the detailed provisions of Head 5, the CLAI considers that a number of the proposals are unworkable and/or carry a risk of materially increasing the costs burden on parties in litigation and therefore require further consideration, including the following:-

11.1. The scope of documents to be produced at the initial stage of proceedings (Head 5(1)) is so broad as to mean that the costs implications for parties wishing to initiate proceedings, who will be required to carry out a scoping exercise to identify documents within the scope of Head 5(1), are such that there is a real and substantial risk the proposals will have a chilling effect on the initiation of litigation. In the view of the CLAI, the scoping exercise to be carried out by clients under the current draft proposals in Head 5(1) and 5(5) will not materially change from what is currently required under the existing system, which gives rise to substantial costs. It is estimated by the CLAI Committee that costs of discovery in commercial litigation can often represent at least 50% of the overall costs of a case. Under the Scheme proposals, the differences will be (i) that those costs will now be frontloaded at the initial stage of litigation; and (ii) that there will be now introduced a second stage of

[3] Kelly Report, paragraphs 5.2.1–5.2.3, p. 190.

discovery and a second incurring of discovery costs. The CLAI's view therefore is that the proposals are likely to lead to an overall increase in discovery costs compared to the current regime.

11.2. The proposal that a claimant would have to produce documents "*material to the outcome of proceedings"* or on which the other party might rely, prior to receipt of any defence document (Heads 5(1) and 5(5)) is, in the view of the CLAI, unworkable in circumstances where a party simply cannot know what is material to the outcome of proceedings, or what documents another party might wish to rely on, until a defence document has been delivered.

11.3. The proposal that the second stage of document production would only occur 28 days prior to trial gives rise to a real risk of damaging the efficient conduct of civil litigation, and, in particular, commercial litigation and carries with it a substantial risk of increasing the costs of civil litigation. It would also put Ireland out of step with other common law jurisdictions.

12. The CLAI considers it is essential that such far reaching changes to production of documents in civil litigation are subjected to careful scrutiny to ensure that any changes, which will undoubtedly have far reaching and untested implications in terms of access to justice, costs and efficiency, are premised on a sound and rational evidence basis. This is particularly so where the effect of the reforms may prove to be inconsistent with their aims. For example, it has been publicly stated on behalf of the Government that an objective of the reforms is to "*prevent abuse of the discovery process by introducing a new production regime that will be more effective, efficient and lead to lower costs"*[4] but, in the view of the CLAI, they risk having the opposite effect. The Kelly Report, which recommends different changes, does not provide an evidence-base for the reforms now proposed.

13. The CLAI has also provided comments in respect of the proposed changes to judicial review (Part 3 of the General Scheme). In particular, the CLAI notes the introduction of a new criterion, both as to whether the Court can grant relief in judicial review and as to any award of costs in judicial review, of a claimant being able to establish that granting judicial review will result in a *"significant benefit*" to the claimant. That is a new criterion, it is not defined in the current Scheme, and for the reasons explained below, the CLAI respectfully submits that the proposal to include such a threshold merits further consideration, and, at minimum, further guidance should be provided in any draft Bill as to the intended meaning of that phrase.

[4] Press Release (6 January 2026): https://www.gov.ie/en/department-of-justice-home-affairs-and-migration/press-releases/minister-jim-ocallaghan-publishes-civil-reform-bill-to-overhaul-judicial-review-and-streamline-courts-processes/.

III. SUBMISSIONS IN RESPONSE TO GENERAL SCHEME

A. PART 2 – PRODUCTION OF DOCUMENTS

14. As noted in the Executive Summary, a fundamental and preliminary concern which the CLAI wishes to address is the fact the General Scheme appears to envisage detailed provisions in relation to production of documents being implemented by way of primary legislation. The CLAI believes it would be a serious mistake to proceed in that manner.

15. The Kelly Report was very specific in recommending that primary legislation should not set out the details of any new documentary production process, rather the primary legislation should only set out the high principles.

16. The point is made several times in the Kelly Report, but one example is the recommendations at Chapter 5, which state:-

> *"5.2.1*
>
> *The Review Group recommends that primary legislation be enacted to (a) abolish the current entitlement to discovery, inspection and production of documents under the existing rules of court for the various jurisdictions and the associated case law and (b) specify the principles and policies underpinning a new remedy to be elaborated upon in new rules of court – to be designated "production of documents" so as to make clear the departure from the regime it will replace – which will regulate the entitlement of parties to civil litigation to documents in advance of trial.*
>
> *5.2.2*
>
> *The primary legislation should provide for the prescribing of a date on which the existing regime should come to an end and mandate the respective court rules committees to replace by that date the existing discovery rules with rules complying with the principles and policies mentioned at Section 5.2.1.*
>
> *5.2.3*
>
> *The principles and policies set out in the primary legislation should facilitate regulation of the entitlement to pre-trial documents on the basis of a scheme of rules of court along the lines included at Appendix 2 to this report."* [5]

17. The current General Scheme goes very clearly beyond addressing the policies and principles and instead provides for details of the actual procedure, including the points at which disclosure is to occur and the time for it. It is proposed that the detail of the

[5] Kelly Report, paragraphs 5.2.1–5.2.3, p. 190.

process – which the Kelly Report specifically recommended be in the form of Rules appended to its Report to be made by the Rules Committee – should be provided for in primary legislation in significant respects.

18. As the CLAI pointed out in our original submission to the Review Group, there have been multiple changes in the United Kingdom to the disclosure process there – some tested by way of pilot programmes – and all showing the need for the production process to be amenable to change, and rapid change. If the procedure is put into primary legislation, the CLAI is concerned that it will be incapable of timely change and improvement based on practical experience, changes in technology, and changes in the nature of disputes before the Irish courts. The CLAI is unaware of any other jurisdiction where primary legislation sets out the detail of the production process.

19. The rationale of ensuring an ability to respond to developments undoubtedly underpinned the Kelly Report recommendation that any new document production process be regulated by Rules adopted by the Rules Committee.

20. Introducing primary legislation regulating the actual procedure for making discovery, in the view of the CLAI, cuts directly across what the Kelly Report proposed. The CLAI is strongly of the view that there should be no departure from the Kelly Report recommendations in this regard. While the CLAI has engaged in this document with the detail of what is proposed, it strongly favours an approach whereby the detail of any proposed reform in relation to production of documents is dealt with by way of regulation or by the Rules Committee.

21. Indeed, the CLAI suggests that consideration should be given to pilot testing such far reaching changes to document production in civil litigation. This is something that has been done in the United Kingdom. The pilot testing of case management reforms, for example, is identified throughout the OECD Report: Modernising Staffing and Court Management Practices in Ireland (see, for example, page 114, 117, 118,121, 122, 199, 204, 224).[6] In respect of discovery, the Business and Property Courts of England and Wales ran a three-year Disclosure Pilot Scheme (2019 – 2022) *before* introducing permanent discovery reforms in Practice Direction 57AD (discussed further below). The operation of PD 57AD is itself the subject of a further consultation process chaired by Butcher J. The remit of the current review is to obtain evidence as to the Business and Property Courts disclosure regime and whether it has achieved its goals.

22. The effect of the changes set out in the General Scheme is, in the view of CLAI, assumed rather than supported by a sound evidence base and is based on incorrect

[6] OECD (2023), Modernising Staffing and Court Management Practices in Ireland: Towards a More Responsive and Resilient Justice System: https://assets.gov.ie/static/documents/oecd-report-modernising-staffing-and-court-management-practices-in-ireland.pdf

assumptions about the impact of the proposals on costs and efficiency of litigation. Once in primary legislation, the changes are likely to be extremely difficult to amend, regardless of their then-known (damaging, costly or unproductive) effects.

23. The CLAI strongly urges therefore (i) that there should be no departure from the recommendation in the Kelly Report that procedural reforms of document production process occur through the Rules Committee rather than primary legislation and (ii) that before any far ranging procedural reforms are introduced consideration is given to a pilot scheme in one or more divisions of the Courts to test the effects of the proposed reforms.

HEAD 4 – Abolishment of Existing Discovery, Inspection and Production Procedures

24. Head 4 provides for the abolition of any rule of law that provides for the discovery, inspection or production of documents in civil proceedings, including the procedures provided by Order 31 of the Rules of the Superior Courts, Order 32 of the Circuit Court Rules and Order 45B of the District Court Rules.

25. The CLAI considers that the discovery process, as it is currently framed, contributes to unnecessary costs and delays in resolving litigation. However, the CLAI has a number of fundamental concerns about the current proposed replacing provisions in Head 5.

HEAD 5 – Production of Documents in Civil Proceedings

26. Head 5 proposes a number of significant changes to the existing rules concerning the making of discovery in civil proceedings and to the manner and timelines for the conduct of such proceedings. As is clear from the submission below, the CLAI considers certain of the proposals contained in Head 5 give rise to fundamental concerns for the conduct of civil proceedings in Ireland and which (i) reflect a material departure from the recommendations for reform of discovery made in the Kelly Report; (ii) will result in substantially increased costs for parties in civil litigation; (iii) impose unworkable obligations on parties at the initiating stage of litigation; and (iv) will put Ireland out of step with other common law jurisdictions and have a chilling effect on litigation in Ireland contrary to the objectives of Ireland for Law – the Irish Government's initiative to promote Ireland as a leading global centre for international legal services.

Key features of Head 5

27. The key features of Head 5 can be summarised as follows:-

27.1. Head 5(1) provides that parties to proceedings shall, in accordance with the timelines specified in Head 5(5) produce all documents in their power, possession or control which:

(a) they intend to rely on at trial,

(b) are relevant and material to the outcome of the proceedings, including documents which the other parties to the proceedings would reasonably likely to rely on at trial, and

(c) are necessary for the administration of justice.

27.2. Head 5(5)(a) then provides that a claimant must produce such documents within 28 days of service by it, on the respondent, of the claim form or such longer period as may be agreed by the parties or permitted by the Court. Head 5(5)(b) provides that the respondent must provide such documents within 42 days of the service on the claimant of the respondent's defence, or such longer period as may be agreed by the parties or permitted by the Court.

27.3. Thus, it appears to be envisaged that a claimant will have an obligation to produce documents prior to delivery of a defence. The term *"claim form"* is not defined in the general scheme, however, Head 25 appears to envisage the replacement of existing originating summonses / other originating documents with a document referred to as a *"standard claim notice"*. It is unclear whether it is intended that a *"claim form"* would equate with a standard claim notice and therefore would be the only originating summons / document. That appears however to be what is envisaged under the current General Scheme.

27.4. Head 5(2) provides that the Court may at any time, including on an application of a party where they have not complied with their obligation to produce documents, direct the production of documents that are (a) within the power, possession or control of a party, (b) relevant and material to the outcome of the proceedings, and (c) necessary for the administration of justice. Head 5(3) specifies what the Court shall have regard to in considering the administration of justice.

27.5. Head 5(4) provides that the Court may, at the request of a party or on its own initiative, exclude from production any document for any of the reasons specified at Head 5(4)(a) – (e).

27.6. Head 5(6) provides that unless otherwise provided for by regulation, not later than 28 days prior to the date of trial, or within such other period prior to the date of trial as may be ordered by the Court, the parties shall produce to other parties any additional documents which they believe have become relevant and material as a consequence of the issues raised in pleadings, documents, affidavits, statements of any witnesses or reports of experts, required to be served or produced under the relevant rules of court, or raised in other submissions of the parties. Head 5(7) provides that a party may not rely at trial on any documents that have not been produced in accordance with this part other than by way of leave of the Court.

27.7. It is acknowledged that Head 5(8) provides that the Minister may by regulation amend the time frames in Head 5(5) or (6) and that such amendments may provide for different time frames for different jurisdictions and types of proceedings. For the purposes of this analysis however, the analysis addresses the default timelines that have been specified in Head 5(5).

Proposed initial scope and time periods for producing documents in Head 5(1) and 5(5)

28. The CLAI considers that a default timeline whereby an obligation is imposed on a claimant to produce the documents within the scope specified in Head 5(1) within a period of 28 days of commencing proceedings raises significant and insurmountable practical difficulties in terms of how such obligations could be met at that early stage of proceedings and creates a significant and front loaded costs burden on litigants in terms of their ability to initiate litigation.

Scope of documents caught by Head 5(1) is too broad

29. The scope of documents caught by Head 5(1) is too broad in the view of the CLAI. It would appear that in order to identify what documents are in a claimant's power, possession or control that fall within the ambit of Head 5(1), a full scoping discovery exercise as envisaged by the CLAI Good Practice Guide to Discovery (Third Ed.) under the current discovery regime, would have to have been carried out to identify the 'universe' of documents to be then searched for the purposes of producing documents within Head 5(1).

30. In that regard it is important and appropriate to explain the nature of a scoping exercise typically undertaken in commercial litigation which can be summarised as follows:-

30.1. The first stage is to identify the scope of the *"universe"* of relevant documents. Generally this will involve a data mapping exercise to identify the relevant periods of time covered by the material facts of the dispute; the likely relevant custodians; the likely sources of relevant documents in the client's own records

and IT systems, geographical locations.

30.2. Custodians are identified through engagement with the client to identify the individuals who may hold or did hold data relevant to the matters in dispute (typically by circulating a questionnaire to potential custodians to identify whether they do in fact hold potentially relevant documents, and how and where they stored this data, for example on personal devices, mobile phones, laptops, cloud servers, hard copy documents, etc. and by speaking to key witnesses and others who may have had an involvement in the matter).

30.3. In parallel, an exercise is carried out to identify centrally held data sources through engagement with the organisation's IT function which involves understanding the IT systems in place (including legacy systems where appropriate), data retention policies etc.

30.4. It is also necessary to identify and contact any professional advisors or service providers who were engaged by the party. Depending on the relevant corporate structure, there may be data held by companies affiliated or associated with the party making discovery.

30.5. Once custodians are identified it is necessary to take steps and to engage with the organisation's IT function to identify the likely types and sources of data. Data whether in electronic or hard copy form can be stored in any number of locations.

30.6. A collection is then carried out to obtain a copy of the data sources identified (in a manner which does not alter the original data or metadata), so that they can be processed and searched for data of relevance to the matter. The collection process is usually carried out by a suitably qualified IT specialist in conjunction with the external legal team and relevant internal stakeholders such as the in-house legal team and IT function.

30.7. Generally when a collection is carried out before the issues in the case are fully known, it is necessary to take a cautious approach to the collection and carry out a broad collection, for example by applying the widest possible date range. This can greatly expand the size of the universe (which in complex commercial litigation matters can involve millions of documents) and the cost associated with identifying, preserving, collecting and reviewing those documents.

30.8. Once the collection has been carried out, the data is processed to remove clearly irrelevant data and to facilitate the efficient searching and review of the documents through technical processes such as deduplication, email threading, filtering and application of key word searches.

30.9. At this point, a review process is carried out to identify the documents which are relevant and also to identify any documents which may attract privilege. The review stage may involve the use of technology tools / technology assisted review, such as Continuous Active Learning and a tiered manual review by the legal team.

30.10. The final stage in the process is the production, which under the current discovery regime, involves the generation of discovery schedules and the export of documents for the Affidavit of Discovery and production to the party who has requested discovery.

31. This is a time consuming and costly process requiring significant resources. It is not just a question of financial resources, but also opportunity costs in terms of client resources being diverted to the exercise. The latter are costs that are not recoverable. This is so even in the context of smaller organisations or individual claimants. The CLAI considers that on the current scope proposed in Head 5(1), insofar as concerns a scoping exercise, it is unlikely that there will be any material change to the costs involved in that exercise which will, in large part, still require to be carried out. That being so, the net effect of the proposals, in terms of costs implications, is to front load very substantial costs to a party at the initiating stage of litigation – as envisaged under the General Scheme. The members of the CLAI committee consider that based on their experience, in commercial cases, discovery costs will often reflect at least 50% of the overall costs of a case. In addition to frontloading substantial discovery costs, the General Scheme proposes to then have a second stage of discovery production prior to trial. It appears to the CLAI that will also involve a further scoping and production process, thus introducing a second stage of discovery costs not currently present in the existing regime. The CLAI considers therefore there is a material risk that the draft Scheme proposal will result in increased costs of discovery for parties in litigation.

32. The CLAI is also concerned that the front loading of significant discovery costs such as envisaged under the Scheme will have a chilling effect on the choice of Ireland as a jurisdiction in which to initiate litigation. The CLAI notes that the proposed scope of initial discovery is so broad as to put Ireland out of step with other common law jurisdictions. The CLAI considers that the introduction of such changes would have a damaging effect on the objectives of the Government's Ireland for Law initiative to promote Ireland as a global centre for international legal services.

33. The CLAI is also concerned that the front loading of discovery (and associated costs) as envisaged, could significantly adversely impact the dynamics of settlement and the prospects of proceedings being compromised. Under the current regime, the point in time prior to discovery is in many proceedings a natural point in time at which parties consider whether a reasonable compromise can be reached. That is in part driven by

the dynamic that is possible at that stage to avoid incurring extensive discovery costs and therefore both parties have the incentive to consider what if any reasonable settlement could be reached. If an initial disclosure obligation of the breadth currently proposed under Head 5(1) is imposed, there is a significant risk, in the view of the CLAI, that clients that have incurred that costs will have less incentive to engage in relation to settlement at an earlier stage of the proceedings and, equally, there will be a considerably higher cost to settlement for any paying party.

34. The CLAI understands from public statements that have been made in relation to the General Scheme that one of the concerns which the reforms seek to address is what is perceived as a deterrent to non-institutional clients in initiating proceedings because of the discovery or disclosure process and costs associated with it. The CLAI considers, however, that the current proposed Scheme creates a real and serious risk that the upfront costs burden placed on a litigant seeking to initiate proceedings is such that it will have a chilling effect on the commencement of actions having regard to the costs burden of commencing them, in circumstances where there is an almost immediate and extensive obligation to produce documents within the scope of Head 5(1). There is no doubt, in the view of the CLAI, and taking account of experience of discovery in civil litigation, that the proposed Scheme will involve a substantial frontloading of costs on any person wishing to initiate litigation.

35. The CLAI also believes that the proposals raise significant issues in circumstances where proceedings are urgent, and more generally, raises particular issues for commercial litigation in that regard. As matters stand, a party seeking entry to the Commercial List must in its application for entry must demonstrate that it has moved with all reasonable due expedition in initiating the proceedings. Assuming that remains the position as regards entry to the Commercial List, it would not be open to a party seeking to have a case admitted to that list to delay proceedings being initiated for the purposes of ensuring that they can carry out the necessary exercise to collect documents to ensure they can be produced in accordance with the envisaged timeline. For the reasons explained in this document, such a collection exercise in the context of commercial litigation is likely to be significant.

36. The proposals also need to be considered in the context of the statutory limitation periods that apply to civil litigation under the Statute of Limitations, 1957 and in particular consideration would need to be given as to what changes might need to be made to the existing limitation periods in the event such additional obligations are to be imposed on parties at initial stages of litigation.

Obligation to produce documents within the scope of Head 5(1) prior to delivery of a defence

37. A separate and fundamental difficulty with the current wording of Head 5(1) is that it requires a claimant to produce documents that are *"relevant and material to the outcome of the proceedings"* or documents which the other parties would be *"reasonably likely to rely on at trial"* without sight of the other party's defence.

38. Under Head 5(5), a claimant's initial obligation to produce documents in accordance with the threshold set out in Head 5(1) would arise prior to delivery of any defence. The CLAI considers it would be difficult if not impossible for a claimant to identify what documents are *"relevant and material to the outcome of the proceedings"* or indeed what documents *"the other parties would be reasonably likely to rely on at trial"* without sight of any defence document. By definition, what is material to the outcome of the proceedings can only be identified by reference to the issues in the proceedings, and in turn the issues in the proceedings can only be identified through the exchange of pleadings setting out the respective claims and defences.

39. The CLAI notes in this regard that this was not the scope proposed in the Kelly Report. The Kelly Report proposed that a claimant, ordinarily within 14 days of service on the respondent of the claim form (the pleading setting out its claim) would be required to submit to the other parties all documents available to the claimant *on which the claimant relies in prosecuting the claim*, including documents publicly available, except for any documents that have already been submitted by another party. The same obligation was then imposed on a respondent, ordinarily within 28 days of the respondent's defence. The initial stage of document production was therefore defined by reference to documents on which each party *relied*.

40. The CLAI agrees that in principle there is merit in imposing obligations at specified stages of the proceedings (including at a very initial stage) to produce certain documents of a foundational nature for any claim. The CLAI is concerned however that the proposed scope identified in Head 5(1) is too broad and/or is unworkable in a context where no defence has yet been delivered. The CLAI is also concerned that the proposal reflects a substantial departure from what had been recommended in the Kelly Report.

41. In its submission to the Review Group, and in identifying proposed reforms to discovery, the CLAI submitted that on balance it favoured a requirement to disclose at the initial stage of the proceedings (1) any documents referenced in the initiating pleading, and (2) any documents considered or relied upon in producing the pleadings. The latter suggestion reflected what was at the time a draft Practice Direction for the English Business and Property Court which included an obligation at the outset to disclose *"the*

key documents on which [the party] has relied (expressly or otherwise) in support of the claims or defences advanced in its statement of case…"

42. Disclosure in the Business and Property Courts in England and Wales is governed by Practice Direction 57AD.[7] The CLAI has at **Appendix A** to this document included a note outlining the procedure under that practice direction and notes the differences between that procedure and what is proposed under the General Scheme. In summary, Practice Direction 57AD distinguishes between Initial Disclosure and Extended Disclosure. Under the rules on Initial Disclosure, the party must provide to all other parties at the same time as its statement of case initial disclosure comprising the key documents on which it has relied (expressly or otherwise) in support of the claims or defences advanced in its statement of case (and including the documents referred to in that statement of case); and the key documents that are necessary to enable the other parties to understand the claim or defence they have to meet. A party making initial disclosure is not under any obligation to (a) conduct a search for documents beyond any search it has already undertaken or caused to be undertaken for the purposes of the proceedings; (b) provide copies of documents that have already been provided to the other parties or which are known to be in the other party's possession, unless asked to do so; or (c) disclose adverse documents. The Court may, on application, and whether or not initial disclosure has been given, require a party to disclose documents to another party where that is necessary to enable the other party to understand the claim or defence they have to meet or to formulate a defence or a reply. The obligation to give initial disclosure is subject to exceptions, including that it is not required if it would comprise more than 200 documents or 1,000 pages, whichever is larger. As noted, there was initially a pilot scheme to test these reforms and there remains an ongoing review scheme to assess their effectiveness.

43. The CLAI remains of the view set out in its submission to the Review Group that a requirement at an initial stage to disclose (1) documents referenced in the initiating pleading and (2) any documents considered or relied upon in producing the pleadings is preferable both in terms of the costs burden on litigants but also the overall administration of justice and efficiency of litigation, to what is proposed in Head 5. The introduction of an obligation of that nature would undoubtedly mark a significant change to the current High Court Rules, however, it has the significant advantage that it addresses the objective of ensuring that parties interrogate their own cases at an earlier stage, leading to a better and earlier awareness of what documents they will actually

[7] Practice Direction 57AD – Disclosure in the Business and Property Courts: https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part-57a-business-and-property-courts/practice-direction-57ad-disclosure-in-the-business-and-property-courts.

need for the purposes of presenting their cases in Court.

44. The foregoing suggestion also has the advantage that it does not however create or involve the difficulties which arise on Head 5 and particular the costs burden which will arise by imposing extensive obligations to collect and produce documents at the initial stages of litigation and the conceptual difficulties of requiring parties to do by reference to a threshold of what is relevant and material to the outcome of proceedings or what the other party may wish to rely on, but at a stage where no defence has been delivered. It must be remembered that any proposed obligations will have to apply without discrimination to all litigants including the State, statutory bodies, recipients of free legal aid, etc. It is not clear how such bodies will cope with the obligations imposed or the associated costs.

45. The CLAI agrees that there should be a second stage of production of documents in civil proceedings, following the close of pleadings, by which point the issues in the proceedings are defined. However it is important that in order to ensure that a second stage does not materially increase costs, the first document production stage is appropriately narrowly defined. The question of the scope of second stage discovery is addressed under the next sub-heading below.

46. The CLAI wishes to make clear that in its view the current proposal to impose obligations on parties to produce documents by reference to the threshold in Head 5(1) at a stage in the proceedings where the claimant has not yet seen the defence is an unworkable proposal.

47. To take one example, Head 5 envisages that an application may be made to court, including in circumstances where a party has failed to comply with those obligations. It is difficult if not impossible to see how a court faced with an application by a defendant that a claimant has not complied with obligations to produce all documents in accordance with the test set out in Head 5(1), could determine that application, without any defence having been delivered. In the same way as it is impossible for a claimant to identify what is relevant and material to the outcome of proceedings prior to seeing what defence is being raised, it is equally impossible for a Court to determine whether an obligation to produce documents by reference to that threshold has been satisfied or not in the absence of any defence crystallising what is in fact in issue between the parties.

48. For all of the reasons set out, a reform proposal premised on a claimant producing all documents in its possession, power or control that are relevant and material to the outcome of proceedings or on which the defendant may wish to rely, prior to a claimant receiving a defence, is a wholly unworkable and unfair procedure. The proposal that there would be an exchange of documents "*material to the outcome of the proceedings*"

at the initiating stage of proceedings and prior to receipt of any defence is one that as far as the CLAI is aware, is not mirrored in any comparative jurisdiction and would put Ireland out of step with other common law jurisdictions.

Proposal in Head 5(6) to have a second stage for exchanging documents 28 days prior to trial

49. As stated above, the CLAI is in favour of reforming the process of discovery to provide for the imposition of obligations on parties to initially produce, with or shortly after their claim form, documents referenced in their pleadings or on which they relied for the purposes of producing their pleadings.

50. The CLAI is also in favour of an obligation to produce further documents being imposed at a second stage. However, the CLAI considers that should occur at an earlier stage in civil proceedings than what is currently proposed in Head 5(6).

51. The CLAI is strongly of the view that the appropriate touchstone for determining the timeline for any second stage production of documents should be the close of pleadings, rather than by reference to the commencement of trial, as currently proposed in Head 5(6).

52. The CLAI considers that a proposal of an exchange of documents not later than 28 days prior to the date of trial being additional documents which the parties *"believe have become relevant and material as a consequence of the issues raised in pleadings, documents, affidavits, statements of any witnesses or reports of experts…or raised in other submissions of the parties"* as suggested in Head 5(6) would in practical terms give rise to real and significant practical difficulties and increased costs burdens in the context of most civil litigation but in particular in the context of commercial litigation.

53. While timelines for steps to be taken in preparation for trial vary from case to case in the Commercial List depending on the nature and complexity of the trial, a typical timeline leading to trial commences at a point in time where both sides have in their possession all relevant documents – in other words when discovery is complete.

54. Ordinarily at that point the steps that follow are:-

    54.1. A plaintiff delivers witness statements and expert reports (on average 3/4 weeks).

    54.2. A defendant delivers witness statements and expert reports (on average 3/4 weeks).

    54.3. The plaintiff delivers legal submissions (on average 2 weeks from the date of the defendant's expert / witness statements).

54.4. The defendant delivers written submissions (on average 2 weeks from the plaintiffs written submissions).

54.5. The experts meet and produce a joint report for the Court.

54.6. A trial is fixed for at least two weeks after the filing of the final legal submissions. That is to allow a Commercial Court Judge an adequate opportunity to read the papers in advance which is essential for the efficient running of cases in the Commercial List.

55. The CLAI believes that a process as envisaged under Head 5(6) whereby after an exchange of witness statements and expert evidence there is, shortly prior to trial (28 days), an obligation to exchange a further set of documents, creates:-

55.1. a real and substantial risk of resulting in the need for parties to deliver further supplemental witness statements and/or expert reports to deal with new documents, with obvious increased costs associated with same,

55.2. a real and substantial risk that the hearing of trials will be delayed because parties and/or their witnesses and/or their experts will need an opportunity to consider new documents and as necessary deliver further evidence in relation to them,

55.3. a real and substantial risk of increased interlocutory applications shortly prior to trial in the event that the production of new documents at such a late stage lead one or other of the parties to make an application challenging the adequacy of the documents produced and seeking production of further documents with associated increased costs,

55.4. a real and substantial risk of undermining what is currently viewed a streamlined and successful case management process operated in the Commercial List for ensuring that sufficiently in advance of the exchange of evidence in a case, parties have complied with their document production obligations,

55.5. a real and substantial risk of putting Ireland out of step in terms of trial management with other jurisdictions.

56. Having regard to all of the foregoing concerns, the CLAI suggests that any reforms in relation to production of documents should specify that the second (and final) stage of production of documents in civil proceedings should occur following the close of pleadings. This would also be consistent with what occurs under the disclosure rules in the Business and Property Courts in England and Wales and further detail of the

procedure there is set out in **Appendix A**. We also note in the Appendix that, while practices vary between different courts and states, provinces and territories, discovery in Australian and Canadian courts is also ordinarily sequenced after the close of pleadings. We have not identified anywhere in Australia or Canada that requires the disclosure of all material documents prior to the close of pleadings.

57. It could for example be provided in any new legislation that within a specified period (42 days or more where necessary) of the close of pleadings (i.e. the time limited for the delivery of a reply and/or defence to counterclaim), parties would have an obligation to disclose documents consisting of the following:-

(a) documents which the party making disclosure has relied upon (whether expressly or otherwise) in preparing their pleadings;

(b) documents which adversely affect the case being made by a party to the proceedings including the party making disclosure;

(c) documents which support the case being made by a party to the proceedings, including the party making disclosure; and

(d) documents which are material to the issues and/or the outcome of the proceedings.

58. The classes of documents at (a) – (d) were suggested by the CLAI as an appropriate way to reform and re-define the classes of documents to be produced in civil litigation in the submission to the Review Group.

Miscellaneous issues in relation to Head 5

Absence of any guidance in the General Scheme as to the type of search that is reasonable for a party to conduct

59. The CLAI notes that the General Scheme does not give any guidance as to the type of search for documents in respect of which a party is obliged to conduct. An obligation defined by reference to an obligation to produce documents *" in their power, possession or control",* as noted above, appears to the CLAI to require a party to conduct a scoping exercise equivalent to that currently required under the discovery rules and one which is an onerous and extremely costly task, as is explained in the CLAI Good Practice Guide (Third Ed.).

60. As explained above, the CLAI is strongly of the view that scope of documents to be produced at initial stages of litigation should not be so broadly defined as suggested in Head 5(1). If any obligation of that nature is to be provided for, the CLAI suggests that

consideration should be given as to whether any reforms of discovery should explicitly provide guidance as to what is expected of a party in terms of conducting the search of documents. For example, it could be specified that a party for the purposes of producing documents in its power, possession or control, is obliged to conduct a search of its documents which is reasonable having regard to the circumstances of the case, including the complexity of the issues in the case, the value of the case, the costs that are likely to be incurred in carrying out broader searches, the volume of documents likely to be involved if broader searches are carried out, and the likely relevance to the issues of the documents that will be encompassed in a broader search. This suggestion was made in the CLAI submission to the Review Group.

Absence of clarity as to whether there is any obligation on a party to communicate the parameters proposed to be applied in searching for documents

61. In any detailed reforms, it may be appropriate to specify that a party should communicate to the other party the parameters which it has applied to its search of documents and/or the basis on which it considers those parameters to be reasonable. It is not clear from Head 5 of the General Scheme in what form it is envisaged any document production will occur. For example, under the current Rules, a party produces an Affidavit of Discovery whereby some description of the exercise conducted for the purposes of identifying documents is given and the documents being produced are listed in a schedule. It is not clear whether the reforms envisage any obligation on any party to produce documents with some narrative whether on affidavit or otherwise. It appears to the CLAI that there is merit in parties clearly communicating the parameters applied with a view to reducing the scope for disputes at a later stage in proceedings (as frequently occurs under the current system) whereby it is suggested that further searches ought to have been but were not carried out.

Absence of clarity as to listing of privileged documents

62. Head 5(4) provides that the Court may, at the request of a party or on its own initiative, exclude from production any document for any of the reasons specified at Head 5(4)(a) – (e). Ground (4)(b) identifies as a ground on which a document may be excluded from production "*legal impediment of privilege*". As a matter of law, a party is not obliged to produce legally privileged documents to the other side. Therefore, any obligations imposed under Head 5(1) together with Heads 5(5) and (6) by definition do not require a party to produce privileged documents. It is however unclear what, if any, mechanism is envisaged under the proposed reforms is to be used in order to inform the other side of what, if any, cohort of documents a claim of privilege is being maintained in respect of.

63. A party can assert a claim privilege over documents where it is reasonable to do so. That includes a situation where there is an arguable claim to privilege but ultimately a Court may decide that argument is incorrect. The only way an opposing party can interrogate an assertion of privilege over documents is if they are on notice of the documents over which privilege has been claimed. Under the current Rules, a party must list documents in respect of which privilege is claimed and identify the species of privilege relied upon (for example, litigation privilege or legal advice privilege). Where the opposing party considers by reference to that description that an incorrect claim of privilege has been made, that party may seek inspection of the documents and ultimately if opposed, a court resolves the challenge to privilege. The CLAI considers that any reforms in relation to production of documents in civil proceedings would need to specify the mechanism by which parties to litigation identify to opposing parties, documents in respect of which privilege has been claimed.

Unclear what if any sanction is envisaged for a failure to comply with obligations under Head 5

64. Under the General Scheme, Head 5(7) provides a party may not rely at trial on any documents that have not been produced in accordance with the Part. Therefore, a sanction that is provided for under the current Scheme is an inability to rely on documents where they have not been produced in accordance with Head 5.

65. It is not clear however whether it is envisaged that a party will be able to seek a remedy in the event that a party has failed to comply with obligations either initially or at a later stage in the proceedings to produce documents required to be produced under Head 5. There would also seem to be a considerable risk that it would be extremely difficult for a party to definitively argue a failure to comply with the criteria for production specified in Head 5(1) in circumstances where at least some of the criteria are subjective – i.e. documents on which they intend to rely at trial.

66. The CLAI submits that careful consideration should be given in any reforms to what if any sanctions are to be available to a Court and/or to opposing parties in respect of a failure to comply with any of the obligations at the different stages to which those obligations are being imposed. To take an example, if reforms were introduced on the basis of the current draft Head 5, a situation could arise whereby a defendant to litigation receives documents 28 days prior to a trial which are undoubtedly highly relevant to the claim, but which were never produced at the initial stage of production. Under the current General Scheme, it is difficult to see what, if any, sanction follows for that in circumstances where they have been produced at least 28 days prior to trial. For the defendant however, the production of new highly relevant documents at that stage

may have considerable cost consequences in terms of a necessity to deliver additional evidence, to brief additional experts or require existing experts to deliver supplemental reports, to make applications to the court to obtain directions to permit all of the foregoing.

Scope of proceedings to which document production rules will apply

67. The CLAI notes that Head 5 appears to apply to "civil proceedings". The CLAI further notes that Head 25 appears to envisage the creation of a standard claim notice in respect of all originating documents.

68. The CLAI assumes that any reforms are not intended to extend the types of proceedings in which discovery occurs beyond those in which it already occurs, however, the CLAI respectfully suggests that consideration should be given to making that clear in the context of any new reforms. For example, there are lots of types of proceedings that take place in the Commercial List which are civil proceedings but which do not involve or require discovery, for example, applications under the Companies Acts, applications under the Mergers Regulations and/or commercial judicial review.

B. PART 3 – JUDICIAL REVIEW

HEAD 8 – Judicial Review

69. Part 3 of the General Scheme contains a number of significant changes to the operation of judicial review in Ireland and seeks to consolidate (with certain exceptions), in one place, the various statutory provisions in relation to judicial review and Order 84 of the Rules of the Superior Courts.

70. The CLAI welcomes the modernisation of the nomenclature of the various reliefs which are available in judicial review proceedings with the proposed renaming of orders of certiorari, mandamus and prohibition to quashing, mandatory and prohibiting orders.

71. However, it is noted that the recasting of the bases on which the Courts can grant relief in judicial review proceedings introduces a number of new elements, including a public interest test and the requirement that the remedy sought provides a "*significant benefit"* to the applicant. Depending on how these are defined and/or interpreted they may impose significant limits on judicial review remedies. How the Courts will interpret these matters will also lead to uncertainty, at least in the short term. It will make it difficult to be able to advise clients in relation to such proceedings. At minimum, consideration should be given to whether the General Scheme should provide some guidance in relation to these elements.

72. A further change is that costs may only be awarded to an applicant where the final decision of the court provides a "*significant benefit*" to the applicant (Head 8(7)). It is not clear whether this is in truth designed to reformulate existing rules on locus standi e.g. to conduct public interest litigation. As noted in the previous paragraph, what a "*significant benefit*" might constitute is unclear and this leaves the position in relation to the costs in judicial review proceedings also very uncertain.

73. The CLAI assumes that this proposed change is intended to deter unmeritorious claims, or claims that might be brought for strategic benefit but which only give marginal benefit to the applicant. The adoption of a term "*significant benefit"* as the relevant threshold however, arguably goes beyond excluding merely unmeritorious claims, or claims of marginal benefit only. It appears to the CLAI that depending on how the concept of "*significant benefit*" is interpreted, both in terms of the ability of the Court to grant substantive relief in judicial review and in respect of costs awards, it may, if it imposes too high a threshold, undermine the ability of judicial review to constitute an effective remedy. There is already a requirement that an applicant in judicial review establish a *"sufficient interest*" in the outcome of the proceedings. That is also the relevant test still applied in the United Kingdom. The CLAI respectfully suggests that further consideration should be given as to the implications of adopting an entirely new requirement of "*significant benefit"* and what precisely that means bearing in mind the variety of decisions that are properly challenged by way of judicial review. The CLAI also notes it is not a threshold typically imposed in statutory appeals.

74. The CLAI further notes that the proposed Scheme provides that, when considering whether such error was material to the decision, the Court shall take into account whether, in the absence of such an error, a different decision would have been made, which would have placed the applicant in a materially better position. This test runs the risk at least of a court seeking to second guess what decision a public body might or could have made in certain circumstances and the possible consequences of this need to be considered further as it could result in extensive evidence about counter factual scenarios that might slow down the determination of proceedings.

HEAD 9 – Jurisdiction

75. Head 9 of the Scheme contains a major change by proposing to grant the Circuit Court jurisdiction in respect of certain matters, including judicial reviews relating to citizenship, migration and asylum.

76. It is also proposed to give the Circuit Court jurisdiction in respect of judicial reviews of decisions of certain public bodies and proceedings in relation to certain enactments as will be specified in Schedule 2 to the proposed Bill. It is not clear which bodies and

enactments this will apply to as Schedule 2 has not yet been drafted. Under the present system a number of judicial review proceedings which have a commercial character and concern decisions of public bodies are dealt with in the Commercial Division of the High Court.

77. Judicial reviews which have a commercial complexion often concern decisions of sector-specific regulatory bodies and decisions of central Government regarding significant grants and licensing issues that affect commercial enterprises. Experience has shown us that judicial reviews in the commercial sphere tend to involve high value issues with extensive expert evidence and often have international interests at play. Cases of this nature also require significant case management given the complexity of the issues.

78. Given the characteristics of what might be termed "*commercial judicial review proceedings"* as described above and the attendant resource burdens which the management of such proceedings places on the courts, we submit that it would be preferable that judicial reviews of this type be reserved for the High Court.

79. This should be borne in mind when any decision is being made as to which public bodies and which enactments are being specified for inclusion in Schedule 2. Separately and in any event, we would suggest that, where there is a significant commercial element to a case and where this can be demonstrated to the High Court, the High Court would have jurisdiction in respect of those cases.

80. While Head 9 provides that judicial reviews in respect of citizenship, migration and asylum matters are to be heard in the Dublin Circuit Court, other judicial reviews will presumably be heard in the Circuit where the subject matter of the judicial review or the applicant is situate in the normal way. This has the potential to adversely impact the consistency and the precedential value of judgments because Circuit Court judgments are rarely readily available in written form. This, in turn, could lead to different outcomes in different Circuits and possibly forum shopping by applicants.

81. A great number of judicial review cases engage with matters of significance concerning the orderly and lawful administration of our country. Without a body of reported judgments, this will create uncertainty for commercial operators, including potential investors in regulated sectors, and could undermine the valuable work of agencies like Ireland for Law with their message about the benefits of litigating in Ireland.

HEAD 13 – Specialised Provisions

82. The CLAI welcomes Head 13(2)(b) as it provides clarity as to the giving of notice to foreign parties who may be affected by an application for judicial review, an issue which had created practical difficulties.

C. PART 4 – CIVIL PROCEDURE IN THE COURTS

HEAD 15 – Case Conduct Principles and Function of the Court in Conduct of Civil Proceedings

83. The CLAI welcomes the case conduct principles set out in Head 15(1). The CLAI supports the principle of conducting proceedings in a manner which is just, expeditious and likely to minimise the costs of the proceedings, as well as the use of alternative dispute resolution procedures where appropriate. It also agrees that the identification of issues at as early a stage as is practicable assists in the early resolution of proceedings and saving of costs.

84. While much commercial litigation in Ireland is conducted in the Commercial Court, where rigorous and efficient case conduct case and case management consistent with this head are well established, commercial litigation spans all the civil divisions of the High Court, in particular the Chancery and Non-Jury lists. The CLAI therefore welcomes the introduction of case conduct principles, and in particular the focus on case management, across the civil divisions of the High Court.

85. The CLAI also welcomes the proposed functions of the court identified in Head 15(3). In particular, in ***PJ Carroll & Co. Ltd v. Minister for Health and Children***,[8] the Supreme Court identified case management as an "integral part" of the Commercial Court's success and the CLAI considers that its extension to other areas of civil law would assist in the early identification of issues and the minimisation of costs and delay.

86. The CLAI would emphasise, however, that any extension of case management would need to be accompanied by measures to ensure that courts, and in particular the judiciary, are given adequate resources to carry out this function.

87. The experience of the CLAI has been that judges in charge of the other High Court civil divisions already strive to provide active case management when the circumstances of the case require, including in suitable commercial cases. The CLAI expects that the express legislative identification and recognition of the principles to be applied and the goals to be achieved by case management is likely to encourage more rigorous and formalised practices being adopted in the other civil divisions of the High Court.

88. The CLAI would express one note of caution regarding this aspect of the proposals. Order 63C RSC was introduced by S.I. No. 255 of 2016. That Order, which applies only to non-jury and chancery actions, envisaged relatively active case management, with judges having powers which were analogous to the powers of the Commercial List Judge. It also envisaged judges and registrars being expressly assigned by the

[8] [2005] 1 I.R. 294, p. 314.

President of the High Court to exercise such powers.

89. The former President of the High Court, Mr. Justice Kelly, due to lack of judicial resources, was unable to assign judges for the purposes of Order 63C. It would appear that to this day, no judges or registrars have been assigned for the purposes of Order 63C , although the case management and pre-trial provisions are sometimes invoked and applied in an ad hoc or patchwork manner.

90. The CLAI would welcome greater consistency and predictability regarding how Order 63C – or any similar rules of court introduced to give effect to this head – will apply and operate. It would seem to the CLAI however that significant engagement with the President of the High Court, and most likely the list judges themselves, would be crucial to ensure that sufficient resources are available to give effect to these very sensible proposals.

HEAD 16 – Presumption against Granting of Adjournments

91. In principle, the CLAI welcomes the presumption against the grant of adjournments in the absence of sufficient reason for doing so. The CLAI considers that it is important to ensure that this provision is operated in a manner which maintains equality of arms as between differently resourced litigants. It would also observe that adjournment and extension decisions are classic discretionary case management decisions in respect of which it may not be possible or even helpful to formulate precise prescriptive rules.

92. The CLAI also considers that the mandatory language in Head 16(3) could in certain circumstances work an injustice and would recommend that the provision be amended so that the Court is required to consider whether any conditions should attach to any adjournment, including as to costs, as opposed to providing for a mandatory and automatic "*penalty".*

HEAD 17 – Deemed Discontinuance of Civil Actions

93. The CLAI welcomes the concept of deemed discontinuance as a measure which should limit unnecessary delay in the prosecution of proceedings. It notes that the proposed measure differs from that which was recommended in the Kelly Report.

94. The problem of stale or inactive claims is less pronounced in commercial litigation than in other areas of civil practice. Nonetheless, the proposed reforms are welcome and provide a pragmatic and balanced response to the issue. The proposed reforms also dovetail with the recent decision of the Supreme Court in ***Kirwan v Connors***[9]. Taken together with that decision, this reform has the potential to significantly improve the

[9] [2025] IESC 21.

efficiency and fairness of civil litigation.

HEAD 18 – Practice Directions

95. It is noted that this provision, codifying the power of the President of the High Court, seeks to implement recommendations in that regard by the Law Reform Commission (LRC 97-2010) and the Kelly Report and is very much to be welcomed. We also note that the provision is modelled on that in respect of the issue of practice directions by the President of the Court of Appeal in the Court of Appeal Act, 2014.

HEAD 19 – Pre-Action Protocols

96. The CLAI welcomes the principle of expanding pre-action protocols (PAPs), which should result in earlier exchange of information, definition of issues and dispute resolution, resulting in a reduction of costs and delay. It notes that these protocols have been used successfully in other jurisdictions in a range of areas, including commercial litigation.

97. The CLAI notes that it is intended that the Minister may make protocols by regulation, having consulted with, *inter alia*, the Rules Committees. The CLAI notes the recommendation of the Kelly Report[10] was that:-

> *"The most effective means of extending PAPs to other areas of litigation [i.e. beyond clinical negligence cases, where there is already provision for them] would, in the Review Group's view, be to confer on the court rules committees – rather than a Minister – a general power to prescribe PAPs for specific categories of dispute identified by those committees. The assignment of such a power to the court rules committees would ensure that the content of PAPs was informed by the professional expertise and experience represented in those committees and was fully aligned with and integrated into the procedures of the court concerned."*

98. The CLAI completely agrees with those comments, and would add that the Rules Committee has the capacity and skill set to adopt and amend PAPs rapidly, and that is important in order to respond to new developments and also to deal with unintended consequences that can always arise. Were the ability to make PAPs to rest solely with the Minister, any changes would have to be by way of legislation which may take longer and would occupy resources at departmental level. It also needs to be borne in mind that it can be anticipated that there may be a significant number of PAPs ultimately made dealing with different types of litigation.

99. We also suggest that cost minimisation be a specific factor in making PAPs (i.e. listed in Head 19(4)), as one of the specific concerns, highlighted in the Report, was the front-

[10] Kelly Report, Chapter 5, paragraph 10.3.1, p.133.

loading of costs arising out of PAPs, and this needs to be considered when drawing up PAPs and considering the types of litigation to which they ought be applied.

HEAD 20 – Compliance with Pre-Action Protocols

100. The proposal that proceedings might be stayed, or that there be cost consequences, for non-compliance with PAPs makes sense.

101. The proposed provisions about the deprival of interest, or grant of additional interest, on awards of damages where offers made in accordance with a PAP have been refused, appear to us to require further consideration as to their logic. For example, it would seem to give rise to the potential for applications to trial judges to fix an interest rate on an award at a particular level by reference to non-compliance. We believe it would be more appropriate if the penalty for non-compliance concerned legal costs only.

102. We note that Head 20(c) and (d) refer to "*appellant"* and "*respondent*" but assume that this is an error and these subsections are not meant to only apply at appellate level.

HEAD 25 – Creation of a Standard Claim Notice

103. We note that the creation of a standard "*claim notice"* to replace other forms of originating documents was a recommendation of the Review Group.

104. In capturing all types of proceedings in a standard *"claim notice"*, it is important to ensure that this does not automatically give rise to disclosure obligations which would not otherwise arise. For example, many types of Companies Act, 2014 applications and applications under S.I. No. 233/2023 – European Union (Cross-Border Conversions, Mergers and Divisions) Regulations 2023 (which are now commenced by way of Originating Notice of Motion) do not require *inter-partes* disclosure. If a standard "*claim notice"* is adopted, then sufficient flexibility will need to be incorporated to allow for the nuances of different types of proceedings.

HEADS 26 and 27 – Time Limit for Furnishing Party and Party Bill of Costs and Non-Compliance with Time Limit for Furnishing Party and Party Bill of Costs

105. The time period of three months for the provision of a bill of costs may, in lengthy and complex commercial court cases, be too short. This is a situation where "*one size does not fit all".* The drawing up of a bill of costs in many commercial cases is a very time consuming and costly exercise. A period of three months to do so may not allow sufficient time for negotiations between parties to avoid a formal drawing up of a bill of costs. At the very least, it ought to be possible for parties to make an application to the trial judge for an extension of this time period to avoid the consequences set out in Head 27.

HEAD 28 – Rules of Court Committees' Remit to Include Rules of Evidence as Apply to Civil Proceedings

106. The CLAI notes the proposed expansion of the remit of court committees to include rules of evidence. The CLAI agrees that having regard to the professional expertise and experience represented in those committees of practical issues which arise in the course of litigation, there is potentially a benefit to expanding their remit. By way of relevant example, the CLAI considers that the current rules of evidence relating to the admission of documents in civil proceedings would benefit from consideration by court committees. In circumstances however where the rules of evidence are a matter of substantive law, it would be important to carefully consider, taking account of the relevant Constitutional considerations, the permissible scope of delegation to the Rules Committee in this regard.

HEAD 29 – Limitation of the Term of Lis Pendens

107. The CLAI welcomes the limitation of the term of *lis pendens* to 28 days and the requirement that a party bring an application in order to maintain a *lis pendens* beyond that period. It notes, and agrees with, the view expressed in the Kelly Report[11] that the current statutory requirements for the registration of a *lis pendens* are insufficiently rigorous. Given the impact which a *lis pendens* has on the sale of property, the default position should be that some form of court oversight is required for its maintenance beyond a short period.

D. PART 5 – JURISDICTION OF CIRCUIT COURT AND DISTRICT COURT

HEADS 30 and 31 – Extension of Monetary Limit of Jurisdiction of Circuit Court and District Court

108. The CLAI welcomes the extension of the monetary limits of the Circuit and District Courts, having regard in particular to the inflation which has occurred since the last changes in 2013. This should result in lower value cases being assigned to a more appropriate jurisdiction, with a consequent reduction in legal costs and complexity.

[11] Kelly Report, Chapter 5, paragraph 10.4.5, p. 140.

APPENDIX A

Head 5 – Comparative Analysis

England and Wales

1. Disclosure in the Business and Property Courts is governed by the Civil Procedure Rules, Practice Direction 57AD.

2. Practice Direction 57AD requires as follows.

Initial disclosure

3. Each party must provide to all other parties at the same time as its statement of case initial disclosure comprising the key documents on which it has relied (expressly or otherwise) in support of the claims or defences advanced in its statement of case (and including the documents referred to in that statement of case); and the key documents that are necessary to enable the other parties to understand the claim or defence they have to meet.

4. A party making initial disclosure is not under any obligation to:-

    4.1. conduct a search for documents beyond any search it has already undertaken or caused to be undertaken for the purposes of the proceedings;

    4.2. provide copies of documents that have already been provided to the other parties or which are known to be in the other party's possession, unless asked to do so; or

    4.3. disclose adverse documents

5. The Court may, on application, and whether or not initial disclosure has been given, require a party to disclose documents to another party where that is necessary to enable the other party to understand the claim or defence they have to meet or to formulate a defence or a reply.

6. The obligation to give initial disclosure is subject to exceptions, including that it is not required if it would comprise more than 200 documents or 1,000 pages, whichever is larger.

Extended disclosure

7. A party wishing to seek disclosure of documents in addition to, or as an alternative to, initial disclosure may request extended disclosure. This request is made after the parties have exchanged statements of case. Within 28 days of the final statement of case each party is required to state, in writing, whether or not it is likely to request search-based extended disclosure.

8. Where search-based extended disclosure is likely, the claimant is required, within 42 days of the final statement of case delivered, to serve the other parties with a draft list of 'issues for disclosure'. The issues for disclosure are the key issues in dispute, which the parties consider will need to be determined by the court with some reference to contemporaneous documents in order for there to be a fair resolution of the proceedings. It does not extend to every issue which is disputed in the statements of case.

9. The parties are then required to seek to agree the issues for disclosure in advance of the first case management conference.

10. The application for extended disclosure will be determined by reference to the "*issues for disclosure".*

11. Extended disclosure involves using so-called *"disclosure models".* Different models can and will be ordered in respect of different issues for disclosure

12. The disclosure models are as follows.

Model A: Disclosure confined to known adverse documents

13. This entails the disclosure of known adverse documents in accordance with a continuing duty.

Model B: Limited Disclosure

14. This entails the disclosure of:-

    14.1. the key documents on which the disclosing party has relied (expressly or otherwise) in support of the claims/defences advanced in their statement of case;

    14.2. the key documents that are necessary to enable the other parties to understand the claim or defence they have to meet; and

    14.3. known adverse documents in accordance with their (continuing) duty.

15. A party giving Model B disclosure is under no obligation to undertake a search for documents beyond any search already conducted for the purposes of obtaining advice on its claim or defence or preparing its statement(s) of case. Where it does undertake a search however then the (continuing) duty to disclose adverse documents applies.

Model C: Disclosure of particular documents or narrow classes of documents

16. This entails the disclosing party's conducting a request-led search for particular documents or narrow classes of documents relating to a particular issue for disclosure, and then disclosing the responsive documents.

Model D: Narrow search-based disclosure, with or without narrative documents

17. This entails the disclosing party's conducting a reasonable and proportionate search for documents that are likely to support or adversely affect its claim or defence or that of another party in relation to one or more issues for disclosure, and disclosing the responsive documents.

18. A *"narrative document"* is a document which is relevant only to the background or context of material facts or events, and not directly to the issues for disclosure. Disclosure of such documents may or may not be ordered as part of Model D disclosure.

Model E: Wide search-based disclosure

19. This entails the disclosing party's conducting a reasonable and proportionate search for documents which are likely to support or adversely affect its claim or defence or that of another party in relation to one or more of the issues for disclosure or which may lead to a train of inquiry which may then result in the identification of other documents for disclosure

20. Model E is only to be ordered in an *"exceptional case".*

Known adverse documents

21. Where an order for Model B, C, D or E extended disclosure is made on one or more issues for disclosure, any known adverse documents not already disclosed must be disclosed at the time ordered for that extended disclosure.

22. In a case where no order for extended disclosure is made in respect of a party on any issue for disclosure, that party must still disclose all known adverse documents within 60 days of the first case management conference.

Comparison with the production of documents regime envisaged in Head 5

Head 5(1)

23. Head 5(1) suggests that, within 28 days of the service its the claim form, in the case of a claimant, and within 42 days of the service the defence, in the case of a respondent, the parties to civil proceedings shall produce all documents in their power, possession or control which:-

(a) they intend to rely on at trial,

(b) are relevant and material to the outcome of the proceedings including documents which the other parties to the proceedings would be reasonably likely to rely on at trial; and

(c) are necessary for the administration of justice.

24. It is not clear whether the matters at (a) –(c) constitute cumulative criteria relating to one class of documents; or whether they constitute three classes of documents.

25. In either eventuality, it seems clear that compliance with this duty would require wide search-based disclosure akin to Model E disclosure in England and Wales. This is apparent from the fact that the duty extends to *"all documents in their power, possession or control*" as distinct from known documents.

26. The only obvious distinction from Model E disclosure would be in a scenario where the criteria are cumulative and therefore, although the searches required would be extensive, the documents required to be produced would be limited to those on which the producing party intends to rely at trial, and, therefore, would not include adverse documents.

27. This approach is in stark contrast to disclosure in England and Wales which sees Model E disclosure limited to *"exceptional case*" only.

28. Further points of distinction include:-

28.1. The approach proposed in Head 5(1) would require searches for documents to be carried out by all parties before pleadings have closed and therefore before the issues in dispute are known, whereas in England and Wales, only known documents are required to be disclosed prior to the close of pleadings, and Practice Direction 57AD imposes no obligations to search for documents until extended disclosure is ordered and, even then, only where Model C, D or E disclosure is ordered.

28.2. If the criteria referenced in Head 5(1) are not cumulative, which seems the most logical reading, the claimant would be required to determine the materiality of documents without sight of the defence, and the respondent would be required to do the same, one assumes, without sight of any reply. This is to be contrasted with the approach in England and Wales which only sees the issues for disclosure resolved after the close of pleadings.

28.3. There is no suggestion of a limit on the extent of the production which would be required to be made by the claimant and respondent post delivery of their

respective claim forms and defences. This could lead to a requirement for voluminous production exercises in commercial disputes. This is to be contrasted with the England and Wales approach which limits initial disclosure to 200 documents or 1,000 pages, whichever is larger.

Head 5(2)

29. Head 5(2) proposes that the Court may, at any time, direct the production of documents that are:-

    (a) within the power, possession or control of a party,

    (b) relevant, and material to the outcome of the proceedings, and

    (c) necessary for the administration of justice.

30. Again the reference to power, possession or control, implies that the widespread searches for documents will be required where the Court has directed the production of documents.

31. Whereas Practice Direction 57AD in England and Wales seeks to ensure a tailored approach to the key issues in dispute and to avoid wide search-based disclosure (i.e. Model E disclosure), the wording of Head 5(2) suggests that this will be required whenever production of documents is ordered by the Irish Courts.

Head 5(6)

32. Acknowledging that the time periods in Head 5 can be adjusted by regulation made by the Minister, as drafted Head 5(6) proposes that, not later than 28 days prior to the date of trial, the parties shall produce to the other parties "*any additional documents which they believe have become relevant and material as a consequence of the issues raised in pleadings, documents, affidavits, statements of any witnesses or reports of experts, required to be served or produced under the relevant rules of court, or raised in other submissions of the parties.*"

33. Again, this contrasts sharply with the position in England and Wales which:-

    33.1. Seeks to ensure that the key issues in dispute are resolved promptly after the close of pleadings, as distinct from the approach in Head 5(6) which appears to seek to establish a practice where the issues in dispute might not be established (and accordingly the documents that might be relevant and material to those issues) until after witness statements, expert reports and even legal submissions have been exchanged.

    33.2. Imposes an obligation on parties to deliver adverse documents either as part of

extended disclosure or within 60 days of the first case management conference (after which the parties are in any event subject to a continuing obligation to make such disclosure). This approach ensures that such documents are available to a counterparty while that counterparty is preparing witness statements, expert reports and legal submissions, which is necessary in order for the parties to properly prosecute their claim / prepare for the case that they will have to meet at trial. The approach canvassed in Head 5(6) however will see parties having to prepare all of those documents without sight or even awareness of such documents adverse to their counterparties, unless those documents were produced to them at an earlier stage.

33.3. In an appropriate case, will allow for the fair disposal of issues without search-based disclosure having regard to: (i) the obligation to produce adverse documents at an early stage; and (ii) the possibility of Model B disclosure. The fact that residual relevant and material documents would only be produced under Head 5(6) one month from the trial date, renders it virtually-certain that wide search–based document production will be sought in all Irish commercial disputes.

Other jurisdictions

Scotland

34. Rule 27 of the Rules of the Court of Session require parties to lodge any documents under their possession or control that have been incorporated within their pleadings. The documents are required to be lodged at the same time as the writ/pleadings concerned and served on the other parties. There is no obligation to search for documents for this purpose.

35. A party can seek an order for disclosure of documents before or after the commencement of proceedings. The courts are empowered to order the inspection/preservation of documents or property as deemed necessary for the civil proceedings.

36. This position is to be contrasted with Head 5(1) in that the Scottish procedure does not insist on the conduct of searches and/or the identification of documents material to the issues in dispute absent a Court order nor does it require such efforts prior to delivery of a defence.

USA, Australia and Canada

37. Practices vary between different courts and states, provinces and territories. However, discovery in Australian and Canadian courts is ordinarily sequenced after the close of

pleadings. We have not identified anywhere in Australia or Canada that requires the disclosure of all documents material to the outcome of a case prior to the close of pleadings.

APPENDIX B

CLAI Committee Members

Brian Kennedy SC (Chair)
Garrett Breen, Partner, William Fry LLP (Vice-Chair)
David Sweetman BL (Secretary)
April McClements, Partner, Matheson LLP (Treasurer)
Julie-Anne Binchy, Partner, DAC Beachcroft (Public Relations Officer)
Shauna Keniry BL (Deputy Secretary)
Niall Buckley SC
Rosaleen Byrne, Partner, McCann FitzGerald LLP
Nicholas Cole, Partner, A&L Goodbody LLP
Elizabeth Davis, General Counsel, PricewaterhouseCoopers
Andrew Fitzpatrick SC
Paul Gardiner SC
Caren Geoghegan SC
Enda Hurley, Partner, A&L Goodbody LLP
Peter Johnston, Partner, Mason Hayes & Curran LLP
Imogen McGrath SC
Jonathan Newman SC
Caoilfhionn Ní Chuanacháin, Partner, Addleshaw Goddard LLP
Bairbre O'Neill SC
John O'Riordan, Partner, Dillon Eustace LLP
Kelley Smith SC
Paul Sreenan SC
Anthony Thullier BL
Stephen Walsh BL
Richard Willis, Partner, Arthur Cox LLP