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SUBMISSION OF THE COUNCIL OF THE BAR OF IRELAND

Judicial Planning Working Group

30 JULY 2021

Introduction

The Council of The Bar of Ireland is the accredited representative body of the independent referral Bar in Ireland, which consists of members of the Law Library and has a current membership of approximately 2,150 practising barristers. The Bar of Ireland is long established, and its members have acquired a reputation amongst solicitors, clients and members of the public at large as providing representation and advices of the highest professional standards. The principles that barristers are independent, owe an overriding duty to the proper administration of justice and that the interests of their clients are defended fearlessly in accordance with ethical duties are at the heart of the independent referral bar.

Scope of the Consultation

The Judicial Planning Working Group has invited the Council of the Bar of Ireland ("the Council") to make submissions to the Judicial Planning Working Group on the terms of reference set out and to assist in its task as described in the Programme for Government "*to consider the number of and type of judges required to ensure the efficient administration of justice over the next five years*".

The Judicial Planning Working Group is composed of an independent Chair comprising representatives of the Department of Justice, department of the Taoiseach, Department of Public Expenditure and Reform, Office of the Attorney General, and the Courts Service.

The Judicial Planning Working Group will consider the following points:

1. To consider the number of and type of judges required to ensure the efficient administration of justice over the next five years in the first instance, but also with a view to the longer term.
2. To consider the impact of population growth on judicial resource requirements.
3. To consider, having regard to existing systems, the extent to which efficiencies in case management and working practices could help in meeting additional service demands and/or improving services and access to justice.
4. To evaluate the estimated impact of the Covid-19 pandemic on court caseload in the short, medium, and long term and strategies for reducing waiting times to significantly improve on pre-Covid levels.
5. To examine the experiences of other jurisdictions (particularly Common Law areas), and obtain accurate and up to date information on judicial practices and case management systems, together with caseload data in relation to Irish courts.
6. To consider the costs associated with additional judge numbers, including salaries, allowances, judicial support staff and chambers.

7. To review forthcoming and proposed policy and legislative reforms that may impact on the requirement for judge numbers including;
    a. Recommendations of the Civil Justice Review
    b. The O'Malley Review on victims of crime
    c. Family Justice Reform
    d. Review of Legal Aid financial eligibility criteria
    e. Courts Service Modernisation Programme
    f. Commencement of relevant provisions of the Assisted Decision-Making Capacity Act 2015
    g. Judicial Appointments Commission Bill
    h. PfG commitment to establish a new Planning and Environmental Law Court
    i. Insolvency Review
    j. Economic development.
8. To make recommendations for developing judicial skills in areas such as white-collar crime.
9. To make recommendations on relevant issues such as judicial workload, barriers to entry, efficiency gains, and speed of access to justice.
10. To consider the implications of Brexit on the courts in regard to judicial resources and potential increased workloads arising.

The Council has prepared this submission in response to the scope of the consultation outlined above under the following headings:

1. Composition & Methodology of the Working Group
2. Capacity of the Judicial System
3. Legal Aid Eligibility and Scope
4. Experience and Types of Judges
5. Common Law v Civil Law Systems
6. Experience of Lay Magistrates in England & Wales
7. Number of Judges Required by the Irish Judicial System
8. The Efficient Administration of Justice as Balanced with Constitutional Rights
9. Summary of Conclusions

1. Composition & Methodology of the Working Group

The composition of the Working Group as described above indicates that there are no members of the Judiciary, or members of either branch of the legal profession on the group. The Council believes that the failure to include the professions on the Judicial Planning Working Group is a fundamental omission and represents a missed opportunity to avail of their experience in contributing to the internal debate amongst the Working Group.

In addition, the absence of a roadmap, or indicators regarding the methodology of the process creates a challenge in the Council being able to make a focussed and refined submission where the points being considered by the Working Group are very broad in their nature as set out above. Consequently, the contents of this submission are broad in nature and should not be viewed as the final position of the Council on any report and/or recommendations that may emerge from the Judicial Planning Working Group.

2. Capacity of the Judicial System

The Council acknowledges that the efficiency of the judicial system is a necessary condition for the protection of every person's rights, compliance with our Constitution and the European Convention on Human Rights, legal certainty and public confidence in the rule of law. This includes time being afforded to litigants to present their cases, and to do so in a public manner; both of which lend themselves to the rule of law.

Though the maxim *vigilantibus non dormientibus jura subvenient* (delay defeats justice) is often used as a weapon by Defendants against Plaintiffs who are slow to prosecute, the 'delays' perceived in the justice system can be attributed to the lack of resources in the system available, where there are insufficient numbers of Judges and requisite supports to each such judge available to deal with the numbers of cases. The answer is not to limit such cases, or limit a litigant to a time slot, the answer is to increase the resources of those responsible for hearing cases and deciding their outcome. With a growing population and presumably an increase in the numbers of litigants accordingly; together with an increase in the complexity of cases and resultant time required to try such cases, assessment of the requisite increase in the number of judges is essential.

For example, a particular area in which additional capacity is needed is in an area of litigation under expansion namely climate and environmental litigation. This is one of the fastest growing areas of litigation across Europe and worldwide. There is a need to provide for access to justice in this area, while allowing for speedy resolution of challenges to the building of appropriate housing and other strategic infrastructure projects. A particular difficulty caused by the current *clearance rate* is that any challenges which are invariably long and complex,

lead to a delay and a lack of certainty for developers while waiting for judicial determinations, due to a shortage of resources and judges to deal with such cases.

One often heard proposed solution to the increase in such environmental challenges is to limit access to the courts. However, limiting public access to justice as opposed to improving the clearance rates is, at the very least a questionable solution, and one open to Constitutional challenge. Such rush to judgment would have the following disadvantages:

(i) international criticism of Ireland for limiting access to justice;
(ii) further legal challenges to Irish rules of standing as being contrary to EU law;
(iii) increased domestic litigation to challenge the constitutionality of limitation rules, and rules of standing;
(iii) the degradation of public confidence in the rule of law
(iv) public resort to extra legal challenges, such public campaigns on environmental and planning decisions as happened with the Shell to Sea controversy.
This is by no means a definitive list.

A development which may be considered is the establishment of an environmental and planning court. There has been some limited national discussion of the form and function of such a court. Essentially the main choices are:

(a) a division of the High Court, with judges rotating into that division from time to time;
(b) a specialist High Court division, with assigned judges building up a level of specialty;
(c) an environmental court located in every circuit; with a specialised trained judge.

However, a disadvantage of specialist judges who do not hear cases in other lists, is the silo effect of the Court, in which legal principles on environmental and planning could become divorced from general legal principles. This is also true of other areas in which the introduction of specialist judges has been mooted, such as in the arena of family law.

3. Legal Aid Eligibility and Scope

Resources include resources made available to litigants. There is a very strict and narrow means test applied to civil legal aid. An applicant will need to have an annual disposable income of less than €18,000 and disposable assets of less than €100,000 (the house that you live in is not included in calculating the assets) in order to be approved for legal aid. In addition, there are certain allowances which are completely out of date such as accommodation costs of €8,000 and childcare costs of €6,000 per child. There is no discretion to provide legal aid if a person is narrowly outside the already narrow means test. The current

financial limitations prescribing or stipulating those entitled to legal aid mean that this invaluable resource is not available to many litigants who urgently require legal assistance in order to access the justice system to vindicate their rights.

This then leads to an increase in the number of self-represented litigants which has the knock-on effect of pulling from already limited judicial resources where a judge has to spend more time explaining the law and procedure to a lay litigant than s/he would have to do had the litigant the benefit of legal representation.

By and large the majority of civil legal aid tends to be in the area of family law.

Further significant areas of law are excluded from the remit of the legal aid. There is no legal aid available for employment claims, including those before quasi-judicial bodies like the Workplace Relations Commission. There is no legal aid available in respect of social welfare appeals; and matters that come before other quasi-judicial bodies, no matter how complex, important or sensitive the issue may be and no matter how few resources and limited capacity the applicant may have and no matter how significant the resources of the respondent.

The limited availability of legal aid causes an increase in the number of lay litigants appearing before the Courts which in turn causes inefficiencies in the system owing to the fact that lay litigants are generally unfamiliar with Court process and procedure. An extension of legal aid in terms of eligibility and to those additional areas referenced above would greatly assist in the efficient running of the Courts system as clients would be in position to avail of the expertise of the legal professions.

4. Experience and Types of Judges

In assisting the working group to identify the numbers and types of judges required to ensure the efficient administration of justice, the Council has expanded in this submission under the following themes:

(i) professional judges as a prerequisite to the efficient administration of justice and the experience of lay magistrates in other common law jurisdiction;
(ii) the necessity for further recruitment of judges in line with Council of Europe identified standards;
(iii) the efficient administration of justice balanced with other Constitutionally protected rights.

Experienced judges are a prerequisite to the efficient administration of justice. The delivery of quality decisions by experienced professional judges is a key indicator of the efficient administration of justice and is the common method of recruiting judges in common law

countries[1]. Ireland, Malta, Norway, Switzerland, England and Wales, Northern Ireland and Israel are identified as common law countries that rely on experience and seniority among lawyers without a competitive exam as a method of recruitment.

The Irish Constitution does not prescribe any necessary qualification for appointment as a judge; however considerable experience in the practice of the barrister's or the solicitor's profession is made requisite by the Courts (Supplemental Provisions) Act 1961, ss 5, 7 and 29. Judges of certain European and international courts who have been previously practising barristers or solicitors are also eligible for appointment as a judge of the High Court, the Court of Appeal or the Supreme Court.

The Council submits that the minimum training required by statute is the most objective and reliable indicator of the suitability for judicial office. The statutory minimum period safeguards the quality of candidates appointed to the bench which in turn supplements the efficient running of the judicial system[2].

The Courts (Supplemental Provisions) Act, 1961 sets out various minimum qualifications for the appointment of judges. Section 29(2) of the Courts (Supplemental Provisions) Act, 1961 provides that a person *'who is for the time being a practising barrister or solicitor of not less than ten years' standing'* is qualified for appointment as a judge of the District and Circuit Court. A similar requirement is reflected in s.17(2)(a) of the 1961 Act as amended by s.30 of the Courts and Court Officers Act 1995. For appointments to the High and Supreme Courts, the necessary qualification is that the person *'is for the time being a practising barrister or a practising solicitor of not less than 12 years' standing who has practised as a barrister or a solicitor for a continuous period of 2 years immediately before such appointment'*.

Section 13 of the Courts and Court Officers Act 1995 provides for the appointment of a Judicial Appointments Advisory Board (JAAB) for the purposes of *'identifying persons and informing the Government of the suitability of those persons for appointment to judicial office'*. Section 16 of the Courts and Court Officers Act 1995 specifies that a person who wishes to be considered for judicial appointment which includes information as to *'education, professional qualifications, experience and character'.*

The requirement for professional experience is also reflected by the fact that an individual who is recommended for judicial appointment by the JAAB must comply with the relevant minimum qualifications set out in the Courts (Supplemental Provisions) Act, 1961 and meet the following requirements which place particular emphasis on experience in practice:

[1] Council of Europe, "CEPEJ Evaluation Report – 2020 Evaluation Cycle", p. 49.
[2] See Article 34.1 of the Constitution and the statutory requirements on qualifications of judges in Parts III and IV the Courts (Supplemental Provisions) Act 1961 and more recently under s.13 the Courts and Courts Officers Act 1995, as amended by s.12 of the Court of Appeal Act 2014.

"(b) (i) The Board shall recommend a person to the Minister under this section only if the Board is of the opinion that the person—

(I) has displayed in his or her practice as a barrister or a solicitor a degree of competence and a degree of probity appropriate to and consistent with the appointment concerned,

(II) in the case of an appointment to the office of ordinary judge of the Supreme Court, of Ordinary Judge of the Court of Appeal or of ordinary judge of the High Court, has an appropriate knowledge of the decisions, and an appropriate knowledge and appropriate experience of the practice and procedure, of the Supreme Court, the Court of Appeal and the High Court,

(III) is suitable on the grounds of character and temperament,

(IV) complies with the requirements of section 19 of this Act, and

(V) is otherwise suitable.

(ii) In determining whether the requirements of subparagraph (II) are satisfied, the Board shall have regard, in particular, to the nature and extent of the practice of the person concerned insofar as it relates to his or her personal conduct of proceedings in the Supreme Court, the Court of Appeal and the High Court whether as an advocate or as a solicitor instructing counsel in such proceedings or both".

The Court has interpreted the requirement of practical experience in *The State (Walshe) v Murphy* [1981] IR 275[3] where it held that the minimum requirement of "ten years standing" for a barrister to be appointed as District Court Judge must be construed as a person who is a practising barrister (or solicitor) at the time of his appointment and whose aggregated practice …. at that time is not less than ten years. Finlay P stated that he had no doubt that *'the apparent intention of the legislature was to provide a minimum standard of competence and skill for the person eligible for appointment as a Justice of the District Court'*[4].

Similarly, the Committee of Ministers of the Council of Europe adopted 'Recommendation CM/Rec (2010) 12 on judges: independence, efficiency and responsibilities' that decisions concerning the selection and career of judges should be based on objective criteria pre-established by law or by the competent authorities. Such decisions should be based on

[3] *The State (Walshe) v Murphy* [1981] IR 275
[4] [1981] IR 275, at 284

merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity[5].

The rationale for judges having professional experience is inherently linked with the practice of law in a common law jurisdiction.

There are a number of reasons for appointing judges who are have long experience as lawyers. Firstly, the capacity of being a judge is acquired in the course of practising the law which is particularly true in a common law system. Secondly, a professional judge has had long experience of dealing with clients and members of the public and through that experience has gained the ability to 'read' people, which is crucial when hearing witness actions. Thirdly, the independence of the judiciary is protected where judges are appointed on the grounds of experience rather than on the basis of any other competing interest.

5. Common Law v Civil Law Systems

The legal system in Ireland is organised around a common law system over which those who possess legal qualifications will have more practical experience than lay judges or adjudicators.

The common law system applicable within this jurisdiction is a system of law which has been developed by judges through decisions of the Courts (precedents) rather than through legislative statutes, and by its repeated use affords consequent experience and knowledge to those who practise in the law. The common law system is premised upon those precedents and participation in the practice of trials of cases leads to an understanding of precedence and its weight which is the founding tenet of the common law system.

Accordingly, pursuant to our common law system, future decisions are bound by the body of precedent and the *de facto* engagement by the professions in cases of such nature gives rise to the requisite experience and understanding of that system. This allows those who are appointed judges to have the requisite authority and knowledge and experience to exercise their duty of deciding cases upon precedent.

In order to comply with our common law system, judges must have experience in the application of the two parts to such *binding precedents* namely *ratio decidendi* the understanding of the reasons for such judicial decisions and *obiter dictum* which are the observations by a judge in a case on legal questions premised upon facts not present or not material in the case and/or which arose in such manner which rendered a decision

[5] Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities and explanatory memorandum (Council of Europe Committee of Ministers website). Accessed at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805afb78

unnecessary. Such *obiter dictum* is not binding but is of persuasive authority in subsequent cases.

In the circumstances, the difference between our common law system and that of the Code Civil (Napoleonic and/or the code of laws compiled by the roman emperor Justinian enunciating the authoritative legal codes which would appear to be the provenance of the code civil), is where the precedent of case law and its practise which creates the form of the resulting published judicial decision, is of primary importance whilst in the later Napoleonic systems, it is the codification of statutes which predominate.

In such latter Code Civil, judges exercise an investigative role and engage in the bringing of charges and/or the cross examination of witnesses for the purpose of establishing facts and then the application of remedies is premised upon the legal codes obtaining. This system is entirely different to that of the common law system where experience as above referenced is essential. In the common law system judges are impartial and save in very limited circumstances, do not have an inquisitorial role.

The role of lawyers in common law countries is arguably more involved than in exclusively civil law systems. In common law countries such as Ireland, barristers present oral legal arguments to the judge (or a jury in a criminal trial) on precedent and its application to the facts of the case and examine witnesses themselves. Judges have greater flexibility in common law systems to apply case law to individual cases through their application of the law to the facts or by distinguishing the facts from an otherwise applicable legal precedent. It is often the case that in common law courts, judgements are longer and more discursive than those of judges of civil law traditions. Judgements are required to explore not only the major issues in a case but the minor issues which influenced the decision at hand and the reasons for their opinions. In the Supreme Court, decisions may also include the dissenting opinion of judges. This is contrasted to a civil law system where codified law prevails and the element of judicial interpretation or judicial activism is reduced. It should be noted that appropriate judicial activism is to be welcomed and many of the social advances seen by Ireland in the 1960's onwards is as a result of the interpretation of the Constitution as a living document by judges such as Cearbhal O'Dálaigh, Brian Walsh and Seamus Henchy[6].

The legal system in Ireland therefore requires deep training and knowledge of the law for lawyers and especially for judges, or in the words of Lord Devlin '*the capacity of being a judge is acquired in the course of practising the law*' [7].

Having practiced for many years before their appointment, judges will have gained experience as lawyers in an adversarial system and honed the skill of seeing the interpretation

[6] e.g., *Ryan v. AG* [1965] IR 294, *Murphy v. AG* [1982] 1 IR 241
[7] Devlin, P, *The Judge* (Oxford: Oxford University Press, 1979), p. 36-47

of legal issues from both sides. The nature of this legal experience supports the fundamental task of a judge to give effect to principles of natural justice, namely *audi alteram partem* and *nemo judex in causa sua* which require a judge to hear both sides fairly and impartially and without bias or even the appearance of bias.

The Council submits that high quality candidates with long experience in legal practice are best suited to appointment to such roles as has been the long-term convention of appointments. The Council adopts the view that the recruitment of judges should reflect the minimum competency requirements established in statute for the safe and efficient administration of justice.

6. Experience of Lay Magistrates in England & Wales

The Council is aware of the operation of a system of lay magistrates in other jurisdictions where lay judges are appointed with virtually no formal legal training or experience.

England and Wales is distinctive in comparison with many other jurisdictions in its use of lay persons in the Magistrates' Courts extending as far back as 1196 when magistrates were commissioned to 'keep the peace'. {from the Latin, *Magister* or master}

The value of Magistrates' Courts is linked to a legal tradition in the UK of "local justice" and justice by one's peers underpinned the role of the magistracy making the legal system "highly distinctive"[8] to other jurisdictions. This is best described in the Review of the Criminal Courts of England and Wales published by Lord Auld in 2001:

"Lay magistrates or Justices of the Peace have an ancient history, dating from the late 12th century when Richard I commissioned certain knights to preserve the peace in unruly areas. They were responsible to the King for ensuring that the law was upheld and were known as Keepers of the Peace. They first acquired the title of Justices of the Peace in 1361, by which time they had authority to arrest suspects, investigate alleged crimes and punish offenders. For centuries they also had local administrative responsibilities. But in the 19th century, except for liquor and gaming licensing, these passed to local authorities; and their policing role passed to local police forces. They are appointed by the Lord Chancellor from all walks of life; few are lawyers. When sitting they rely for legal advice on a legal adviser, who is, or is responsible to, a justices' clerk"[9].

[8] Donoghue, Jane C. Reforming the Role of Magistrates: Implications for Summary Justice in England and Wales, *Modern Law Review*, Vol. 77, Issue 6 (November 2014), p. 928

[9] The Right Honourable Lord Justice Auld, *Review of the Criminal Courts of England and Wales*, September 2001. Accessed at: https://webarchive.nationalarchives.gov.uk/+/http://www.criminal-courts-review.org.uk/ccr-00.htm

The lay magistracy is composed of unsalaried volunteer members of the general public who sit as part-time judges, known as Justices of the Peace, in the Magistrates' Court in England and Wales. The Magistrates' Courts Act 1980 codifies the procedures applicable to the Magistrates' Courts of England and Wales. As of April 2016, there were 17,552 serving magistrates sitting in approximately 330 Magistrates' Courts. In recent years and following a government consultation on the role of magistrates, there has been concern surrounding the decrease of more than 20 per cent of sitting magistrates since 2011[10].

Magistrates decide on matters of fact and law, and so they perform both the functions of judge and jury that are undertaken in the Crown Court. Legal advice is provided to Magistrates, when required, by the Justices' Clerk. The Magistrates deal with minor crimes, certain limited civil actions, and preliminary hearings or applications.

A unique feature in the operation of Magistrates' Courts in England and Wales is that all criminal cases begin in a Magistrates' Court in that they have responsibility for deciding if the defendant should be kept in custody or let out on bail with conditions. Magistrates deal with three kinds of cases, summary offences, either-way offences and indictable-only offences[11]. They can give punishments such as fines, unpaid work in the community and prison sentences up to 6 months or up to 12 months for more than one crime[12]. If the case is indictable-only, the Magistrates' Court will generally decide whether to grant bail, consider other legal issues such as reporting restrictions, and then pass the case on to the Crown Court.

Magistrates can also hear cases at a family court and deal with issues including the arrangements by which children are taken into State care or put up for adoption, custody arrangements involving children of separated parents and the enforcement of child maintenance orders. Magistrates can also make orders to prevent domestic abuse.

In court, Magistrates usually sit as a panel of three, an experienced chair and two 'wingers', supported by a trained legal adviser, who is an assistant to the Justices' Clerk. Once appointed, a Magistrate is allocated to a particular Local Justice Area, sitting as part of the bench of Magistrates. The local bench is led by a Chair who is elected annually by the members to act as their leader and representative.

Anyone over the age of 18 and under 65 can apply to be a Magistrate; no legal training or formal qualifications are required, although applicants must be able to demonstrate six key qualities: good character; understanding and communication; social awareness; maturity and sound temperament; sound judgement; and commitment and reliability.

[10] Donoghue, Jane C. Reforming the Role of Magistrates: Implications for Summary Justice in England and Wales, *Modern Law Review*, Vol. 77, Issue 6 (November 2014), p. 930

[11] These include crimes like minor assaults, motoring offences, theft, handling stole goods and TV licence evasion.

[12] There are further proposed changes to the Magistrates' Courts system in terms of their sentencing powers. Currently, the maximum sentence that can be imposed in the Magistrates' Court is 6 months.

During the initial months of training, Magistrates sit in court with two experienced members of the bench and are mentored. At the end of the first year, the Magistrate receives consolidation training and, approximately 12 to 18 months after appointment, the Magistrate undergoes an appraisal which is carried out by a trained Magistrate appraiser, sitting as part of the bench in an observation role. Subsequent appraisals take place every three years to ensure that a Magistrate's competence is retained. While Magistrates are expected to undertake training throughout their careers, there is no mandatory Continuing Professional Development scheme and there is no system of sanction in place for those who do not attend training.

The House of Commons Justice Committee Report "The Role of the Magistracy"[13] expressed concern over evidence suggesting that training for Magistrates is not always of sufficiently high quality and submissions that the appraisal systems was unfit for purpose. The Report also concluded that the range of training available is sometimes too narrow to equip Magistrates for the role that they are expected to fulfil and to help them contribute to cultural change within the criminal justice system.

Issues of representation on Magistrate Courts might also bring into question the democratic legitimacy of their role as multiple Government reports have found that there is a lack of diversity in Magistrate Courts. It has also been recognised that there were "considerable differences" in the operation of Magistrates' Courts Committees across the country which impacted consistency in court practices across difference courts[14]. Other research has pointed to the observation that magistrates are not using the powers available to them to sentence appropriately which results in a substantial difference in approaches to sentencing in cases before magistrate courts and Crown Courts where judges can view cases differently[15].

The Magistrates' Courts in England and Wales represent a longstanding legal tradition involving the participation of lay persons as decision makers which does not exist in Ireland save in limited circumstances or in the composition of juries in criminal and civil hearings.

The Irish Constitution guarantees the independence of the judiciary. Since Irish independence, there has been no devolution of power to members of the community or magistrates other than in limited scenarios provided for by statute, for example where statutory bodies with limited judicial function deal with statutory claims, i.e. the Workplace Relations Commissions and the Private Residential Tenancies Board.

[13] House of Commons Justice Committee The Role of the Magistracy Sixth Report of Session 11 October 2016. Accessed at: https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/165/165.pdf
[14] Ibid, p.85-85
[15] Donoghue, Jane C. Reforming the Role of Magistrates: Implications for Summary Justice in England and Wales, *Modern Law Review*, Vol. 77, Issue 6 (November 2014), p. 956

As provided for in article 34.1 of the Constitution, *'Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public'*.

Article 37.1 empowers persons or bodies other than courts to exercise limited functions and powers of a judicial nature, but not in relation to any criminal matters. This indicates that all criminal matters, even of a limited nature, must be dealt with by judges in Courts.

Article 38 sets out important general principles concerning the conduct of criminal trials in the courts. These include the requirement that criminal trials be held '*in due course of law*', that minor offences may be tried in courts of summary jurisdiction, and that, subject to certain limited exceptions, a person charged with a non-minor offence cannot be tried without a jury.

The Supreme Court has carefully drawn the parameters of issues which involve the administration of justice or justiciable issues which engage the exclusive jurisdiction of the Courts and functions which do not involve the administration of justice[16]. Those parameters represent the Constitutional limits to the operation of judicial and quasi-judicial powers.

The Council submits that the operation of lay courts in this jurisdiction would require a fundamental constitutional change to the justice system and indeed a profound departure from a body of legal precedent setting out the confines of justiciable issues that remain within the realm of the Courts and those which are suitable for non-judicial bodies with limited functions.

7. Number of Judges Required by the Irish Judicial System

The Council acknowledges that the President of the High Court has recently communicated the necessity to recruit 20 additional High Court Judges as necessary for the proper administration of Court lists. JAAB has elsewhere published a range of statistics in relation to judicial appointment since 2002 which informs this position. The Council, while recognising that the identification of positions is a matter for the Courts Service, nonetheless recognises that increased judicial appointments are needed to aid in the effective running of Court lists.

The Council's submission draws on recent reports which have recognised that the number of judges in this jurisdiction remains below the EU average and consequently impact the efficiency of the administration of justice[17].

[16] *McDonald v Bord na gCon (No 2)* [1965] IR 217
[17] See both the 2020 and 2021 European Commission Rule of Law Report

The Council of Europe published its annual report "European Judicial Systems – CEPEJ Evaluation Report" on 22 October 2020 which analysed data on the function of the judicial systems in 45 European Member States. The indicator for appropriate judicial recruitment was assessed by the Council of Europe by measuring the judicial system budget per inhabitant as an overall percentage of Gross Domestic Product. The Report showed that Ireland was "well below"[18] the budgetary efforts of other member states in the median amount budgeted for the judicial system as calculated in relation to the population as a percentage of total public expenditure and as a percentage of Gross Domestic Product.

The Report also looked at the number of judges per 100,000 inhabitants noting that a "coherent area" in Central and Southeast Europe had more than 20 judges per 100,000 inhabitants while countries, such as the Republic of Ireland, were close to the bottom in terms of numbers of professional judges at 3.3 per 100,000[19].

The Report also analysed the "clearance rate" in European judicial systems as indicators to assess court efficiency at European level. The Clearance Rate is the ratio obtained by dividing the number of resolved cases by the number of incoming cases in a given period, expressed as a percentage. The Clearance Rate is intended to show how the Court is coping with the in-flow of cases and allows comparison between systems regardless of their differences and particularities. Where the Clearance Rate is less than 100%, the trend suggests that the Court system is able to resolve fewer cases than it receives. The report found that the Republic of Ireland was the second lowest (63%) of the court systems examined in the report in civil and commercial litigation in courts of first instance and the lowest of all EU states[20].

Other reports such as the European Commission 2020 Rule of Law Report highlight that the number of judges per inhabitant in Ireland remains the lowest in the EU, which could also affect the efficiency of the Irish justice system:

"The justice system budget and the number of judges remain below EU average. While the budget per capita for the justice system, which was EUR 55.7 in 2018, has constantly increased in the last years, the budget as a percentage of GDP has stagnated."[21]

This trend is still reflected in the most recent EU Justice Scoreboard published on 8 July 2021[22].

[18] CEPEJ Evaluation Report – 2020 Evaluation Cycle, p.22
[19] CEPEJ Evaluation Report – 2020 Evaluation Cycle, Figure 3.2 Number of professional judges per 100,000 Inhabitants and variation, 2010-2018 (Q1, Q46), p.48
[20] CEPEJ Evaluation Report – 2020 Evaluation Cycle, Figure 5.9 Evolution of Clearance Rate and Disposition Time in civil and commercial litigation cases at first instance (Q91), p. 115
[21] 2020 Rule of Law Report, country chapter on the rule of law situation in Ireland, p. 5
[22] See EU Justice Scoreboard 2021, p.26

The recent European Commission 2021 Rule of Law Report indicates in its country by country analysis the challenges relating to the length of proceedings in Ireland which delay is likely contributed to by the reduced number of judges[23]. The findings on the efficiency of the justice system were as follows:

"The average length of proceedings in the High Court in 2019 was 785 days, an increase of around 35 days from 2018. In particular, the length of commercial proceedings continued to increase, by around 220 days from 2018 to 2019. By contrast, length of proceedings at circuit and district courts decreased in 2019 compared to 2018, following an increase the previous year. Length of proceedings at the Court of Appeal increased by around 110 days between 2019 (1220 days) and 2018 (1101 days). Between 2018 and 2019, the length of criminal proceedings increased by around 120 days at circuit court and by around 100 days at the central criminal court"[24].

The Council also recognises and supports proposals of procedural reform in addition to further recruitment of professional judges. In the Review of the Administration of Civil Justice Report[25] a number of recommendations for reform to Court procedure would likely help to reduce the case management caseload that falls to judges. The Report recommends that the conduct of pleadings and the extension of case management powers be given to *'an expanded cadre of Deputy Master by rule of court'*[26]. The Report recommends that full use be made of the powers conferred by the conduct of trials rules in the High Court to contain the time and expense incurred in adducing expert evidence and to impose timetables on the successive stages of the trial process.

The Council recognises that these reforms, alongside recruitment, would doubtlessly contribute to a more efficient legal system.

The Council is also conscious of the downward trend in the applications for judicial appointment primarily at both Circuit and District Court level which may arise from pay cuts adopted during the last economic recession and the additional service requirements to acquire a full pension. Anecdotally, these conditions are recognised as a disincentive for application to the role. This should be of significant concern in circumstances where the majority of cases are dealt with at District and Circuit Court level and by far the greatest number of litigants experience the justice system at the level of these Courts. It is of crucial importance that in providing resources for the Courts, all Courts are properly resourced,

[23] 2020 Rule of Law Report, country chapter on the rule of law situation in Ireland, p. 7
[24] 2021 Rule of Law Report Country Chapter on the Rule of Law Situation in Ireland, p.7
[25] Review of the Administration of Civil Justice 2020, as chaired by the Honourable Mr Justice Peter Kelly, Former President of the High Court
[26] Former President of the High Court, the Honourable Mr Justice Peter Kelly, Review of the Administration of Civil Justice, p. 397

thereby guaranteeing access to justice for all litigants and not just those appearing before the superior Courts.

The Council is of the view that additional recruitment of judges in line with the European average is needed in order to support the efficient administration of justice. While the Council is not in a position to be prescriptive as to the number of judges to be recruited on a list by list or jurisdictional basis, it defers to the Courts Service as the appropriate party to provide accurate data which would identify and support the contentions regarding the numbers of judges necessary, and the jurisdictions to which they should be deployed, with the adequate resourcing of the Courts Service.

The Council is aware that there is no published data (or indeed metric) available by which the efficiency of Irish Court lists are measured on an annual or monthly basis. The gathering and/or availability of such information on a list-by-list basis would doubtlessly provide a better breakdown on where further judicial resourcing should be focused in addition to the already available information furnished by the Courts Service.

8. The Efficient Administration of Justice as Balanced with Constitutional Rights

The Judicial Planning Working Group is tasked with considering the number and type of judges required to ensure the efficient administration of justice.

The recent proliferation of Hybrid Courts will assist in the efficient administration of justice by judges. Along with Bar Councils in other jurisdictions, the Bar of Ireland has welcomed the procedural efficiency brought about by Hybrid hearings but has also urged caution on the widespread rollout of remote hearings[27].

The Council is equally conscious that the efficient administration of justice must not be at the expense of constitutionally protected rights of great importance, such as the requirement of the administration of justice in public. In the words of one senior member of the Council:

"the legal world must make the best of what is available to it, since to do otherwise would be to deny access to justice to those who need it and to wholly infringe upon a person's right to a fair trial within a reasonable time. The ultimate balancing exercise, as set out above, is fairness as against expediency, and the best solution in each case must be decided on a case-by-case basis, while always bearing in mind that just because a case can be heard remotely, does not mean it should be heard remotely".[28]

[27] https://www.lawlibrary.ie/2021/05/04/statement-on-the-administration-of-justice-post-pandemic-may-2021/
[28] Sara Phelan SC, 'In the interests of justice', The Bar Review, Volume 25; Number 3 – June 2020, p. 83.

One facet of the administration of justice which may be challenged by remote hearings is the perception of justice having been done or been seen to be done. Often litigation presents an opportunity for a person to seek vindication of their rights, to be heard and addressed. Equally important is the role performed by judges in society as impartial decision-makers presiding over courtrooms and ensuring a fair trial take place. The cultural perception of judges reinforces the importance of their neutral function, emphasising their authority and the legitimacy of the court as an institution.

The requirement of a hearing in public is central to the effective administration of justice. At the *"heart"*[29] of the democratic Irish legal system are Article 34.1 and Article 37.1 of the Constitution which at their core provide for the administration of justice in public save in special and limited cases which allows a restriction on the publicity of the administration of justice. Article 34.1 provides:

"*Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public."*

The publicity requirement in Article 34 is not necessarily to have the public present but instead places emphasis on having the doors of courts open so the general public can observe justice being done. This was adverted to by Walsh J in *Re R Ltd*:

'... The actual presence of the public is never necessary, but the administration of justice in public does require that the doors of the courts must be open so that members of the general public may come and see for themselves that justice is done. It is in no way necessary that the members of the public to whom the courts are open should themselves have any particular interest in the cases or that they should have business in the courts. Justice is administered in public on behalf of all of the inhabitants of the State.'[30]

During Covid-19 the vast majority of litigation moved online in accordance with Government advice. The prospect of remote hearings as the default forum going forward rather than the exceptional forum is now under consideration.

To date there are no studies in this jurisdiction on the extent to which public administration of justice is protected by the use of remote courts. However, the Oireachtas Library and Research archive has highlighted domestic disadvantages for those who lack the resources to participate in remote hearings by referring to disparate access to fixed broadband

[29] Byrne, Raymond, McCutcheon, Paul, Cahillane, Laura, Roche-Cagney, Emma *Byrne and McCutcheon on the Irish Legal System* (Dublin: Bloomsbury Professional, 2021), at para. [4.09]
[30] *Shelly v Mahon* [1990] 1 IR 36

connections across Irish regions[31]. In the UK there are reports which have highlighted the difficulties faced by parties "understanding what was happening"[32] in Court proceedings.

Another impact of remote courts on the effective administration of justice is the symbol of the Courtroom. Reporting on a three-year empirical study on remote judging and the impact of video conferencing in Australian Courts on the role of the judge (which effectively removes the association between Judge and Court), research has linked the spatially distributed event of remote court hearings as impacting the authoritative role of the judge and the legitimacy of the Court[33]. Our system relies on a significant number of cases settling rather than proceeding to trial. The absence of the 'steps of the Court' in a remote setting is a significant barrier to settlement, or if settlement is not possible, the parties at least being in a position to 'narrow the issues' prior to trial.

The Council submits that in considering the 'type' of judges required, in addition to the pressing issue of recruitment, the Judicial Planning Working Group should take into account the role of the judge and the Courtroom in the new remote environment and ensure that efficiency of justice supports and enhances the legitimacy of the legal system.

[31] Oireachtas Library & Research Service, 2020, L&RS Note: Remote Court Hearings
[32] Nuffield Family Justice Observatory, 'Remote hearings in the family justice system: a rapid consultation', 2020, p. 12
[33] Moran, Leslie J., Rowden, Emma & Wallace, Anne "Remote Judging: the Impact of Video Links on the Role of the Judge" *International Journal of Law* in Context. Dec 2018, Vol. 14 Issue 4, p504-524

9. Summary of Conclusions

The Council was invited to make submissions to the Judicial Planning Working Group on the number of and type of judges required to ensure the efficient administration of justice over the next five years. In so doing, the Council emphasises the following:

I. The delivery of quality decisions by experienced professional judges is a key indicator of the efficient administration of justice and is the common method of recruiting judges in common law countries. The Council adopts the view that the recruitment of judges should reflect the minimum competency requirements established in statute for the efficient administration of justice.

II. The Council submits that the operation of lay courts in this jurisdiction would require a fundamental constitutional change to the justice system and indeed a profound departure from a body of legal precedent setting out the confines of justiciable issues that remain within the realm of the Courts and those which are suitable for non-judicial bodies with limited functions. For the reasons as set out above, the Council is not supportive of, or in favour of, the operation of lay courts in this jurisdiction.

III. The Council submits that additional recruitment of judges in line with the European average is needed in order to support the efficient administration of justice. While the Council is not in a position to be prescriptive as to the number of judges to be recruited on a list by list basis, it defers to the Courts Service as the appropriate party to indicate the adequate resourcing of the Courts Service.

IV. The Council is aware that there is no published data (or indeed metric) available by which the efficiency of Irish Court lists are measured on an annual or monthly basis. The gathering and/or availability of such information on a list-by-list basis would doubtlessly provide a better breakdown on where further judicial resourcing should be channelled in addition to the already available information furnished by the Courts Service.

V. The Council submits that in considering the 'type' of judges required, in addition to the pressing issue of recruitment, the Judicial Planning Working Group should take into account the role of the judge and the Courtroom in the new remote environment and ensure that efficiency of justice supports the legitimacy of the legal system.