BAR COUNCIL SUBMISSION TO THE MINISTER FOR JUSTICE & EQUALITY ON THE PROPOSED ESTABLISHMENT OF A COURT OF APPEAL

14TH May 2013

SUBMISSION TO THE MINISTER FOR JUSTICE BY THE BAR COUNCIL CONCERNING THE PROPOSED ESTABLISHMENT OF A COURT OF APPEAL

The Bar Council wishes to express its support for the proposal to establish a Court of Appeal. The current caseload of the Supreme Court is such that appeals are taking an inordinate amount of time to progress through the system and the Bar Council welcomes the establishment of an intermediate appellate court which would alleviate this backlog and ensure that appeals are disposed of within reasonable time limits with attendant costs savings.

The current situation is that civil cases commenced in the High Court may wait as long as four years for an appeal to the Supreme Court. That such a situation has arisen is unsurprising given that the Supreme Court, which dealt with appeals from seven High Courts in 1971 now deals with appeals from 36 High Courts. This increase in the volume of litigation is discussed in detail in the Report of the Working Group on the Establishment of a Court of Appeal in its 2009 Report ("the Report"). Contributing factors include population growth and the increase in commercial activity in the State. Added to these is the increasing development of new areas of regulation in areas such as Planning Law and Corporate Enforcement which inevitably generate litigation. There has also been a trend towards an increasing complexity in civil litigation which lengthens the process in both the High Court and on appeal.

While the Supreme Court has taken a number of measures to address its overwhelming case load including the operation of a priority list to fast track urgent appeals, increased case management with which counsel have cooperated and the practice of sitting in divisions of three, the backlog is nonetheless increasing and the proposed establishment of a Court of Appeal is urgently required to address chronic delays in the court system.

The priority list currently consists of approximately 70 cases so that there is now, as noted by the Minister in his address on 2nd March at the Seminar on Constitutional Reform relating to the Courts, "a backlog on top of a backlog". The Working Group pointed out in its Report that the efficiencies gained in commercial litigation being

processed in the Commercial Court were being lost on appeal due to delay and this continues to be the case. This is a trend which has continued for a number of years and the Courts Service notes in its Annual Report from 2011 that the Supreme Court received 499 appeals during that year. While the Court has disposed of appeals at a rate which compares very favourably with its international counterparts (disposing of 190 matters in 2011 compare with 69 appeals heard by the UK Supreme Court during a comparable period[1]), the continued accretion of this backlog makes it clear that this is an unsustainable state of affairs which urgently requires reform.

While no detailed proposals have been circulated by the Minister at this point, the Bar Council wishes to endorse a number of the recommendations made by the Working Group its 2009 Report.

The Bar Council is in agreement with the Report insofar as it distinguishes between the roles of intermediate appellate courts and courts of final appeal. It is important that the new Court of Appeal be concerned primarily with error correction and the Supreme Court be left to deal with those appeals which involve important points of law.

The Bar Council believes that constitutional amendments will be required to establish the new Court and to ensure that it fits within the existing court system. Broadly speaking, the Bar Council is in favour of an overall amendment of Article 34 to establish and accommodate the new Court as well as the consequential amendments of other Articles that were highlighted by the Working Group as flowing from such an amendment of Article 34. The new Court of Appeal should be woven into the fabric of the existing court system as set out in the Constitution. Establishing the new Court in this manner will ensure constitutional coherence by placing the Court and its President clearly within the constitutional structures already established in the State. It will also make it possible for the new Court to have competence in constitutional matters.

The Bar Council shares the Minister's concern about the "splitting" of cases with constitutional issues going to the Supreme Court with the Court of Appeal retaining seisin over the other issues in the appeal. To avoid this, the new Court of Appeal

[1] *United Kingdom Supreme Court Annual Report 2011*, at page 24. (Figures refer to appeals heard by that Court between 1 April 2011 - 31 March 2012).

must be established in such a way that it is clear that it has full jurisdiction to deal with all issues arising on appeal from the High Court. An amendment along the lines suggested by the Working Group will also avoid questions over the validity of the new Court such as those raised in respect of the Court of Criminal Appeal in *People (A.G.) v. Conmey* [1975] 1 I.R. 341. It should promote the public perception of the Court as being of equal status to the existing Superior Courts. Finally, and importantly, it should secure the independent status of the new Court and the judges appointed to it.

We understand that the Minister intends to establish a single court with jurisdiction in both criminal and civil matters and we fully support that approach which would also involve the abolition of the existing Court of Criminal Appeal. That Court, which is comprised of one judge of the Supreme Court and two judges of the High Court sitting on a part time basis carries a significant case load and as noted in the Courts Service Annual Report for 2011, the backlog in the Court of Criminal Appeal continues to grow. The Annual Report notes that the Court disposed of 290 matters in 2011 but nonetheless had 438 matters on hand as of 31 December 2012.[2]

It is salutary to note that at one stage it was intended that the workload of the Court of Criminal Appeal might be returned to the Supreme Court and provision was made for this in section 4 of the Courts and Court Officers Act 1995. It has been quite clear for some time now that this would be unworkable and that both courts are now overburdened. The growing backlog of the Court of Criminal Appeal itself indicates the necessity of ensuring that the new Court of Appeal is properly resourced and can avoid further backlogs.

The pressures of that case load and the lack of permanent judges appointed to the Court may explain why judgments from the Court of Criminal Appeal are frequently given on an *ex tempore* basis. The Bar Council believes that, while understandable given the pressures on the Court's caseload and the lack of resources, this is not the optimal way in which to develop a consistent body of jurisprudence in this important court which deals with the critical matter of individual liberty. The Bar Council believes it is critical to the success of the new Court of Appeal that, unlike the Court of Criminal Appeal, it should have a permanent panel of judges appointed to it and

[2] Annual Report of the Court Service 2011, at page 40.

that the number of judges be sufficient to cope with the case load of the Court. It will also require sufficient resources to ensure that the Court operates as efficiently as possible.

Adequate resourcing for the new Court of Appeal is absolutely critical. The Bar Council fully supports the appointment of a permanent panel of judges to the Court. It is vital that there be a sufficient number of judges appointed to enable the new Court to process appeals expeditiously. The Bar Council is of the view that there should be a minimum of 12 judges appointed permanently to the Court and that the other necessary resources be allocated to it to ensure that it can operate effectively.

The introduction of a new intermediate appellate court will raise important issues about the role of the Supreme Court and the way in which cases may come before it following the establishment of the new Court. The Bar Council is broadly in favour of there being a leave requirement to appeal from the Court of Appeal to the Supreme Court and supports a requirement that the appeal concerned raise a matter of exceptional public importance or some similar formulation.

One of the issues which the Minister has highlighted is how appeals which concern the constitutional validity of legislation might be dealt with in such a system. The Working Group took the view that such cases ought to be treated as any other appeal. In other words, such cases should be appealed to the Court of Appeal and would only be further appealed to the Supreme Court if the leave requirements were met. The Bar Council supports this approach. The Bar Council also supports making some provision for appeals to "leapfrog" from the High Court to the Supreme Court where appropriate.

In summary, the Bar Council welcomes the establishment of an intermediate appellate court and hopes to provide constructive comment on matters of detail as they may arise.

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