Submission to the Judicial Planning Working Group's Open Consultation

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This submission confines itself to one of the themes identified by the Group's consultation: the development of judicial skills.

I am a lecturer in Constitutional Law and Law and Technology at Technological University Dublin, a qualified non-practising solicitor, and author of _How Judges Judge: Empirical Insights into Judicial Decision-Making_. I am the lead investigator on an ongoing research project hosted by the Department of Justice, _An Evidence Review of Behavioural Economics_, reviewing the literature on behavioural economics as it applies to the justice sector and delivering a series of complementary workshops for staff within the Department and in agencies under its aegis. I have delivered workshops on the non-legal factors that affect judicial decision-making to different groups including legal practitioners, public policy research institutes, the Australian Law Reform Commission and, next year, to judges on the Health and Education Chamber - First-tier Tribunal for Scotland.

The following suggestions for the improvement of judicial skills are largely based on practices and operations in other jurisdictions. The Working Group may wish to consider how such practices and operations could be implemented by the Irish judiciary, either through the Judicial Studies Committee operating in the Judicial Council or through related agencies.

Research-informed training on non-legal factors that can judicial decision-making

The establishment of the Judicial Council was an important step in committing to formalising the delivery of education and training to the Irish judiciary. Aside from judges knowing the law and court procedure, it is important that judges understand the factors _beyond_ the law that can affect decision-making. It is suggested that there has not been enough attention to this aspect of the judicial role to date, notwithstanding the important development of the delivery of unconscious bias training to Irish judges earlier this year.

There is a wealth of empirical research from other jurisdictions on the psychological and other non-legal factors that can affect judges in their role.[1] One area that may merit particular consideration by

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[1] For an overview, see Brian M Barry, _How Judges Judge: Empirical Insights Into Judicial Decision-Making_ (Informa Law from Routledge 2021) ch 2.

the Working Group is the development of Irish judges' understanding of how cognitive biases – errors in thinking and decision-making processes (as distinct from unconscious biases, which typically refer to social biases based on demographic characteristics such as gender or race) – can affect judging. For instance:

- *hindsight bias* (also referred to as the 'knew-it-all-along effect') – the tendency to think that an event is more predictable or inevitable after it has happened than it actually was at the time, and
- *confirmation bias* – the tendency to selectively seek out information or overestimate the quality of information that supports our preconceived belief and to disregard information to the contrary.

Understanding these, and other effects is important and necessary to ensure that high standards of judicial practice and conduct are maintained. In the United States, Canada, Germany and Slovenia, among others, judges participate in interactive 'in-house' training programmes, demonstrating how such errors in decision-making can have a detrimental effect on hearings and case outcomes.

One particularly potent mode of judicial training and education in this area is through short-form experiments, often conducted at judicial training days and conferences. These experiments are based on vignettes of hypothetical legal cases, asking judges to decide on liability, an award of damages, a sentence etc. Participants are divided into two groups, a 'control' group and an 'experimental' group. Participants in both groups are provided with the same materials on the hypothetical legal case, but in the experimental group, a further piece of information is added to test for the potential effect of a cognitive bias. The decision-making of judges in the two different groups is compared to see what difference the factor makes, if any. Some brief descriptions of published case studies are set out below, to illustrate.

Anchoring effect

1. The anchoring effect is the tendency to be drawn to initial values when making a numerical judgement, even where that initial value may be irrelevant or unrealistic. In one experiment, German judges were asked to hand down a sentence in a hypothetical case. They were told to roll dice and to take whatever value emerged as the recommended sentence length of the prosecutor. Even though they knew it to be a game of chance, and

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even though all judges heard the same set of case facts, the number appearing on the dice affected sentencing outcomes considerably.

2. [US administrative judges were asked to decide on an employment law discrimination claim](). Where the claimant referred to an outlandish amount of compensation awarded in a case similar to hers that she had seen on a court reality TV show, this irrelevant anchor had a sizable effect, raising the amount of compensation the judges were prepared to award.

Exposure to inadmissible evidence that ought to be disregarded

An [experimental mock trial]() found that US judges were unable to ignore inadmissible evidence about an alleged rape victim's prior sexual history. Judges exposed to this irrelevant, inadmissible evidence that the judges ought to have disregarded were much less likely to convict the accused when exposed to it.

Training using these short-format experiments tends to be well-received by judges, and often, they ask for further, similar training after their initial participation. This is perhaps because this mode of learning is an absorbing way for judges to understand important factors that may affect their day-to-day decision-making in a controlled, low-stakes environment, allowing them to self-reflect and improve upon their practices on the bench.

Harnessing data and trends on judges' caseload, throughput and outcomes to improve judging

The collection and analysis of data on caseload, case throughput and judicial outcomes in the Irish judicial system have improved considerably in recent years. Recent innovations in this regard such as the increasingly-sophisticated collection of data on case throughput published in annual reports of the Irish Courts Service, the work of the Criminal Justice Operational Hub, and the Judicial Council's recent tendering for a research report into *Assessing Methodological Approaches to Sentencing Data Collection and Analysis* are important and welcome initiatives.

It is suggested here – and, no doubt, the Working Group is aware – that much more can be done in this regard. In-depth, empirically-grounded data on a wide range of areas of the courts' work, judgecraft and trends in judicial decisions would provide the basis for judges to meaningfully self-reflect on their role and their working product at various levels – as individual judges, as judges on the various district, circuit or superior courts, and as a judiciary as a whole. Academics in law and related

fields in the social sciences are increasingly well-versed and trained in empirically investigating courts' and judges' work, employing rigorous, best-practice methodologies. The cost-benefit analysis is favourable. For relatively small outlays – research projects of such a nature tender for between €15,000 to €30,000 – researchers are available and trained to deliver sophisticated, bespoke analysis to the Irish judiciary on a variety of issues, such as:

- Sentencing patterns and trends,
- Trends in damages and other remedies, (to give but one example, trends in contributory negligence),
- Settlement rates,
- Trends in the use of various legal sources in judgments,
- Judgment writing styles,
- Case throughput, individual judges' caseload and busyness, and timelines between different stages in court proceedings.

Empirical research of this nature has considerable potential to deliver rich, malleable and sustainable datasets together with bespoke analysis, providing judges with the opportunity to analyse aspects of their role as individual judges, as collective courts (comparing trends in equivalent courts in different parts of Ireland, for instance), and as a judiciary as a whole. Such projects come with the concomitant long-term benefit of the design and implementation of systemised datasets that could be maintained into the future.

It is suggested that initial dialogue between members of the judiciary and academics who conduct empirical work of this nature may precipitate ideas on the kinds of data and analysis that could prove most beneficial. Providing empirically-grounded information will give judges a more granular understanding of trends in their role, and what is going on around them.

Indeed, legal practitioners increasingly rely on sophisticated litigation analytics tools, often based on artificial intelligence technologies, to inform their practice and advice to their clients. It makes sense that the Irish judiciary should have the benefit of equivalent tools and analysis to improve consistency (insofar as is appropriate) and efficiency in their role.

Contact
I am available to provide further information or consultation on any of the above.