



**Oifig an Phríomh
Aturnae Stáit**
Chief State
Solicitor's Office

Submission to the Judicial Planning Working Group

July 2021

The CSSO welcomes the opportunity to make a submission to the Judicial Planning Working Group, in our capacity as a stakeholder organisation in the Justice sector. We have considered the Terms of Reference and in our response have focused on the key areas where we feel we could add insight:

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.

We assume that the Working Group will be taking an objective data-based approach to the analysis of the number of judges required to effectively handle the current volume of litigation in Ireland. As professional practitioners, we would not hold ourselves out as being sufficiently well informed to offer a view on the judicial numbers needed today although we note the divergent views expressed in response to the increase of five in the number of High Court judges which was recently introduced under the Civil Law (Miscellaneous Provisions) Act 2021.

For the purpose of responding to this question, would suggest that, in order to strategically consider the number and type of judges required in this jurisdiction, one key question for the Working Group to determine will be the optimal role for a judge. The Working Group would seem well placed to analyse whether this role should be expanded from its current remit (perhaps to include an extended case management function) or contracted, with elements of the judicial function being allocated to other court officers, insofar as is compatible with our Constitution.

The importance of going back to first principles and considering the appropriate role of a judge is clearly illustrated by the comparative evaluations of the number of judges across the various European jurisdictions which are carried out every two years by the CEPEJ¹. The CEPEJ's 2020 Evaluation Report (which uses 2018 data) shows that there are between 10 and 30 professional judges per 100 000 inhabitants in the vast majority of States and that their distribution has remained broadly stable over the years. The average number of professional judges per 100,000 inhabitants is 21. By contrast, the number of professional judges per 100,000 in Ireland is just 3.3.

This comparative landscape is further illustrated by the very recent Commission 2021 EU Justice Scorecard. This presents an annual overview of the efficiency, quality and independence of justice systems. Its stated purpose is to assist Member States to improve the effectiveness of their national justice systems by providing objective, reliable and comparable data. In the most recent scorecard, published on 8 July 2021, Ireland has the

¹ European Commission for the Efficiency of Justice

lowest number of judges per 100,000 of the population in the EU whereas we are ranked 8th (mid-to-high table) for the number of lawyers.

This contrast can partly be explained by the different legal systems across Europe and in particular the fact that traditionally the respective roles of the judge and the lawyers in civil law and common law legal systems have been quite different, with civil law litigation often described as being more 'judge-centred' or 'judge-controlled'. This points to the fact that if reforms to the administration of civil justice in Ireland will require a more interventionist role for the judge in controlling the procedural trajectory of the litigation, this may consequentially increase the number of judges required.

Aside from the number of judges required, we would also suggest that the Working Group consider the judicial specialisms needed. In our view, where specialist Courts or specialist divisions of the High Court are established to meet the particular needs of a practice area, a specialist judge should be appointed to that division. For example, the new Planning and Environmental Court which the Government have committed to establishing under the current Programme for Government would be best served by a judge with specialist expertise in that area. Procurement law is another area which might lend itself well to the specialist division approach.

Finally, on a practical note in respect of judicial numbers, there are currently a finite number of courts and courthouses available around the country. In a post pandemic period, that capacity has to be taken into account if increasing the number of judges who might be appointed. This is relevant to the potential growth in e-litigation which is discussed further under para. 4 below.

2. To consider the impact of population growth on judicial resource requirements

We would agree that population growth is a relevant factor in the assessment of judicial resource requirements. Indeed, it forms the benchmark for the leading comparative analysis on judicial resources (see para. 1 above). However, in our view, the key challenges for the Working Group to address are less to do with the need to increase judicial resources in line with future population growth and more to do with identifying the level of judicial resources which is needed for the population at present. Once that exercise is settled, then the projection of percentage increases needed in judicial resources in the coming years in line with forecasted population growth should be more straight-forward.

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.

In our view, there is significant scope for active case management to be used to meet service demands and to increase efficiencies in the administration of justice. Such an approach would put the progress of a case under the control of the court rather than the parties and should help to ensure greater consistency in litigation timeframes.

In the public consultation carried out in 2018 by the Civil Justice Review Group, considerable support was expressed from within the public sector and the State sector for increased use of case management procedures. Increased use of case management and shifting this responsibility away from the parties and instead centralising it in the Court system would necessarily require greater resources in the Court system although it should ultimately reduce the cost of litigation for the private parties involved.

In this regard, we would support the greater use of case management procedures. We would further support the allocation of case management functions, where possible and compatible with Article 37 of the Constitution, to Court officers other than the judge, thereby reserving valuable judicial time for when it is absolutely needed. To that end, we would support the recommendation of the Civil Justice Review Group for the appointment of a sufficient number of Deputy Masters to preside at case management conferences, whether in conjunction with or as an alternative to, greater involvement by judges in case management.²

In terms of the practicalities of case management in any given specialist practice area, we would advocate for the relevant Judge or Deputy Master to engage in open discussions with relevant stakeholders to consider the case volumes, trajectory, pace of the litigation, etc. in order to identify how case management might be most effective in that practice area.

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.

While the Courts Service will be best placed to evaluate the impact of Covid-19 on court caseload numbers across the various jurisdictions and practice areas, we would comment from the perspective of the State that, during the Covid-19 pandemic, litigation in certain areas where the State is heavily involved has increased significantly (for example judicial review). We would also note that in many areas, the Covid-19 pandemic has in fact had a positive operational impact. It has proven to be a catalyst for far greater use

² Case management and procedural reform generally is examined in detail in Chapter 5 of the Civil Justice Review Group Report. Our Office was represented on that Group and so our views can be taken to be broadly aligned with those reflected in that Report.

of technology and considerable progress has been made by the Courts Service towards an optimal e-litigation model, which we would welcome.

In our view, investment in technology and the establishment of a secure digital forum for Court business has significant potential to reduce waiting times for Court dates. A digital forum has the potential to allow much minor court business to be disposed of without needing to take judicial time in Court, for example, it could allow online applications for adjournments or other orders, generation and dissemination of hearing dates and court calendar management. Furthermore the use of remote hearings to avoid the need for parties, legal teams, witnesses etc. to be physically present in Court should again serve to reduce waiting times.

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.

We agree this exercise will be important to inform the analysis of the Working Group and have suggested useful resources under para. 1 above.

6. To consider the costs associated with additional judge numbers, including salaries, allowances, judicial support staff and chambers.

We would not have the necessary costs expertise to comment on this matter although we agree it is a relevant consideration. If the topic of indirect costs to the State as a result of increases in judicial appointments is to be considered, we would suggest that the increased cost to the State of legal representation would also be examined. Where, for example, a practice area of the High Court is currently managed by one judge, that puts a certain cap on the volume and pace of litigation in that area. If the number of judges involved were to double to two or higher, that would have a considerable knock-on impact in terms of the resource demands on our office.

Ultimately this requires a cost benefit analysis which will be a matter of policy and not something on which we would express an opinion, save to highlight that when considering the consequential and indirect costs associated with increased judicial numbers, the requirement for increased legal representation for the State and the associated costs of same should also be considered.

7. To review forthcoming and proposed policy and legislative reforms that may impact on the requirement for judge numbers.

We agree this review would be important. As one example, the policy in the Programme for Government to establish a new Environmental and Planning Court will clearly impact on the requirement for judge numbers.

8. To make recommendations for developing judicial skills in areas such as white collar crime.

In our view, the need for both standardised judicial training for all new judges and also for specialist training if specialist appointments are being made (see 1. above), is a key factor to consider in increasing the number of judges being appointed. In our view, it would be important for an increase in the numbers of judges to be accompanied by a commensurate investment in judicial training. The Working Group may find the comparative data around judicial training in the EU Justice Scorecard (see 1. Above) to be of interest in this regard.

As noted in para. 4 above, we would support the move towards an optimal e-litigation model. In order for this to be achieved, it is important that judges would receive regular technology upskilling training to ensure, for example, that judges are comfortable working from e-books rather than duplicate e-books and hard copy books being required for remote hearings.

9. To make recommendations on relevant issues such as judicial workload, barriers to entry, efficiency gains and speed of access to justice.

In relation to speed of access to justice, in our experience, this can vary quite considerably depending on the practice area (i.e. the particular Court list) which a litigant is trying to access. This disparity has been exacerbated by Covid-19 where certain areas (for example Circuit Court personal injury actions) may now have large backlogs whereas a Commercial Court matter can be remotely case managed and can get on quite quickly. To that end, if the number of judges are to be increased, it may be worthwhile for the Working Group to recommend an allocation of newly appointed judges to those areas where access to justice is currently problematic. However, this is clearly an issue which would not be addressed by increasing the number of judges alone.

10. To consider the implications of Brexit on the courts in regard to judicial resources and potential increased workloads arising.

We note that in the years since Brexit there has been much speculation about the potential for Ireland to become a jurisdiction of choice for cross-border commercial disputes and other forms of international dispute resolution, particularly in respect of disputes arising between parties from Common Law jurisdictions who are operating within the EU, given our status as a significant

EU Common Law jurisdiction. We would not be best placed to comment on whether this trend has yet materialised but as and when it does, there may naturally be an impact on judicial resources. The opportunities to be gained in high value legal work coming to Ireland will only be realised if such disputes can be disposed of in a timely and efficient manner.



Chief State Solicitor's Office

Osmond House, Little Ship Street, Dublin D08 V8C5, Ireland

T: +353 (0)1 417 6100 | E: contact@csso.gov.ie

www.csso.ie