

## Office of the Director of Public Prosecutions Submission to the Judicial Planning Working Group

### Introduction

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The Office of the Director of Public Prosecutions (ODPP) is pleased to make a submission to the Judicial Planning Working Group. We refer to the Secretary Ms. Nicola Kelly's letter and email of the 30 June 2021 inviting submissions and enclosing the terms of reference of the Working Group. Where relevant in the submission, terms of reference (TOR) of the working group are referenced.

The ODPP would be happy to be consulted further on the criminal justice system aspects of the project as the work progresses. Further to the request of the Working Group, the Chief Prosecution Solicitor, Helena Kiely, has already provided input by way of a meeting with the OECD team who are doing a review of judicial resourcing in Ireland. The ODPP is also a member of the High Level Working Group on the Role of An Garda Síochána in the Public Prosecution System (HLRG). Data and information about the prosecution system in Ireland collected in the context of the work of that group may be of assistance to your group in the area of criminal law and will be available from the Department of Justice.

### General Remarks

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The Director welcomes the work of the group on judicial resourcing with a view to improving the administration of justice for citizens. The focus of the ODPP is on the criminal justice system in particular, although the ODPP is also a party to civil matters in particular in the area of judicial review. The Director is acutely conscious of and concerned by the enormous backlogs in criminal trial courts created by the pandemic, and supports any additional resourcing to address the long delays in jury trials.

The ODPP recognises that adequate resourcing of the administration of justice, including of judges, is essential for a number of reasons of principle:

- Ensuring the constitutional, ECHR and EU Charter right to a trial without undue delay is not infringed because of systemic delays.
- To ensure that there is adequate judicial time so that processes and decisions that require the impartial adjudication of a judge are not inappropriately left to the parties.
- Upholding the rule of law. It is noted that the projected work of this Judicial Planning Working Group is referenced in the [EU 2020 Rule of Law Report Ireland Chapter](#), in the context of Ireland having the lowest number of judges in the EU per capita, as documented in the annual [EU Justice Scoreboards](#). Low judge numbers are also highlighted, with reference to its potential impact on efficiency of the Irish justice system, in the very recent [EU 2021 Rule of Law Report Ireland Chapter](#).

It might be expected that Ireland would have a lower number of judges dealing with criminal law than some other EU Member States as Ireland does not have the model of an investigating judge who is involved in directing a criminal investigation from an early stage. However, as we will set out below, as a result of case-law and legislation there is an increasing trend towards more judicial involvement in the criminal process and this can be expected to continue.

In this brief submission, we would like to draw your attention to three main points:

1. It is imperative that decisions on judicial resourcing are informed by the effect of same on other parts of the system if delays are to be addressed and the service to justice system users is really to be improved.
2. There are a number of areas where it is anticipated there will be more judicial input required in criminal law into the future: case management, disclosure and the EU context.
3. Finally, we underline the importance of resourcing legal and non-legal training for judges given increasing complexity and areas of specialisation within criminal law.

### The importance of systems for factoring in the effect of increased resources / developments in one part of the system on other parts

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We note that your terms of reference make explicit reference to the need to consider the impact of population growth on judicial resource requirements.

We would highlight that there is a wide range of factors that may impact the demand for judicial resource requirements in the criminal sphere, including developments (legislative, policy or resourcing related) within the justice system itself.

These will include trends in the numbers of Gardaí; resourcing of specialist agencies; Garda investigation numbers; files submitted to the Office of the DPP, decisions to prosecute and trials on indictment; summary trials directed by An Garda Síochána under delegated function from the DPP; appeal numbers in all court jurisdictions. Some of this data will be available from the Courts Service but if there is any data that you would like us to provide we would be happy to do so.

It is important that a system of resourcing be developed across the justice system so that the knock on impact of any increased resources in one part of the system on other organisations is addressed.

For example, an increase in Garda staff numbers (of 2,700 since 2016) is likely to be one of the main drivers behind the increase in investigation files submitted to this Office. There was an approximate increase of 27% of files for decision on prosecution in 2020 and an anticipated further increase of 27% in 2021. It is estimated that, based on the current rate of increase, sometime in 2022 the ODPP will find itself dealing with double the amount of criminal investigation files it had to deal with in 2017. We mention this as an example of the importance of understanding the knock on impact of increasing the resourcing of one part of the criminal justice system on other parts.

The current level of judicial resourcing of criminal cases has sometimes led to large lists in circumstances where there is no real prospect of most of the cases listed for trial being heard. This is not in the interests of victims, accused persons, witnesses or any of the other participants in the court system. The Circuit Court is the busiest jurisdiction for criminal trials in recent years and there has been a cumulative 31% increase in new criminal matters in Dublin Circuit Criminal Court from 2017 to 2020, with a similar increase anticipated between 2020 and 2021.

The Courts have sought to address the increased workload and the impact of the COVID-19 backlog (TOR 4) by scheduling additional trials in circumstances where judicial resources are limited. On Monday 5 July 2021, seventeen cases were listed for trial in the Dublin Circuit Criminal Court. On that day, only one jury was sworn in for trial, with three additional trials commencing later that week. Seventeen cases were listed for trial albeit only five judges are currently available for criminal work in Dublin Circuit.

This has created considerable challenges for the ODPP in preparing for and staffing this projected level of court activity. Retention of prosecution counsel has also proved problematic of late as barristers are briefed by both the prosecution and the defence. With a professional duty to give precedence to acting on behalf of an accused who is in custody, increasingly prosecution counsel have needed to hand over cases at short notice (in order to deal with cases where they act for the defence). It can be difficult to quickly find replacements given the number of cases scheduled to proceed for trial on a particular date and with such uncertainty as to what case will commence on that date.

Most importantly, it is not possible to give any certainty to victims and witnesses that their cases will proceed. This lack of certainty for victims and witnesses – who are giving up their time and juggling other parts of their lives – leads understandably to frustration and heightened emotion and makes it very difficult for criminal justice actors when engaging with victims.

With the pandemic – and anticipated to continue into the future – many witnesses are giving evidence from abroad. The current scheduling system makes it extremely difficult to plan – and ultimately secure – this evidence. The Director cannot currently advise the country facilitating the video link – in the mutual legal assistance request – when the witness will be required to give evidence or the date and time that the court in that country will be required to facilitate the giving of evidence. Member States in the EU generally require the witness to give evidence from a court in that country.

This Office would welcome an increase in judicial resources to ensure speedy access to justice and to provide greater certainty for the public and judicial authorities in other countries (who facilitate the taking of evidence from abroad) as to when their participation will be required. However, we would emphasise that this requires cross sectoral co-ordination to ensure that these courts can be effectively resourced by other participants to ensure there is an improvement to users of the system. For example, in addition to the immediate costs of salary, supports (both human and digital) and continuing professional education, additional judges in the criminal system will mean factoring in registrars, court facilities, prosecution solicitor and counsel, defence solicitor and counsel with attendant legal aid costs, victim support services, prison/detention services and probation services.

## Increased judicial input in criminal cases – Criminal Procedure Act 2021 – case management

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With reference in particular to TOR 3, in the area of judicial case management, the recently passed and not yet commenced [Criminal Procedure Act 2021](#) provides for preliminary trial hearings for indictable matters.

The objectives of this reform are noteworthy in the context of the current challenges for victims and witnesses set out above. The Criminal Procedure Act 2021 – at section 6(4) – identifies the factors that the trial court should consider when deciding whether to hold a preliminary trial hearing and the timing of such hearing, so as to achieve the purposes of the Act. The factors identified include the following:

- (a) facilitate the expeditious and efficient conduct of the proceedings;
- (b) result in the least disruption to the jury and witnesses in the trial of the offence; *and*
- (c) best protect the interests of any victim of the offence.

Judges will, on their own motion or at the application of the parties, conduct one or more pre-trial hearings. They will hear submissions and make orders on procedural and substantive matters (listed at sections 6(7) and 6(8) of the Act), including admissibility of evidence, that up to now would have been dealt with in a unitary trial. It is envisaged that in principle, where decisions on admissibility of evidence are taken at preliminary trial hearings, the same judge will conduct the trial.

While it is envisaged that this will ultimately lead to less delays in prosecutions, shorter trials and less disruption to victims, witnesses and juries, it will require more judicial input and ‘ownership’ at an earlier stage and on an ongoing basis. This legislative change is particularly relevant to provisions for the next five years as judges and stakeholders navigate the new system (TOR 1).

This important development should be included in the list of reforms that may impact on the requirement for judge numbers at TOR 7. This opportunity for efficiency and improving the system for accused persons, victims, witnesses and jurors, in particular in relation to cases with voluminous evidence, will be lost if there are not adequate judicial and other resources to optimally use this new case management system for criminal matters. This requires a focus on how criminal cases are currently processed through the courts and in particular on scheduling and organisation of judicial resources. Distinct court time will in our view have to be allocated within the listing system for preliminary trial hearings. As illustrated above, this will need to be done in collaboration with the other actors in the system.

## Increased Judicial input in criminal cases – Disclosure

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Judicial time dealing with disclosure in criminal matters can also be expected to increase. In the Irish system, there is a duty on the prosecution, arising from the constitutional right to a fair trial, to disclose evidence in the prosecution’s possession which the prosecution does not intend to use, if that evidence could be relevant or could assist the defence. The prosecution must determine the relevancy of the evidence presented to the court in the context of ensuring a fair

trial, while at the same time balancing the privacy rights of those who come into contact with the criminal justice system. The input of the trial court in striking this balance is often sought by defence or prosecution.

Disclosure issues in the context of trial readiness is one of the matters to be considered at the preliminary trial hearing. Such hearings on disclosure issues have become much more onerous with emerging technology. Many investigations generate voluminous evidential material, most of it from electronic devices and arising from use of social media. It can be anticipated that more time will be spent – in future at preliminary trial hearings - on adjudicating on disclosure issues, such as identifying and agreeing search terms for voluminous materials.

In addition, in the area of non-party disclosure, there are now statutory provisions<sup>1</sup> making the issue of disclosure of counselling notes a matter for the Court unless the right to a court hearing is waived by the complainant. This is also one of the matters that will be dealt with in a preliminary trial hearing. As recommended in the [O'Malley Review on Vulnerable Victims and Witnesses](#) (referred to in TOR 7), consideration is being given to the question of whether the disclosure of medical records should also be made subject to a similar statutory regime. It can be anticipated that more judicial time will be spent on consideration of such non-party disclosure material as this right to a court hearing is availed of more by victims and by relevant witnesses.

## Potential increased judicial input in criminal cases – EU context

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The EU context – the source of approximately 40% of criminal law legislation in Ireland between 2015 and 2020<sup>2</sup> – may merit further scrutiny by the working group in the context of judicial resources for criminal law. The current example of the considerable increase in cases in Ireland's extradition court lists since March 2021, when An Garda Síochána gained access to the Schengen Information System (SIS II), illustrates the resource implications of Ireland's participation in EU co-operation measures in the area of criminal law.

In circumstances where judges – and/or prosecutors – are involved in (or oversee) investigations in many other EU Member States, co-operation that might be perceived to be in the police-to-police realm in Ireland will be treated in EU instruments as judicial co-operation, requiring judicial input. With reference to TOR 10, without the UK as another common law jurisdiction (and a large EU Member State) in negotiations on criminal law instruments and as an intervener in the Court of Justice of the EU (CJEU), it will be more difficult to advocate on behalf of the Irish system and to have it taken into account in EU legislation and jurisprudence.

There has also been a recent focus in EU law on effective judicial protection derived from Article 19(2) TEU, in particular in the CJEU's judgments on rule of law issues in some Member States<sup>3</sup>.

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<sup>1</sup> [S.19A Criminal Evidence Act 1992](#), as inserted by S.39 Criminal Law (Sexual Offences) Act 2017 (S.19A), commenced on 30 May 2018

<sup>2</sup> Source – Criminal Justice Cross Agency leadership program 2020 project on Collaborative Systems and the development of Criminal law at EU level

<sup>3</sup> Case C-64/16 *Associação Sindical dos Juizes Portugueses*; Case C-619/18 *Commission v Poland*; Case C-192/18 *Commission v Poland*

The importance of independent judicial oversight in judicial co-operation measures such as the European Arrest Warrant has been underlined by the CJEU<sup>4</sup> and future EU criminal law judicial co-operation instruments are likely to require judicial input.

In addition to judicial co-operation, the EU has competence in the area of criminal procedural law, often codifying European Convention on Human Rights standards set by the European Court of Human Rights. The safeguard of judicial and independent decision-making to ensure procedural fairness can be observed in EU criminal procedural law. Prior authorisation (either judicial or by an independent administrative authority) of access to retained data for criminal investigations is a central issue in the ongoing jurisprudence from the Court of Justice of the EU (CJEU) and the Irish Courts<sup>5</sup> on the issue of data retention and is likely to influence Irish legislation. In EU procedural rights directives, it is envisaged that the decisions on derogations from, for example, the right to information<sup>6</sup> or the right of access to a lawyer<sup>7</sup>, are taken by a judicial authority or are at least required to be subject to judicial review.

The EU context therefore merits consideration in an examination of judicial resourcing in criminal law as judicial time may in the future be required for:

- (a) operating EU measures in judicial co-operation in criminal matters; *and*
- (b) more prior judicial oversight of procedural rights and intrusive investigative measures in criminal investigations (particularly in the District Court).

### The central importance of resourcing training and knowledge management for judges in the context of increasing complexity and specialisation in areas of criminal law in a small jurisdiction

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With reference to types of judges in TOR 1 and to judicial skills in TOR 8, there is increasing complexity and specialisation in areas of criminal law. Digitalisation creates particular challenges in terms of both evidence (as the observations in relation to voluminous data and disclosure above illustrate) and new types of offences carried out online – for example, in the areas of sexual offences and financial crime.

Specialist expertise has been developed within our own Office in a range of areas of criminal law and practice, including: cybercrime; confiscation and forfeiture of assets; competition offences; data protection; domestic violence; environmental crime; financial crime and corruption offences; GSOC prosecutions; health and safety offences; human trafficking; international and EU law; juveniles; money laundering; organised crime; terrorist offences; road traffic offences; sea

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<sup>4</sup> Case C-216/18 PPU *LM*; Joined Cases C-508/18 *OG* and C-82/19 PPU *PI*; Case 209/18 *PF*

<sup>5</sup> Joined Cases C-203/15 and C-698/15, *Tele2/Watson*; Case C-207/16, *Ministerio Fiscal*; Case C- 623/17, *Privacy International*; Joined Cases C-511/18, C-512/18 and C-520/18, *Quadrature du Net, French Data Network and Ordre des Barreaux*; Case C-746/18 *HK/Prokuratuur*; Case C- 140/20 *G.D. v Garda Commissioner* (reference from Ireland).

<sup>6</sup> Directive 2012/13/EU, Article 8(4)

<sup>7</sup> Directive 2013/48/EU, Article 8(2) (Ireland has not to date opted into this Directive)

fisheries; sexual offences, and victims of crime. Earlier this year, the ODPP established the first phase of a specialist Sexual Offences Unit. When it is fully established it is planned that all sexual offences prosecuted in the Central Criminal Court and almost all categories of sexual offence in the Dublin Circuit Court will be managed from beginning to end within this new unit.

Against this background, the ODPP is seeking to find the balance between generalist and specialist expertise and the attendant challenge of resourcing training and knowledge management in a small prosecution service and a small jurisdiction. Similar challenges face the judiciary and it is key that continuing legal education, skills training and knowledge management for judges are prioritised and resourced to meet this need. The range of, often novel, offences to be tried is particularly evident in the Circuit Court, which has jurisdiction in Circuits countrywide for all indictable crimes except murder and rape/aggravated sexual offences. With approximately 4,000 trials heard in the Circuit Court per year, training support for these judges is essential as new offences are added to the statute book.

White collar crime (referenced in TOR 8) is one area where judicial specialisation has been identified. The Review Group Report of structures and strategies to prevent, investigate and penalise economic crime and corruption ([Hamilton Review](#)) (which should also be included in the list of reforms at TOR 7) recommends engaging with the judiciary on the development of judicial training in respect of complex economic crime/corruption cases, and on the possibility of judicial specialisation in this area.

In addition to legal specialist training, it is very important that judges can access continued training in non-legal skills including trauma-informed communication skills. Referencing Article 25 of the EU Victims' Rights Directive – and acknowledging the importance of judicial independence – the O'Malley Review on vulnerable victims recommends that:

“All judges presiding over criminal trials for sexual offences and all lawyers appearing in such trials should have specialist training which equips them with an understanding of the experience of victims of sexual crime. They should also have training in connection with the questioning of witnesses who are especially vulnerable by virtue of youth or disability.”

Reflecting the need to prioritise and resource this area, the [2021 EU Justice Scoreboard](#) (Figure 36 p.30) on “Availability of Training for Judges on Communication 2020” references training for judges on communication with: victims of gender based violence; asylum seekers or persons of different cultural, religious, ethnic or linguistic backgrounds; and with visually or hearing impaired persons.

Digitalisation also requires training for legal professionals, including judges, in IT skills. Aspects of justice will be delivered electronically, as very much hastened by the pandemic, and this should in many cases improve the efficiency and accessibility of the justice system. This requires digital skills and ongoing training for judges and all practitioners. The [2021 EU Justice Scoreboard](#) includes digitalisation of justice systems as a new indicator of quality of justice systems. Ireland's place in the various tables also indicates a need for investment in this area.

These observations have focussed on continuing training. For the ODPP's views on the importance of criminal law to initial training (for entrants to the professions who may ultimately

become judges) please see the [ODPP submission to the Legal Services Regulatory Authority \(LSRA\)](#) of 10 August 2018. It is also noted that, at the request of the Minister for Justice, the LSRA is carrying out research on barriers for solicitors and barristers and increasing diversity. This may be relevant to the work of the working group.

## Conclusion

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We trust that the above observations will be of some assistance to the work of the Judicial Planning Working Group, particularly in relation to judicial resourcing for criminal law. As indicated above, the ODPP will be happy to assist the group with any further issues that arise in the criminal law area.

**Office of the Director of Public Prosecutions**

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