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DUBLIN SOLICITORS BAR ASSOCIATION

SUBMISSION

SUBMISSION TO THE JUDICIAL PLANNING WORKING GROUP

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ABOUT THE DSBA

(THE DUBLIN SOLICITORS BAR ASSOCIATION)

1. The Dublin Solicitors' Bar Association ('DSBA') was established in 1935 and is the largest independent association of Solicitors in Ireland, with a membership of over 3,000 practitioners.

DSBA is a solely representative and education body for Solicitors and does not hold any regulatory function. Our membership includes Solicitors' firms of all sizes, from sole practitioners to the largest firms in Ireland and we are the largest independent provider of continuous professional development courses for Solicitors in Ireland.

INTRODUCTION

1. The DSBA welcomes the opportunity to make a submission to the Judicial Planning Working Group ['the Working Group'].
2. In her letter of the 30th June 2021, the Secretary to the Working Group requested the DSBA to make a submission as a stakeholder organisation in the justice sector in respect of the Government's commitment to "*establish a working group to consider the number of and type of Judges required to ensure the efficient administration of justice over the next five years.*"
3. This submission will take the opportunity to address the Working Group on the issue, the number and types of Judges as well as the ancillary matters required to ensure the efficient administration of justice over the next five years.

SUMMARY OF RECOMMENDATIONS

1. DSBA recommends that the Working Group should consider the appointment of additional Judges to the High Court, Circuit Court and District Court levels, particularly as there will be an increased workload at these levels as we emerge from the Covid-19 pandemic and especially in the lower Courts as a result of the introduction of the Personal Injury Guidelines. The number of Judges to be appointed at each level should be determined by reference to a target wait time to receive a hearing date of no more than 8-12 weeks from date of application.
2. DSBA recommends that the Working Group consider the creation of divisions of the High Court/Specialists Judges and suggests, this may be of particular benefit and efficiency in the areas of commercial, information technology, intellectual property, planning and development, personal injury, insolvency and restructuring, employment, probate, matrimonial, mental health and capacity law. We do not advocate that Judges should be confined to such specialist areas but rather that Judges with such specialist skills will be assigned from time to time to these divisions. This would inevitably lead to more efficient and speedier court hearings and determinations.
3. The Working Group might consider the option of allocation of additional judges for criminal trials, particularly at Central Criminal Court where there are 2 year delays for hearing dates.
4. The effect of the Covid-19 restrictions has in many cases created a significant backlog for the Courts at all levels, particularly at District Court and for pre-trial matters at Circuit Court level. Certain changes brought about by Covid-19 restrictions have been helpful and their retention should be considered. In the interests of the efficient administration of justice, other changes should be discontinued as soon as possible, that is all court offices including the Central Office, Wards of Court Office and the Probate Office should re-open their public counter as soon as possible.
5. As part of the consideration given to the efficient use of Judges' time and resources, DSBA recommends that consideration be given by the Working Group to the appointment of Deputy Judges or Masters to handle pre-trial procedural matters and/or additional resources provided to County Registrars, particularly in the Dublin Circuit where the County Registrar's office handles an enormous volume of work. The delay in disposal of pre-trial matters rather than substantive or plenary hearings is a significant barrier to the efficient administration of justice.
6. Active case management and judicial oversight have proven successful in specific court lists and can play a useful role in achieving the efficient administration of justice. Consideration should be given to the use of these tools in a wider variety of cases particularly in cases which raise complex issues and involve voluminous case documents and a significant number of witnesses. These tools create opportunities for collaboration between all stakeholders involved in the litigation matters and increase efficiencies in an adversarial system.

7. The Working Group should consider the efficiencies which could be gained by creative listing of pre-trial matters. DSBA considers that it is of benefit to the Courts and to Courts users that procedural motions where the jurisprudence is well established are carried out (i) on a remote basis and (ii) listed for a specific time. This innovation which has been brought about by the Covid-19 restrictions is useful and represents an efficient use of time and resources.
8. The Working Group may wish to consider the impact of the change to the type of Courts users brought about by the failure to provide Civil Legal Aid to those of modest circumstances. Aside from the primary issue of access to justice, untrained court users acting *pro se* will have the effect of increasing the workload for Court Staff and Judges. This is particularly the case in light of the anticipated changes brought about by the Personal Injury Guidelines where it is expected that many cases will fall to be dealt with within the jurisdiction of the District Court and not involve legal representation.
9. The Working Group should consider the benefit of establishing a premises near the Four Courts, run by the Courts Service for the purpose of facilitating ADR such as mediation, conciliation and arbitration which would be free of charge for use by litigants. Judges and Courtrooms are free to users and the costs of room hire can otherwise be a barrier to parties. Such a facility would also encourage and promote the use of ADR for Court Users and show that it can be part of the state's structure for dispute resolution and run alongside courts.

SUBMISSIONS TO THE JUDICIAL PLANNING WORKING GROUP

The efficiency of the Courts Service and judiciary, and their commitment to justice, bearing in mind its modest annual budget is admirable. That said, the system has scraped along for years with all parties including Courts Users doing their best to paper over the cracks. There is a significant risk that access to justice is not provided to many users and furthermore, that justice is delayed beyond reasonable levels.

In addition to these considerations, there are further pressures and delays heaped on the system by Covid-19 restrictions necessarily imposed due to the pandemic. While it is true that there have been many work-arounds and innovations found, some restrictions have caused real difficulties and delays to our members and ultimately to their clients.

Recommendations

The number of Judges

The number of Judges in Ireland is the lowest out of 47 countries examined by the European Commissioner in 2010¹. For many years, the number of Judges has fallen short of the maximum permitted by legislation; for example the High Court was short of judges for decades. In addition to this, at any point in time, the number of available Judges has been reduced due to Judges being seconded to other matters such as Tribunals or Inquiries. In a recent interview² the President of the High Court indicated that a further 17 Judges might be required to address existing backlogs and to ensure timely hearings in the future.

The lack of Judges might be evidenced from the wait times shown in the Courts Service Annual Report 2019³. These delays are not only in the High Court – the Court of Appeal is now listing cases for 2024. DSBA believes the optimum wait time to obtain a hearing date should be between 8 and 12 weeks, from date of application.

DSBA is supportive of additional appointments to the High Court. In addition, additional Judges may also be required in the Circuit Court and District Court, particularly in light of the delays caused by the Covid-19 restrictions and the anticipated increase in volumes of work at those court levels arising from the adoption of the Personal Injury Guidelines.

DSBA is of the view that these appointments must be viewed on a medium to long term basis as the impact of Covid-19 restrictions has resulted in some unusual delays within the system. In this regard it is essential that the number of Judges is measured to take into account for the workload of each Court after the pandemic backlog has been cleared.

Specialist Judges/Creation of Court Divisions

DSBA also considers that there are efficiencies to be achieved by funnelling certain specialist cases away from the scope of general jurisdiction⁴. Judges and practitioners can then focus

¹ Taken from the Association of Judges in Ireland website - *Who are the Judiciary*

² *The Parchment*, Summer 2021

³ See *Courts Service Annual Review 2019*, page 102

⁴ See article by Markus B Zimmer *International Journal for Administration*, August 2009

their research on their specialist area and this will lead to development of expertise and the law in those fields.

In addition, creation of divisions or the appointment of specialist judges may reduce conflicts and forum shopping by litigants in that the jurisprudence of the Court becomes well defined and transparent and geographic differences are reduced.

DSBA suggests that there is good reason to consider the appointment of specialist Judges at all Court levels. This may be of particular assistance at the District Court and Circuit Court levels where the forthcoming changes brought about the Personal Injury Guidelines will no doubt lead to great increase in the volume work. Other areas of law which might usefully be considered for specialist courts include Commercial, Mental Health and Capacity, Family and Probate.

Deputy Judges/ Masters, County Registrars and support to judiciary

Subject to constitutional considerations, DSBA recommends that the Working Group actively consider the role that Deputy Judges/ Masters can play in the efficient delivery of court services.

In that regard, an examination of the position of Recorder in the England and Wales jurisdiction may be instructive. The position of Recorder was created in 1971⁵. The position is subject to a recommendation to the Queen by the Lord Chancellor after an open competition run by the Judicial Appointments Commission⁶. The Recorder sits as a Judge for 30 days per year. The appointment is for 5 years after which an extension can be provided. Recorders preside over case management, pre-trial matters and can determine cases at County Court and Crown Court level. The position of Recorder provides the practitioner with judicial experience and can act as a low cost graft of additional temporary judicial resources to deal with backlog and pre-trial matters.

Additional resources for County Registrars

The Dublin Circuit is the busiest in the country as would be expected, due to pressure of population and has to deal with a huge volume of work. Of particular concern to the DSBA is the current delays experienced in getting pre-trial matters heard [that is, Motions for Judgment by Default of Appearance/Defence, Motions for Discovery]. Feedback from members indicates that there are wait times of between 11 months and 15 months for new motions. This has the effect of significantly delaying resolution of even routine cases, since they cannot advance where such matters are pending.

DSBA urges that the Working Group considers the appointment of additional staff or Deputy County Registrar(s) for Dublin to assist with the very significant backlog that has built up over the last 18 months and the anticipated increased volumes of post-pandemic litigation.

Court Listing and Resources

DSBA is of the view that creativity and innovation in Court listing can play a useful role into the future in terms of the efficient disposal of cases. For example, during the height of the

⁵ Section 21, Courts Act 1971

⁶ See <https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/judges/recorder/>

Covid-19 restrictions, certain trials and motions were heard via video link. The DSBA welcomes this innovation and is of the view that it works particularly well for straightforward procedural matters [e.g. paper based Motions where no *viva voce* evidence is required].

In respect of court listing, specific time slots allocated to cases are particularly welcome to litigants and practitioners, especially where there are few waiting areas in any of the Dublin Courts. The allocation of a specific time listed must lead to reduced costs for litigants in that the practitioner is only required to be available during that specific time. By way of illustration, prior to the introduction of these time slots, there may have been a call-over at 10.00 a.m., in say, the Circuit Court, but the case/motion might not get on for hearing till 2.00 p.m. In the meantime, given that the case could be called at any minute, the practitioner and the litigant could not leave the vicinity of the Court. Time slot arrangements have also worked well in the appeal Courts.

Admittedly, the historic way the list system worked may have had advantages in terms of the use of the Court's time – that is, there was constantly cases before it and the time specific listing may mean some down time for courts in the course of the day where cases do not proceed. That said, the introduction of a small amount of slack into the system would mean that Courts would have capacity where required for cases to run over or to hear emergency matters. Over-listing of cases does not necessarily lead to further efficiencies and may well put Judges, Registrars and Court staff under much pressure.

Other changes, such as the closure of the Central Office public counter have been highly stressful and challenging for DSBA members and should be discontinued as soon as is possible.

Covid-19 restrictions and the effect on the courts

The DSBA anticipates that the volume and complexity of litigation will increase significantly as society emerges from the Covid-19 pandemic. This will inevitably impact on the ability of the Judiciary to deliver the efficient administration of Justice. Furthermore, the Circuit and District courts will likely also experience an increase in the volume of their workload when the Personal Injury Guidelines are implemented.

Legal Aid and Personal Litigants

Access to justice is an important issue particularly in light of the complex Court environment which has developed since the turn of the century. By way of illustration in 2001 the Circuit Court Rules comprised 211 pages – they now run to over 2,000 pages.

Civil Legal Aid is currently unavailable to those with a disposable income of more than €18,000 per annum. This is in circumstances where the average industrial wage is €44,096⁷ per annum. Speaking at an event to mark the 40th anniversary of the Legal Aid Board on 23rd January 2020, the Chief Justice stated “*Since litigation is becoming more complex, the rights of individuals may not be fully vindicated due to a lack of civil legal aid.*”. The Chief Justice went on to say that he expected that litigation in the near future would become more complex.

The complexity of litigation, it follows, places a larger burden on litigants thereby increasing costs. Consequently, this puts private representation beyond the means of many parties

⁷ See CSO Earnings and Labour Costs www.cso.ie/en/statistics/earnings/earningsandlabourcosts

meaning that they will act *pro se*. As the Chief Justice noted at this event, litigation is more efficient when both parties are properly represented. It follows therefore that an increase in litigants in person will lead to an increase in the time required for cases by Courts staff and Judges.

Of particular concern to DSBA is the anticipated increase in Personal Injury cases heard at District Court level due to the introduction of the Personal Injury guidelines. The current level of scale costs at the District Court (unchanged since 2014) mean that for many solicitors Plaintiff personal injury work is not economically sustainable at that level. Accordingly, it may fall to many litigants in person to pursue their own case. This may lead to parties not doing their own case justice in circumstances where the proofs and procedural requirement for personal injury matters are complex.

A practical way of dealing with these matters might be for the Civil Legal Aid Scheme to be extended to personal injury plaintiffs and for the means test for Civil Legal Aid to be increased.

Facilitating Alternative Dispute Resolution

Alternative Dispute Resolution [‘ADR’] including mediation, arbitration and conciliation can prove a quicker and cheaper alternative to litigation. It follows that if more cases were resolved by ADR that this would reduce the burden on the Courts, Judges and Courts staff.

While Courts are free at the point of use to Court Users, [i.e., litigants are not charged for the Courtroom or for the time of the Courts staff or Judges] with ADR room hire is a consideration. This can be a barrier to parties taking up ADR solutions.

Accordingly, if space were made available through the Courts Service (in the way that mediation is facilitated for family law matters in Dolphin House) then the cost of the room hire would not be a barrier to mediation. Furthermore, the use of ADR as a method of dispute resolution would gain traction, in turn reducing the volume of litigation ultimately coming before the courts.

Delays in Criminal Cases

Defendants in all Courts experience lengthy delays in taking a date for hearing. At District and Circuit Court levels delays prior to the introduction of Covid-19 restrictions were more than a year. The delays in the Central Criminal Court are particularly lengthy and prior to Covid-19 restrictions delays of 1.5 to 2 years were quite common. The additional delays caused by Covid-19 restrictions have added a year to those wait times.

Consequently, DSBA believe that additional judicial resources including judges, courts staff and courtrooms are required to deal with these delays in taking a date for hearing. The delays are most unfair on Defendants on remand and on the victims of crime.

CONCLUSION

As a stakeholder organisation, DSBA welcomes the opportunity to make a submission to the Working Group. DSBA considers that the number and types of Judges required to ensure the efficient administration of justice over the next five years needs to be carefully considered in the context of the unique post Covid-19 challenges that all Courts users will face. DSBA would

welcome the opportunity to engage further with the Working Group to expand upon the themes outlined above and to play its part in developing an efficient system for the coming years.

End of submission.