

# ICCL Submission to the Judicial Planning Working Group

12 November 2021

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## **Introduction**

ICCL welcomes the opportunity to make a submission to the Judicial Planning Working Group.<sup>1</sup> The right to an independent and impartial judiciary is a fundamental part of the right to a fair trial. The independence of our judiciary is generally well protected but international standards require a broader focus on the way justice is delivered to ensure independence and impartiality are both actually protected and are seen to be protected.

This submission focuses on point 3 of the Open Consultation Invitation and addresses the international and regional standards regarding judicial training and education in detail. We make recommendations on how the Irish judiciary can align with international best practice standards on training and education, in part drawing on an expert seminar we convened earlier this year. On point 1, we address the number and type of judges required in Ireland, emphasising the need to increase the number of judges in our criminal courts. In response to point 2, we draw on ICCL's work during the Covid-19 pandemic on the need to always safeguard access to justice and on the need to take measures to address the backlog of cases stemming from the restrictions on hearings during the pandemic. We address point 4 in relation to case management with a particular focus on the limits of remote hearings.

### **1. Number and Type of Judges Required in Ireland**

While the number of judges in Ireland has increased significantly since the foundation of the State,<sup>2</sup> it is now entirely inadequate. Studies carried out by the European Commission have consistently indicated that Ireland has the lowest level of judges per 100,000 population compared with other European states.<sup>3</sup> In the most recent 2021 Rule of Law Report from the European Commission, Ireland is criticised as having the lowest number of judges per inhabitant in the EU, and it is

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<sup>1</sup> This submission was written by Dr Rónán Kennedy (NUI Galway), Dr Laura Cahillane (University of Limerick) and Doireann Ansbro (ICCL).

<sup>2</sup> Raymond Byrne, Paul McCutcheon, Laura Cahillane, Emma Roche-Cagney, *Byrne and McCutcheon on the Irish Legal System* (Bloomsbury Professional, 2021), 164.

<sup>3</sup> European Commission for the Efficiency of Justice, 'European Judicial Systems Edition 2008 (date 2006): Efficiency and Quality of Justice' (Council of Europe, 2008), 255.

noted that this 'could also affect the efficiency of the Irish justice system.'<sup>4</sup>

The Report notes that the Government has committed to review the numbers and types of judges needed to ensure the efficient administration of justice over the next five years, and references the Department of Justice Plan 2021, but states that more immediate measures are necessary. The Report also points to the fact that the budget for justice, as a percentage of GDP has stagnated in recent years and remained below EU average.<sup>5</sup>

In the latest data available, Ireland only has 3.3 judges per 100,000 inhabitants when the average is 17.7.<sup>6</sup> In fact the recent 2021 EU Justice Scoreboard shows just how far Ireland is lagging behind given that 12 out of the 27 countries surveyed have over 25 judges per 100,000 inhabitants.<sup>7</sup> This has led to lengthy delays, with some serious criminal cases unable to go to hearing, and significant dissatisfaction from legal practitioners.<sup>8</sup> As well as delays, it is clear that the low numbers of judges is causing unnecessary distress for court users and also for judges who are struggling with demanding caseloads.<sup>9</sup> The low numbers of judges in Ireland has led to repeated requests from senior judges to government in recent years to increase judicial numbers generally.<sup>10</sup> The ICCL highlighted the issues concerning the ratio of judges to population in its 2007 report, *Justice Matters: Independence, Accountability and the Irish Judiciary*<sup>11</sup> and we now underline again the urgent need to appoint more judges at all levels, and particularly to the criminal courts.

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<sup>4</sup> European Commission (2021), Rule of Law report. Country Chapter for Ireland (Brussels, 20.7.2021, SWD(2021) 715 final) available at:

[https://ec.europa.eu/info/sites/default/files/2021\\_rolr\\_country\\_chapter\\_ireland\\_en.pdf](https://ec.europa.eu/info/sites/default/files/2021_rolr_country_chapter_ireland_en.pdf).

<sup>5</sup> European Commission (2021), Rule of Law report. Country Chapter for Ireland, 6. See also Figure 30, 2021 EU Justice Scoreboard, available at:

[https://ec.europa.eu/info/sites/default/files/eu\\_justice\\_scoreboard\\_2021.pdf](https://ec.europa.eu/info/sites/default/files/eu_justice_scoreboard_2021.pdf).

<sup>6</sup> European Commission for the Efficiency of Justice, 'European Judicial Systems Edition 2020: Efficiency and Quality of Justice' (Council of Europe, 2018).

<sup>7</sup> Figure 32, 2021 EU Justice Scoreboard, available at :

[https://ec.europa.eu/info/sites/default/files/eu\\_justice\\_scoreboard\\_2021.pdf](https://ec.europa.eu/info/sites/default/files/eu_justice_scoreboard_2021.pdf).

<sup>8</sup> Mary Carolan, 'Frustration mounts over court delays as more judges sought', *Irish Times*, 12 November 2021.

<sup>9</sup> See Orla Ryan, 'Ireland's judges are struggling to 'maintain services to which people have a right''. *The Journal.ie*, 6 October 2014.

<sup>10</sup> See for example, Chief Justice Frank Clarke, Statement marking new legal year, October 2019, Shane Phelan, 'It's the small person who bears the brunt' - High Court president launches attack on government over court backlogs', *Irish Independent*, 12 July 2021.

<sup>11</sup> Irish Council for Civil Liberties, *Justice Matters: Independence, Accountability and the Irish Judiciary* (ICCL, 2007), 92.

## 2. Impact of the Covid-19 Pandemic, Demographic Changes, and Implications of Brexit

In March 2020, the Courts Service announced that the courts would temporarily suspend all business after the Irish Government announced that the country would enter a period of temporary restrictions on gatherings, events and movement.<sup>12</sup> Initially, only emergency applications were heard by the Courts but contingency plans were established which have been reviewed periodically. The Supreme Court and Court of Appeal operated remotely since 20 April 2020 and have been the least affected by the country-wide shut down.<sup>13</sup>

The Criminal Courts placed different limits on what cases could be heard at different times during the pandemic. This resulted in lengthy delays and a backlog of cases.<sup>14</sup> Initially, only applications which were urgent, such as new arrests, domestic violence matters and those involving persons in custody, could be heard in the District Court. This expanded over time and the District Court for a period of time only heard matters which exclusively involved State witnesses, i.e. road traffic or public order matters where the only witnesses are Gardaí, or those involving domestic violence, with other matters being automatically put back to a date in the future.<sup>15</sup>

Restrictions on Court hearings has meant there is a massive backlog of cases. Many trials due to be heard in 2021 have been listed for summer of 2023.<sup>16</sup> This means that accused persons must now wait for a significant period of time before they can expect to be tried. Aside from the difficulties that can be faced in trying matters a number of years after they have occurred, accused persons may also opt to enter a guilty plea simply to get matters over with. ICCL recommends that additional judges be allocated to the criminal courts to deal with the growing backlog of cases.

Other matters, such as sentencing and arraignments, have proceeded and staggered lists have been introduced to attempt to adhere to COVID-19 guidelines.

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<sup>12</sup> See [Courts Service announcement](#), dated 13 March 2020.

<sup>13</sup> Courts Service, "[Virtual Remote Courts Piloted in Ireland this morning](#)", 20 April 2020.

<sup>14</sup> [Jury trials may resume by end of March as backlog extends to two years](#), *Irish Times*, 25 February 2021.

<sup>15</sup> [New Measures in the District Court 7th Jan to 1st Mar 2021](#), 6 January 2021.

<sup>16</sup> See reference to backlog in [Almost 5,000 facing court prosecution for non-payment of Covid-19 fines](#), *Irish Times*, 2 April 2021.

Staggered lists means that cases are given a 10-15-minute time slot in which they are allocated to be heard. This is a positive development and should be retained beyond the pandemic. We note that the Courts Services in their latest announcement has announced this will be continued for the time being.<sup>17</sup>

ICCL would underline the importance of retaining access to the Courts to the greatest degree possible. Resources must be devoted to ensuring public health guidelines, such as mask wearing and social distancing, are implemented to facilitate wider access to Courts in person. Where cases are being limited, we would stress the need to prioritise access for at-risk individuals. We note that retaining access to the courts for domestic violence victims was positive and we consider proposals to expand remote hearings for domestic violence victims seeking protection orders is positive.<sup>18</sup>

One of the main challenges for the criminal courts during the pandemic was the requirement for jury trials. It is the constitutional right of all accused persons to be tried by a jury of their peers<sup>19</sup>. The Courts have continuously struggled to balance adherence with COVID-19 guidelines and regulations with the right of accused persons to be tried without delay by a jury. In the Circuit Court and the Central Criminal Court, jury trials were suspended for months at a time.<sup>20</sup>

Jury trials in all courts resumed on 12 April 2021, however, due to limited spaces suited to holding socially distanced trials as well as the significant backlog of cases, progress has been slow in tackling the backlog. A number of steps have been taken by the Courts Service to attempt to tackle these challenges, such as securing alternative venues.<sup>21</sup> ICCL recommends that the Courts Service continue to seek out potential venues which can be allocated to the hearing of criminal trials safely. ICCL

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<sup>17</sup> [Courts Service - Covid-19 - Notice for Michaelmas Term 2021 | The Courts Service of Ireland](#)

<sup>18</sup> See for example, Conor Gallagher, '[Domestic abuse victims to be allowed seek barring orders remotely](#)' The Irish Times, 28 December 2020.

<sup>19</sup> Article 38.5 of the Irish Constitution.

<sup>20</sup> See various Courts Service announcements such as <https://www.courts.ie/news/covid-19-position-criminal-courts-justice-friday-13th-march>; <https://courts.ie/news/circuit-court-notice-court-business-during-level-5-restrictions>; <https://www.courts.ie/news/notice-circuit-court-criminal-jury-trials-will-recommence-12th-april>.

<sup>21</sup> 'Courts Service to use Croke Park to hear criminal trials', *RTE News*, 14 April 2021; Supreme Court relocates to dining hall to hear appeal, *RTE News*, 22 June 2020; '[Peace Activists Colm Roddy and Dave Donnellan on Trial - Report from Days 1 & 2 in Court](#)', Shannonwatch.

considers jury trials should be maintained as far as possible with appropriate resources and facilities provided to the Courts to ensure public health guidelines, including social distancing, can be maintained. We note that the empanelment of juries is still taking place in alternative venues.<sup>22</sup>

*Possibility of remote hearings:* In December 2020, a new law was passed allowing for persons in custody to “attend court” via videolink.<sup>23</sup> ICCL considers that jury trials can be protected by invoking additional safeguards such as staggered witness times and the use of videolink. Witnesses can be sufficiently staggered to ensure that the number of persons in Court remains at an appropriate level, as is currently occurring.

Legislation could be considered in future such situations to allow jurors to hear matters via videolink from socially distanced and safe venues. This would assist with the current backlog and reduce waiting times for matters to get on for hearing.

Finally, as explored in more detail below, although videolink has been introduced as a partial solution to the issue of in-person hearings, remote hearings cannot be invoked in the same widespread manner for criminal trials as for civil law. This was recognised by now retired Chief Justice Clarke in a Statement on the 8 May 2020 where he stated: “*The presidents have always made clear that there are many types of cases for which remote hearings are not suitable. That continues to be the case*”.<sup>24</sup>

### **3. Development of Judicial Skills**

*Recommendations from International Experts:*

The Irish Council for Civil Liberties recently co-organised a seminar on judicial education and training in collaboration with Dr Laura Cahillane of the University of Limerick and Dr Rónán Kennedy of the National University of Ireland Galway. The international expert speakers at that event made wide-ranging contributions on the development of judicial skills in Ireland,<sup>25</sup> and

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<sup>22</sup> [Courts Service - Covid-19 - Notice for Michaelmas Term 2021 | The Courts Service of Ireland](#)

<sup>23</sup> Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020, s. 23(3), (14).

<sup>24</sup> [General Statement of the Chief Justice](#), 8 May 2020.

<sup>25</sup> Some of the presentations from this event are archived at:

[https://www.youtube.com/watch?v=PPfWaVnqyUk&list=PLYow\\_lero6Plvf9St5ZwHsfNmeBfgiHyh](https://www.youtube.com/watch?v=PPfWaVnqyUk&list=PLYow_lero6Plvf9St5ZwHsfNmeBfgiHyh)

highlighted that international best practice now requires that training programmes include material on

- interpersonal and communications skills, including the use of clear and plain language;
- the broader social context;
- unconscious bias and diversity for judges; and
- the issues raised by vulnerable witnesses,<sup>26</sup> which has already been identified as a priority by the new statutory Judicial Studies Committee.

Speakers also underlined that it is important that the government, in its role in resource allocation, should ensure there is

- sufficient time available for judges to attend training courses, by appointing an adequate number to the bench; and
- adequate financial resources for the Judicial Council to staff its training function and to engage external experts as necessary.

These issues will be expanded on further in a report which the ICCL will publish in the coming months.

### *International Best Practice*

The Irish Council for Civil Liberties would underline the importance of the judicial training principles agreed by the European Judicial Training Network (EJTN) and the International Organisation for Judicial Training (IOJT), which are worth considering in full.

### **European Judicial Training Network Judicial Training Principles**

1. Judicial training is a multidisciplinary and practical type of training, essentially intended for the transmission of professional techniques and values complementary to legal education.
2. All judges and prosecutors should receive initial training before or on their appointment.

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<sup>26</sup> See Department of Justice, *Review of the Protections for Vulnerable Witnesses* (2020).



3. All judges and prosecutors should have the right to regular continuous training after appointment and throughout their careers and it is their responsibility to undertake it. Every Member State should put in place systems that ensure judges and prosecutors are able to exercise this right and responsibility.
4. Training is part of the normal working life of a judge and a prosecutor. All judges and prosecutors should have time to undertake training as part of the normal working time, unless it exceptionally jeopardises the service of justice.
5. In accordance with the principles of judicial independence the design, content and delivery of judicial training are exclusively for national institutions responsible for judicial training to determine.
6. Training should primarily be delivered by judges and prosecutors who have been previously trained for this purpose.
7. Active and modern educational techniques should be given primacy in judicial training.
8. Member States should provide national institutions responsible for judicial training with sufficient funding and other resources to achieve their aims and objectives.
9. The highest judicial authorities should support judicial training.

### **International Organisation for Judicial Training Principles**

1. Judicial training is essential to ensure high standards of competence and performance. Judicial training is fundamental to judicial independence, the rule of law, and the protection of the rights of all people.

#### **INSTITUTIONAL FRAMEWORK**

2. To preserve judicial independence, the judiciary and judicial training institutions should be responsible for the design, content, and delivery of judicial training.
3. Judicial leaders and the senior judiciary should support judicial training.
4. All states should:

(i) Provide their institutions responsible for judicial training with sufficient funding and other resources to achieve their aims and objectives;

and

(ii) Establish systems to ensure that all members of the judiciary are enabled to undertake training.

5. Any support provided to judicial training should be utilized in accordance with these principles, and in coordination with institutions responsible for judicial training.

#### TRAINING AS PART OF THE JUDICIAL ROLE

6. It is the right and the responsibility of all members of the judiciary to undertake training. Each member of the judiciary should have time to be involved in training as part of their judicial work.

7. All members of the judiciary should receive training before or upon their appointment, and should also receive regular training throughout their careers.

#### TRAINING CONTENT AND METHODOLOGY

8. Acknowledging the complexity of the judicial role, judicial training should be multidisciplinary and include training in law, non-legal knowledge, skills, social context, values and ethics.

9. Training should be judge-led and delivered primarily by members of the judiciary who have been trained for this purpose. Training delivery may involve non-judicial experts where appropriate.

10. Judicial training should reflect best practices in professional and adult training program design. It should employ a wide range of up-to-date methodologies.

#### *The Importance of 'Judgecraft'*

The literature on JET indicates that the focus has shifted away from enhancing substantive legal knowledge to the development of judicial skills, which are

seen as a key professional competence for judges.<sup>27</sup> The IOJT recognise this in principle eight of its Declaration of Judicial Training Principles. In support of this principle, the IOJT rely on the Bangalore Principles of Judicial Conduct, which necessitate JET programmes that address non-legal knowledge, skills, social context and values and ethics in addition to substantive law. Such training will allow the judiciary to conduct their work in an effective, efficient, and fair manner.<sup>28</sup> The EJTN Handbook on Judicial Training Methodology in Europe echoes this same point and highlights the importance of education and training on what is now called 'judgecraft'.<sup>29</sup>

### *The Importance of the Social Context*

In Principle 8, the IOJT recommends judicial training bodies provide social context training.<sup>30</sup> This has become very common internationally and generally addresses issues such as gender, race, age and disability discrimination within the legal process.<sup>31</sup> This training has the potential to equip the judiciary with the knowledge and skills necessary to develop 'an appreciation of the human condition and the society within which judges operate.'<sup>32</sup> Judicial training in Ireland should include material on the social context in a multidisciplinary framework that provides the judiciary with a safe space to challenge their values, opinions, preconceptions, and prejudices. This will ensure that judges administer justice fairly.<sup>33</sup>

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<sup>27</sup> Richard Reaves, 'Continuing Education for Judges' (2016) 5 Judicial Education and Training 29, 29.

<sup>28</sup> International Organisation for Judicial Training Principles, 'Declaration of Judicial Training Principles' 4.

<sup>29</sup> European Judicial Training Network, 'Handbook on Judicial Training Methodology in Europe' (2016) 18 <[http://www.ejtn.eu/MRDDocuments/EJTN\\_JTM\\_Handbook\\_2016\\_EN.pdf](http://www.ejtn.eu/MRDDocuments/EJTN_JTM_Handbook_2016_EN.pdf)> accessed 22 October 2021.

<sup>30</sup> Principle 8 of the International Organisation for Judicial Training Principles, 'Declaration of Judicial Training Principles' 2.

<sup>31</sup> Cheryl Thomas, 'Review of Judicial Training and Education in Other Jurisdictions' (Judicial Studies Board 2006) 59.

<sup>32</sup> International Organisation for Judicial Training Principles, 'Declaration of Judicial Training Principles' 10.

<sup>33</sup> International Organisation for Judicial Training Principles, 'Declaration of Judicial Training Principles' 10.

#### **4. Enhanced Digital Technology**

Enhanced digital technology does provide opportunities to better meet additional service demands, improve services, and provide access to justice. In the context of judicial planning, for example, the electronic filing of documents to the courts may save time and money. However, it should be noted that efforts to move to electronic conveyancing in Ireland have not yet succeeded, indicating that large information technology projects can be risky and those with systemic consequences should be approached with caution. In addition, the widespread use of technology may exclude those without technological skills or access to broadband, thereby worsening the 'digital divide' and also creating a new 'algorithmic divide'.

Remote hearings have become more widespread in many countries, and came to the fore in an urgent fashion as part of the response to the COVID-19 pandemic. They can work well in very limited context, such as routine and brief hearings, particularly in civil matters. However, they are generally not appropriate for criminal matters, and generally may be unfair to individuals who struggle to understand what is happening and cannot engage properly with their lawyers.

Remote hearings severely impact a person's ability to engage with their legal team during the course of hearings. In the criminal setting, they severely impede the ability of legal counsel to engage with their clients in a meaningful manner, detrimentally impacting the ability to build trust, an essential component in the counsel-client relationship. Remote hearings are also less engaging and are susceptible to IT issues such as time lags, poor or broken connection and poor sound quality. Although a potentially more cost-effective manner of dealing with hearings, a person's right to access to justice should not be sacrificed for the sake of saving costs.

Remote hearings also severely impact victims' rights. A victim's right to participate in proceedings as guaranteed under the Victims Act is very difficult to uphold in a remote hearing. It is challenging for a victim or indeed

the general public to follow a hearing online where simple things like who is who in the courtroom are not apparent.

These concerns are borne out by research in other jurisdictions. Research in England and Wales found that almost three-quarters of lawyers were happy with their experience of remote hearings but noted that:

*the majority of [lawyer] respondents felt that remote hearings were worse than hearings in person overall and less effective in terms of facilitating participation - a critical component of procedural justice. Respondents also found remote hearings to be more tiring to participate in than physical hearings, particularly those that proceeded by video. Findings also suggest that remote hearings may not necessarily be cheaper to participate in, which may be counter to assumptions about relative costs being lower.<sup>34</sup>*

Research on the use of remote of remote hearings in the family law courts in England and Wales raised similar issues:

*[s]ignificant concerns were raised about the fairness of remote hearings in certain cases and circumstances, and there were some worrying descriptions of the way some cases had been conducted to date. These concerns chiefly related to cases where not having face-to-face contact made it difficult to read reactions and communicate in a humane and sensitive way, the difficulty of ensuring a party's full participation in a remote hearing, and issues of confidentiality and privacy. Specific concerns were commonly raised in relation to specific groups: such as parties in cases involving domestic abuse, parties with a disability or cognitive impairment or where an intermediary or interpreter is required.<sup>35</sup>*

Experience in the Northern Ireland family law courts was similar:

*remote hearings are better than not having any hearings but are not yet able to deliver access to justice. The indicators of access to justice that are relevant to this survey - fairness, participation, accessibility, inclusion, timeliness - are not evident in the experiences of our respondents and the administration of justice is seen as being let down by the technology in the court system.<sup>36</sup>*

It is also questionable to what extent remote hearings, which require access to technology and prior knowledge of how to login and observe a court in session, comply with the requirement in Article 34.1 of the Constitution that

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<sup>34</sup> Natalie Byrom, Sarah Beardon, and Abby Kendrick, *The Impact of Covid-19 Measures on the Civil Justice System* (Civil Justice Council, 2020), 8-9.

<sup>35</sup> Mary Ryan, Lisa Harker, and Sarah Rothera, *Remote Hearings in the Family Justice System: A Rapid Consultation* (Nuffield Family Justice Observatory, 2020), 1.

<sup>36</sup> Gráinne McKeever and others, *The Impact of Covid-19 on Family Courts in Northern Ireland* (Ulster University 2020), 5.

'justice ... shall be administered in public.' The transparency which this envisages should not depend on whether an individual has a computer, broadband, or a link circulated in advance. Unless a hearing is not open to the public for a lawful reason, it should be possible for anyone to watch any court sitting without notice and without incurring additional expense.



## About ICCL

**The Irish Council for Civil Liberties** (ICCL) is Ireland's oldest independent human rights body. It has been at the forefront of every major rights advance in Irish society for over 40 years. ICCL helped legalise homosexuality, divorce, and contraception. We drove police reform, defending suspects' rights during dark times. In recent years, we led successful campaigns for marriage equality and reproductive rights.