

SUBMISSION
BY THE JUDICIAL COUNCIL TO
THE JUDICIAL PLANNING WORKING GROUP

26th July 2021

The Judicial Council welcomes this opportunity to make a submission to the Judicial Planning Working Group.

The Judicial Council in Ireland was established in December 2019. Its members are all of the judges in Ireland and its functions are supported by a small administrative team. The Council has a wide range of functions, set out in Appendix 1, which may be summarised as to promote and maintain public confidence in the judiciary and the administration of justice and to deliver judicial excellence and high standards of judicial conduct. While the Working Group's Draft Terms of Reference do not specifically reference the Judicial Council as impacting upon judicial numbers, this is undoubtedly the position.

The Judicial Council is a hugely positive development for Ireland. Key within those functions under the Judicial Council Act 2019 is provision for the first time, on a statutory footing, of both a formal structure for the professional learning and development needs of judges and a mechanism for dealing with and investigating complaints in respect of judicial conduct. In addition the Council is charged with producing personal injuries guidelines and sentencing guidelines and information, both key to consistency and transparency in judicial decision making. Various support functions are also provided for. The breadth of the functions and requirements created by the Oireachtas in passing the Act are such that the roles of the Council cannot be delivered within the existing judicial resources. It is important to point out that no additional judge was appointed in the context of the commitments of the Council. It is also of importance to say that the goals of the Act can only be realised by greater time commitments provided by judges and that can only be achieved if they are supported in being released from their court-based assignments.

As the Council is an independent public body, this submission is made from a Judicial Council resourcing perspective only. It is in isolation from other submissions to be prepared by individual jurisdictions in relation to court sittings or any other demands on judicial time. Data prepared in the context of other components of the work being undertaken by judges for the Working Group, such as timesheets, may overlap or indeed provide a better insight into the efforts of any judge to participate in training or time spent on Council work.

Of the approximately 166 judges in Ireland 48 have designated roles on the Board and Committees of the Council. The Act also envisages the creation of other committees as and when required to deliver upon the Council's objectives which will inevitably increase over time. The Chief Justice and four Presidents in particular have acquired multiple roles since the advent of the Council, as board members and as members of at least three committees each. Every other Board member has at least one other responsibility as part of the Council's structures.

It is therefore the case that this new body presents a significant opportunity for the judiciary but at the cost of significant judicial input. The requirement to assign judges to these roles is, in the main, founded in the Act and not discretionary. Simply put, preparation for and

attendance at Council meetings and training courses is onerous for many and in the absence of the appropriate support for those judges' court responsibilities, there will be a direct impact on the administration of justice. This submission attempts to place a figure upon the number of judges required, which is based on the experience to date and most likely future developments.

This time commitment comes broadly under four particularly onerous areas, in that judges are required to;

1. Train and be trained within the learning and development function;
2. Oversee and participate in the judicial conduct and complaints area;
3. Manage the Personal Injuries and Sentencing Committees' functions;
4. Contribute to the Council's management and governance obligations.

Further detail in relation to each of the foregoing follows.

Judicial Training

The Judicial Studies Committee oversees the delivery of this function. In that regard it adheres to best practice laid down by international judicial training and oversight bodies. It will also adhere to best practice having regard to professional development. Ongoing professional learning and development both within and outside the public sector is considered an essential component in the delivery of excellence. The function is by reason of the requirement for judge-driven training, managed on a day to day basis by a High Court Judge spending 50% of her time dedicated to this area. This is therefore a resource issue, currently for the High Court. Despite this 50% commitment there is a constant tension between maintaining it and the regular demands which present to have all judges available to meet the High Court's demands and even early indications lead to a firm belief that a fulltime judge is required in this role.

It hardly needs to be stated that delivery of a meaningful training offering requires participants to be actually available to attend courses. It is also the case that professional learning and development forms a part of a professional's role and mostly carried out during the working day rather than during personal time. While judicial training is already at unprecedented levels in Ireland, during this development phase of the training offering, courses have been developed and tailored in a manner which mostly fit in around the availability of judges having regard to the court sitting day, typically commencing at 4.30 p.m.

As regards the future, professional development of a meaningful nature will require half day, full day and longer attendance at courses and seminars, including outside Ireland. In

that regard the European Judicial Training Network has unsurprisingly acknowledged in its Judicial Training Principles that judicial training should be provided for judges by judges, should take place prior to appointment and on an ongoing basis, and be included as part of the working day (those Principles are set out in Appendix 2 and nos. 2 – 5 are of most relevance to these points). It is important to note that those principles were adopted by the European Network of Councils for the Judiciary.

It is envisaged that the Judicial Studies Committee will from Quarter 3 of 2022 be requesting the Presidents of the jurisdictions to include in their court schedules the absences of judges who are attending training. While the number of training days per annum varies from country to country, the Scottish model is most comparable to Ireland and is also an example of an excellent training function. All judges in Scotland are expected to complete 5 days of training per annum and to replicate this model in Ireland all Presidents will require additional resources to manage this.

Added to ongoing training, it is a requirement that newly appointed judges receive induction training prior to sitting for a minimum of 5 days. A further resourcing issue is that in addition to the Director, other judges delivering training modules or acting as mentors require to be trained as such and then released to deliver training. A key benefit is that judges in Ireland bring with them to the role upon appointment typically a minimum of 20 years, and regularly over 30 years, post qualification legal experience and skill. This sets them apart from other jurisdictions in the EU. That said, given the myriad of areas they may find themselves adjudicating, no judge comes fully equipped for all cases they encounter. Some skills can be learned outside the courtroom, but many decisions require to be made and difficult encounters managed in real time, sitting alone and in a public arena. It is therefore essential that the type of training required is delivered initially as a part of induction training.

It may be helpful to the Working Group to illustrate the demands by reference to two current courses, both of which originated external to the Judicial Studies Committee (rather than as a part of its own training plans).

1. The Judicial Conduct Committee has, in completing the Guidelines on judicial conduct and ethics, indicated that all judges must receive training in this area in advance of the judicial complaints function commencing. This has proven to be delivered most successfully in groups of no more than six judges. These courses take a half day and 130 judges remain to be trained.
2. It is noted that the “O’Malley Report” is referred to in the Group’s terms of reference at paragraph 7 (h). Its implementation was an objective of the Minister for Justice and the Council immediately adopted its judicial training recommendation as a priority.

To develop and deliver conduct and ethics training by judges to every judge (half day x 160) and O'Malley to 50% of judges (full day x 80), adding in the development time (equivalent of 30 days), will require 190 working days for what is the tip of the iceberg and which relates to training priorities which were not a part of the Judicial Studies Committee's training plans. It is also noted that the Working Group includes at paragraph 8 (White Collar crime) a further external recommendation, yet to be implemented.

Added to current training requirements, it is certainly the case that important developments into the future will require to be supported. The Courts Service modernisation programme will be dependent upon judges embracing new technology and new ways of working. There will be an impact on every judge in this context. Regardless of the success of designing and implementing a significant change programme, it will be a missed opportunity if judges are not trained to maximise the benefits of such a programme.

Based on an average of 5 days training x 165 judges, 5 days x 10 newly appointed (rather than promoted) judges per annum and availability of 5 judges x 10 days each to train colleagues = 925 days which amounts to 4 judges. In addition to the Director position, based on a fulltime requirement, the total number to compensate for training requirements = 5 judges.

Judicial Conduct & Complaints

The absence of any means of managing judicial misconduct (save under the Constitution) has long been seen as an issue for the Irish judiciary, particularly as regards accountability. The commencement of Part 5 of the Judicial Council Act 2019 over the coming months will address this issue. Save in respect of the role of the Secretary to the Council and the involvement of certain lay members, this process will be carried out by judges.

The Judicial Conduct Committee has eight judges within its membership. Furthermore, judges who are not Committee members will have roles in certain circumstances. There are three key resource implications arising from the judicial conduct regime which arise in implementing the requirements of Part 5 of the Act.

Firstly the Committee will, once the legal provisions are commenced following its extensive work in developing guidelines and procedures, require to meet to consider complaints deemed admissible and decide on the action which follows. It may also convene to act if it decides it appropriate in the absence of a complaint. A further role is that, upon the conclusion of an investigation, the Committee convenes to decide on the imposition of a sanction, or otherwise conclude a case, and will also receive submissions from the parties to a complaint. This will be a demand driven resource requirement which will involve the attendance of up to eight judges on each occasion. Therefore while perhaps only sitting once per month, the impact on removing eight judges from the system at any one time will

be significant and without adequate cover will impact on court lists and the administration of justice.

Secondly the Complaints Review Committee has a key and pivotal function in the process and will in the first three years, it is envisaged, be required to sit once per week to prepare for and consider cases and prepare decisions. This is an exposure of the same two fulltime judges from the Committee's membership on those days and further time for reading papers and writing decisions. It is absolutely essential that the members of this committee can meet regularly so as to ensure that backlogs and excessive waiting times for decisions do not develop.

Thirdly the Panels of Inquiry also require two judges in order to carry out the investigation of complaints. This will be approximately two-three days per complaint, though it is expected that the volume may be relatively small.

There are numerous other functions to be carried out which would amount to a drain on court sittings, including judges engaging with complainants to carry out the informal resolution process and of course the time required of a judge complained of to interact with the process.

In total, the complaints regime will require the equivalent of two full time judges.

Personal Injuries and Sentencing Committees Management

The Personal Injuries Guidelines Committee completed its initial work, widely considered to be of national importance, in producing the first iteration of the personal injuries guidelines. This project took one year to complete. The experience of that task was that there is an exceptionally heavy burden on the Committee's Chair as the subject matter expert, in leading the team of judges on the Committee and in working with the Council's administrative staff to oversee decisions and progress. Were much of the work not done outside working hours and at weekends, it is conservative to conclude that 16 weeks of fulltime attention was given by the Chair, without in any way including the essential but lower volume of work carried out by the other judicial members.

The Sentencing Guidelines and Information Committee has and is encountering a similar though greater burden. This other essential work will be a project lasting a number of years and again is of huge national importance, while the breadth of the work is even greater than that in respect of personal injuries guidelines. The reality here is that the Chair, together with her subcommittee chairs, require continuous periods of time free from courtroom assignments to give such an important undertaking the time and attention deserving. Aside from the time spent by the other judicial members in this area, it is envisaged that at least 18 weeks per annum free from any court work is required. Given that peaks and troughs will

arise, it is envisaged that these Committee Chairpersons together would manage with the equivalent of 0.5 judges to cover their unavailability to administer justice by reason of these additional workloads.

Judicial Council Boards and Committees

It is difficult to add up the multiple requirements across the Council's wide range of functions, though it is undoubtedly the case that the exposure of the Presidents of each jurisdiction and at least five other judges with multiple roles, the judges as committee members (and particularly the Chairpersons of each) would conservatively require one fulltime equivalent to cover their additional demands. For example, the Board (consisting of 11 judges) met 9 times in 2020 and the committees a total of 25 times in the last year (from 7 – 8 judges per committee). That equates to approximately 0.5 full time equivalent.

Conclusion

It is acknowledged that the calculation of judicial time is not a perfectly scientific process, and that many fractions of FTEs are involved. However, a reasonable view, having regard to the foregoing, results in a minimum of 8 judges being required at this time to facilitate judicial training and to compensate for the ongoing requirements of the Board, Committees and operation of the other key functions of the Council, as well as the external recommendations which may arise. For the purpose of this exercise, it is suggested that notionally the Court of Appeal be allocated one judge and the three courts below 2 judges each. It is conceivable that any impact on the Supreme Court may be managed by assistance from another Superior Court if required. Notionally 1 judge should be deployed to wherever the Director is recruited from.

None of the foregoing additional requirements have staffing or courtroom implications.

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26th July 2021

Appendix 1

Functions of Council

7. (1) The functions of the Council shall be to promote and maintain—

- (a) excellence in the exercise by judges of their judicial functions,
- (b) high standards of conduct among judges, having regard to the principles of judicial conduct requiring judges to uphold and exemplify judicial independence, impartiality, integrity, propriety (including the appearance of propriety), competence and diligence and to ensure equality of treatment to all persons before the courts,
- (c) the effective and efficient use of resources made available to judges for the purposes of the exercise of their functions,
- (d) continuing education of judges,
- (e) respect for the independence of the judiciary, and
- (f) public confidence in the judiciary and the administration of justice.

(2) Without prejudice to the generality of subsection (1), the Council shall—

- (a) review a proposal, report or recommendation submitted to it by the Board under section 11 (1)(c),
- (b) consider a matter referred to it by a committee under section 16 (5),
- (c) if appropriate, make decisions in relation to a proposal, report or recommendation referred to in paragraph (a) or a matter referred to in paragraph (b),
- (d) adopt and publish in such manner as it considers appropriate—
 - (i) guidelines concerning judicial conduct and ethics prepared and submitted to the Board by the Judicial Conduct Committee under section 43 (3)(d) with the modifications (if any) made by the Board under section 11 (1)(f), or
 - (ii) amendments to guidelines concerning judicial conduct and ethics so prepared and submitted under section 43 (3)(e) with the modifications (if any) made by the Board under section 11 (1)(f),as soon as practicable, and in any event not later than 12 months, after such submission,
- (e) develop and manage schemes for the education and training of judges,

(f) prepare and disseminate information and materials among judges for their use in the exercise of their functions,

(g) adopt—

(i) draft personal injuries guidelines prepared and submitted by the Personal Injuries Guidelines Committee to the Board under section 18 (2)(a) with the modifications (if any) made by the Board under section 11 (1)(d), or

(ii) any draft amendments to personal injuries guidelines prepared and submitted by that Committee to the Board under section 18 (2)(b) with the modifications (if any) made by the Board under section 11 (1)(d),

as soon as practicable, and in any event not later than 12 months, after such submission and publish the personal injuries guidelines and amendments in such manner as it considers appropriate as soon as practicable following such adoption,

(h) adopt and publish in such manner as it considers appropriate—

(i) sentencing guidelines prepared and submitted to the Board by the Sentencing Guidelines and Information Committee under section 23 (2)(a) with the modifications (if any) made by the Board under section 11 (1)(e), or

(ii) amendments to sentencing guidelines so prepared and submitted under section 23 (2)(b) with the modifications (if any) made by the Board under section 11 (1)(e),

as soon as practicable, and in any event not later than 12 months, after such submission,

(i) promote among judges, in such manner as it considers appropriate, an understanding of the principles governing the assessment and award of damages for personal injuries,

(j) subject to section 23 , promote an understanding of sentencing principles and practice among judges and persons other than judges in such manner as it considers appropriate,

(k) establish, maintain and improve communication with—

(i) bodies representing judges appointed to courts of places other than the State, and

(ii) international bodies representing judges,

and

(l) assist with the provision of support to judges generally.

Appendix 2

EJTN 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.
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.