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School of Law

Sutherland School of Law  
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12 November 2021

**Re: Submission to the Judicial Planning Working Group**

**To: Ms Brigid McManus  
Chair of the Judicial Planning Working Group**

Dear Ms McManus,

Please find enclosed our submission to the Judicial Planning Working Group's open consultation. If you require any further clarification in relation to any aspect of our submission please do not hesitate to contact us

Kind regards,

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# Submission to Working Group on Judicial Planning

## 1. Background Information

[Dr Niamh Howlin](#) and [Dr Mark Coen](#) are academics at the Sutherland School of Law at University College Dublin. They have collaborated on a number of research projects to date, focusing mainly on judges and juries in criminal trials.<sup>1</sup> They were the lead investigators on a project on judge-jury relations in Ireland,<sup>2</sup> collaborating with Dr Colette Barry and Mr John Lynch.

In 2020 they jointly published a report arising out of this project entitled *Judges and Juries in Ireland: An Empirical Study*. This study found that judges expressed a high level of confidence in the jury system but were critical of the treatment of jurors, in particular the absence of pre-trial hearings and jury expenses. It also revealed some inconsistency in judicial practice in certain areas, notably in relation to the giving of a warning to jurors about online activity. In 2021 Drs Howlin and Coen published an article in the *Irish Judicial Studies Journal* arising from the same research.<sup>3</sup> This focused on the major findings of the research, namely judicial respect for jurors, judicial proposals for reform of criminal jury trials and judicial attitudes to the conduct of academic empirical research with former jurors.

Howlin and Coen's current research focuses on the development of judicial education and training in Ireland. Using data from the *Judges and Juries* project, they have made a number of findings in relation to the pre-2019 availability of judicial education, which informs their opinions as to the future direction of such education.

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<sup>1</sup> This includes Publications, eg N. Howlin and M. Coen, 'The jury speaks: Jury riders in the nineteenth and twentieth centuries' (2018) 58(4) *American Journal of Legal History* 505-534; Conference Presentations (e.g. the North-South Criminology Conference 2018; the Society of Legal Scholars Annual Conference 2017; the British Legal History Conference 2017) and Teaching (Jury Trials module at UCD).

<sup>2</sup> M. Coen, N. Howlin, C. Barry and J. Lynch, *Judges and Juries in Ireland: An Empirical Study* (UCD February 2020).

<sup>3</sup> M. Coen, N. Howlin, C. Barry, J. Lynch, 'Respect, Reform And Research: An Empirical Insight into Judge-Jury Relations' (2020) 4(1) *Irish Judicial Studies Journal* 116-133.

## 2. Submission

Our submission relates to two of the themes being examined by the Working Group:

- The development of judicial skills.
- The number and type of judges required in Ireland in the next five years, and longer term to ensure the efficient administration of justice.

### 2.a. The development of judicial skills

#### 2.a.i. Our Methodology

In this submission we draw on data from a qualitative study of judge-jury interactions in Ireland. This research aimed to examine judicial and legal practitioner perspectives on how judges preside over criminal jury trials and their approaches to interacting with jurors. We conducted semi-structured interviews with 33 participants: 22 judges and 11 barristers. The discussion in this article is solely based on the data from the 22 judge participants, who were drawn from the Central and Circuit Criminal Courts of Ireland. Interviews with judge participants were held throughout Ireland between June 2017 and May 2018.

We recruited judge participants based on purposive sampling. Experience of presiding over criminal jury trials was the single criterion for inclusion in the study. Participation was open to both currently serving and retired judges. Invitations to participate were sent to 47 current or former Central and Circuit Criminal Court judges throughout Ireland. We received responses from 26 judges and 22 participated in an interview. The sample of 22 judges comprises 16 men and six women. Length of service ranged from one year to 31 years, and four participants were retired at the time of their interview. The sample includes 12 judges with experience of jury trials in the Central Criminal Court and ten judges from Circuit Criminal Court. All participants had experience of presiding over criminal jury trials, but this experience varied across the cohort. Five participants had presided over fewer than 20 criminal jury trials, three participants reported more than 20 but less than 50, three participants had done between 50 and 100 trials, and ten estimated that they had presided over more than 100 criminal jury trials.

An interview schedule was developed by drawing on key themes within extant literature on judging and jury trials. The interviews explored judge participants' perceptions of the judge-jury relationship and their approaches to interacting with jurors. We also focused on their experiences of presiding over criminal jury trials, including their approaches to charging jurors and their views on topics such as juror comprehension, use of written directions and misconduct. While discussing their views and practices in relation to jury trials, judge participants also reflected on how they developed the knowledge and skills required to preside over a jury trial and manage relationships with juries. Some also identified education

and training for judges as an issue requiring reform. The flexibility of the semi-structured interview approach facilitated exploration of this unanticipated topic during interviews.<sup>4</sup> Participants' reflections on their learning processes were analysed using thematic analysis, a flexible approach for identifying, analysing and reporting patterns within data.<sup>5</sup> A broad approach was adopted for initial coding of the transcripts, which ensured data extracts were contextualised.<sup>6</sup> Transcripts were independently coded and agreed by more than one member of the research team.<sup>7</sup> There were several codes related to education, professional development, mentoring and experiential learning, and these were organised into a theme of judicial education, which was reviewed and refined by the project team. Data from this theme and its sub-themes form the basis of our discussion below.

## 2.a.ii Our Findings and Recommendations

Participants in our study learned to be judges in the period between the passage of the Courts and Courts Officers Act 1995 (which resulted in the introduction of annual judicial conferences and the Judicial Studies Institute Journal) and the enactment of the Judicial Council Act 2019. The judges in our sample frequently characterised themselves as learners and reflected on their learning experiences. These reflections were generally unprompted and flowed naturally from their engagement with the central focus of our interviews with them, namely their interactions with juries in criminal trials. Answering questions on charging juries in particular caused participants to consider their own professional growth and skills development. One participant evoked a sentiment expressed by many participants when they stated: 'I'm learning every day...That's one of the reasons that...makes the job so...satisfying' (Judge 20).

Despite recent positive developments following the passing of the Judicial Council Act 2019, judicial education in Ireland is at an embryonic stage that mirrors the position other common law countries were in 30 or 40 years ago.

The data from our interviews demonstrates that until 2020, new appointees to the criminal jury courts in Ireland relied heavily on their experience as practitioners and on informal supports provided by established criminal judges. In the absence of a structured system of judicial education, judges referred to a variety of sources of knowledge, training and development, generally of an informal nature.

We argue that these informal sources of knowledge and development have value, and the best aspects of them ought to be integrated into the emerging new system of formal judicial training. These include experiential learning; informal peer learning; benchbooks; sharing written materials; informal work shadowing; formal mentoring; national judicial conferences and international training and networking. Each is discussed in more detail below.

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<sup>4</sup> A Galletta *Mastering the Semi-structured Interview and Beyond: From Research Design to Analysis and Publications* (New York: New York University Press, 2013).

<sup>5</sup> V Braun and V Clarke 'Using Thematic Analysis in Psychology' (2006) 3 *Qualitative Research in Psychology* 77.

<sup>6</sup> RE Boyatzis *Transforming Qualitative Information: Thematic Analysis and Code Development* (Thousand Oaks, CA: Sage, 1998).

<sup>7</sup> N Mays and C Pope, 'Qualitative Research: Rigour and Qualitative Research' (1995) 311 *BMJ* 109.

### *Experiential Learning*

Experiential learning is 'learning from experience or learning by doing',<sup>8</sup> and is a significant aspect of how judges learn to be judges. On the basis of our interviews, it was a particularly prevalent form of judicial learning in Ireland prior to recent developments. Experiential learning need not be high-stakes, but can include simulations, role play and mock trials.

Participants in our study referred to the high stakes nature of the 'learning on the job' experiential learning that was prevalent in the Irish judicial system. A judge who was a very experienced criminal practitioner prior to appointment stated that they would have benefitted from mock trial training before presiding over a jury trial for the first time.

### *Informal Peer Learning*

Our interviews showed us that informal discussions with judicial colleagues provided important peer learning opportunities for both new and experienced judges. Blatman-Kedrai et al argue that this is one of the best types of training for judges.<sup>9</sup> Indeed, the 'peer group educational model'<sup>10</sup> has been incorporated into the structured judicial training programmes of many common law jurisdictions.

It is important to note, however, that while supportive networks exist between judges, access to such networks is subject to geographical and, presumably, other limitations. A judge in a provincial location stated that their experience of being 'a lone Circuit Court judge' was very different to the collegial environment in the Criminal Courts of Justice in Dublin. It would thus be worth reflecting on the training and ongoing mentoring needs of judges sitting outside cities, as they may require additional supports.

### *Benchbooks*

A benchbook may be defined as an 'instructional manual'<sup>11</sup> for the judiciary, composed of guidance on all the major issues which a judge might expect to encounter in a particular area.<sup>12</sup> While the function of a bench book is not primarily educational, it is nonetheless an important resource for judges and may be particularly helpful to newly-appointed judges. There is certainly scope for exploring further the potential to use, update and maintain centrally-produced materials which can support judges.

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<sup>8</sup> LH Lewis and C J Williams 'Experiential Learning: Past and Present' (1994) 62 *New Directions for Adult and Continuing Education* 5 at 5.

<sup>9</sup> D Blatman-Kedrai, O Landau and B Munk 'Peer Group Consultations as a Judicial Training Model' (2019) 38(2) *The Review of Litigation* 167 at 168.

<sup>10</sup> P M Li 'How our Judicial Schools Compare to the Rest of the World' (1995) 34(1) *Judges' Journal* 17 at 17.

<sup>11</sup> R Munday 'The Bench Books: Can the Judiciary Keep a Secret?' (1996) *Crim LR* 296 at 297.

<sup>12</sup> See, for example, *The Equal Treatment Bench Book* (2021), available at: <[www.judiciary.uk/announcements/equal-treatment-bench-book-new-edition/Is\\_Judiciary](http://www.judiciary.uk/announcements/equal-treatment-bench-book-new-edition/Is_Judiciary)>

We understand that work is currently underway in the Legal Research and Library Services division of the Courts Service to produce a standardised form of Bench Book. Thought must be given to how any benchbook will be periodically reviewed and revised, and who should be responsible for that work.

### *Sharing written materials*

This involves the creation, distribution and editing of written resources. Such resources are not necessarily benchbooks, but fill a gap which exists due to a lack of centrally- or officially-produced documents. Many of our interviewees referred to a culture of sharing specimen jury directions or charges, but it was clear that this was on an *ad hoc* basis.

### *Informal work shadowing*

In the absence of a structured system of training for Irish judges, informal work shadowing evolved. Interviewees recounted being contacted by a serving judge at the time of their appointment, with an invitation to observe them presiding over a trial.

While this type of work shadowing is highly commendable, its informal nature is overly reliant on the goodwill of a number of 'good citizen' judges. Work shadowing should thus be formalised and embedded in the official training programme. Furthermore, newer judges may not have the connections and social capital needed to form the necessary relationships.

### *Formal mentoring*

A formal mentoring scheme is one where mentors and mentees operate within a structured environment. In the context of judicial development, a common approach internationally is for an overseeing body to assign newly-appointed judges to more senior colleagues.<sup>13</sup> Bremer considers how mentoring schemes can help to alleviate judicial stress and isolation, particularly during the difficult transition from advocate to arbiter.<sup>14</sup>

We understand that the training of judges in all first instance courts as mentors has now begun, with a view to the delivery of "judge-led" mentoring and training, from 2021, to newly appointed judges.<sup>15</sup> Our data suggests that a formal mentoring scheme of this nature will encounter fertile ground in the pre-existing collegiality of the Irish judiciary, which already finds expression in the sharing of materials, the giving of advice and a certain amount of work shadowing.

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<sup>13</sup> See, for example, B J Rouse and J C Bouch 'Coaching Better Justice', Judicial Edge, 21 January 2016, <[www.judges.org/news-and-info/coaching-better-justice/](http://www.judges.org/news-and-info/coaching-better-justice/)>

<sup>14</sup> Celeste F Bremer 'Reducing Judicial Stress Through Mentoring' (2004) 87(5) *Judicature* 244.

<sup>15</sup> The Judicial Council *Annual Report 2020*, p 18, available at: <[https://judicialcouncil.ie/assets/uploads/documents/Annual\\_Report\\_2020\\_English.pdf](https://judicialcouncil.ie/assets/uploads/documents/Annual_Report_2020_English.pdf)>

### *National judicial conferences*

The creation of the Judicial Studies Institute in 1996 saw the introduction of annual conferences for serving judges. While the annual conferences seem to perform a useful function of facilitating information exchange, networking and debate among the judges, they also highlight a number of difficulties with Ireland's traditional approach to judicial education.

First, annual conferences were no substitute for a properly structured and resourced system of training judges from the date of appointment onwards. Second, the annual nature of these conferences makes them more infrequent than is desirable for the purposes of meaningful continuing professional development. Third, the existing arrangements group judges into arguably illogical categories of conference. Judges of the High Court share a conference with judges from the two appellate courts, and there is no conference for judges presiding over criminal jury trials. Fourth, one judge in our study indicated that events for judges were sometimes not scheduled so as to facilitate the attendance of those sitting in provincial locations. Finally, the programmes of the judicial conferences are not publicly available, in contrast to the practice in other jurisdictions of making the content of judicial education and training programmes publicly available on their websites.<sup>16</sup>

### *International training and networking*

International judicial networking has increasingly been a feature of the judicial role. International networks and conferences can be an important source of information sharing, support and training. Continued participation in international networks should be facilitated and encouraged alongside the development of our own national judicial training programme. A number of judges who participated in our study spoke very highly of training they had received in Scotland.

### 2.a.iii. Further Specific Recommendations

We would also like to bring to the attention of the working group a number of recommendations made specifically in relation to jury trials in our 2020 report, *Judges and Juries in Ireland: An Empirical Study*.<sup>17</sup> Please note that these recommendations pre-dated some of the recent developments under the Judicial Council Act and can be read accordingly:

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<sup>16</sup> For example, the New Zealand Institute of Judicial Studies publishes an annual prospectus on its website, detailing all of the programmes and events scheduled for the year. See, for example, Institute of Judicial Studies, *Prospectus 2021* at <[www.ijs.govt.nz/prospectus/2021\\_Prospectus\\_for\\_Internet.pdf](http://www.ijs.govt.nz/prospectus/2021_Prospectus_for_Internet.pdf)>. The Judicial Institute for Scotland publishes an annual report on its website which includes details of the courses delivered each year: see Judicial Institute for Scotland, *Annual Report 2019-2020* 23-25 at <[https://judiciary.scot/docs/librariesprovider3/judiciarydocuments/judicial-institute-publications/annual-report-2019-2020.pdf?sfvrsn=c6882555\\_4](https://judiciary.scot/docs/librariesprovider3/judiciarydocuments/judicial-institute-publications/annual-report-2019-2020.pdf?sfvrsn=c6882555_4)>.

<sup>17</sup> M. Coen, N. Howlin, C. Barry and J. Lynch, *Judges and Juries in Ireland: An Empirical Study* (UCD February 2020).

- We recommend further exploration and articulation of the judge's role in criminal jury trials, as part of judges' continuing professional development and in conjunction with the Judicial Studies Committee established under section 17 of the Judicial Council Act 2019.
- We recommend that conversations among the judiciary about aspects of their judicial practice be facilitated both formally (as an aspect of CPD) and informally (as a form of peer learning). It was clear from our interviews with judges that the exchange of ideas and experiences with peers was regarded as extremely beneficial.
- The potential development of centrally-approved template charges on specific issues (for example, particular defences or offences) should be explored with the Judicial Research Office, the Judicial Studies Committee, academic researchers and other stakeholders. Any centrally-approved template charges ought to be underpinned by clear principles, agreed by the judiciary. The use of any centrally-approved template charges should be optional. Processes for the revision and updating of such template charges ought to be developed.
- Training and support in the use of any such materials should be provided to members of the judiciary, and forms of knowledge exchange should also be considered.
- Judges should be provided with training on the psychological and linguistic aspects of juror comprehension and information processing, to help inform their individual judicial practices. Such training might also incorporate discussion of the use of written materials and/or visual aids in trials.
- We suggest that the Judicial Studies Committee (or a sub-committee), in conjunction with academic researchers, develop a set of standards and/or principles for communicating with juries. Such principles should be developed in light of developments and experiences in other jurisdictions; empirical evidence from other disciplines, and Irish judges' own views, practices and suggestions. The guidance should be retained and disseminated by the Judicial Research Office.
- Consideration should be given to organising structured, collective discussion among judges hearing indictable crime, with a view to developing shared approaches to questions like the giving of the internet warning and the provision of written materials.
- One finding of our study was that Irish judges were unaware of the widespread use of 'route to verdict' documents in England and Wales.<sup>18</sup> The Judicial Studies Committee (or a sub-committee), in collaboration with academic researchers and the Judicial Research Office, should provide judges with more opportunities to learn about jury practices in other common law jurisdictions, for example through the organisation of seminars or guest speakers, or the sharing of international developments in other ways.

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<sup>18</sup> See further, Coen et al (n 2 above), Chapter 4.



- Our data suggested inconsistent practices in relation to the provision of deliberation guidance to juries.<sup>19</sup> A deliberation guidelines resource pack should be prepared for judges, to include examples from other jurisdictions. This should be done with input from the Judicial Council (or a subcommittee thereof) and academic researchers, and in conjunction with the Judicial Research Office. Any resources developed should be made available to all judges presiding over trials on indictment, and periodically reviewed and updated.
- Our research indicated a wide variety of approaches to the internet warning, both in relation to whether the warning was given and its content when given.<sup>20</sup> In our report we recommended that a standardised judicial direction dealing comprehensively with the conduct expected of jurors should be created as a matter of urgency. We suggested that the direction should be agreed by the judges assigned to jury trials, with input from legal practitioners and academics.
- It is clear that education is needed in respect of how social media works and how it may impact upon criminal trials. A small number of judges we interviewed indicated that they were not very familiar with social media, and at least one expressed a desire for education in this area.
- Mock trial training should be introduced for all judges newly assigned to presiding over jury trials. In England and Wales such training is compulsory for newly-appointed Recorders. Such an innovation would provide support to new judges, recognise that the role of the judge is very distinct to that of the advocate, and minimise the potential for errors in real jury trials.
- One judge in our study suggested that peer observation should be introduced, where judges would receive feedback from a fellow judge who would observe their conduct of a case. We believe that this suggestion has much to recommend it, and not only for new judges. Peer observation is a two-way learning process, with the person who is observing and providing feedback also benefiting from exposure to different approaches.

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<sup>19</sup> See further, Coen et al (n 2 above), Chapter 6. 'Deliberation guidance' relates to how jurors might approach the 'mechanics' of deliberation, for example, by explaining the role and status of the foreperson, encouraging each juror to contribute etc.

<sup>20</sup> See further, Coen et al (n 2 above), Chapter 7.

## 2.b. The number and type of judges required

It is now widely accepted internationally that Ireland does not have sufficient judges for its population. According to the Council of Europe, in 2016 Ireland had 3.5 judges per 100,000 population in 2016. The average among countries in the OECD was 21 and the median was 18.<sup>21</sup>

The low number of judges has several implications:

- Litigants in civil proceedings experience significant delays;
- Delays in criminal trials have a significant impact on both accused persons and victims;
- Access to Justice is severely impacted;
- Overworked and under-resourced judges are more likely to make mistakes;
- Overworked and under-resourced judges are less likely to be able to avail of judicial education and training opportunities;
- Appointment to the bench becomes a less attractive career option for lawyers.

Overall, we take the view that this issue is a somewhat strange one to include in a public consultation. The appropriate number of judges is a question on which the Presidents of the various courts are best placed to advise the Government, supported by relevant data illustrating the workloads and working culture in their courts.

## Conclusions

Our empirical research in this area has led us to make recommendations both in reaction to judicial skills development generally, and more specifically in relation to jury trials. Our interviews with judges confirmed the unstructured nature of judicial education in Ireland before the establishment of the Judicial Council in 2019. However, they also revealed the myriad ways in which Irish judges developed skills during this period. Their self-led learning included elements of experiential learning, knowledge exchange, work shadowing, conference attendance, mentoring and participation in judicial training in other jurisdictions. We argue that there are elements of this system which ought to be retained as part of the new formal system of judicial skills development.

Another point worth noting is that judges in our study were overwhelmingly positive about receiving training. Some also made suggestions regarding the types of training that they would consider useful and several evaluated the existing approaches to skills acquisition and development. This highlights the importance of including the judges' perspectives in the development of any plans in relation to judicial education and skills development.

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<sup>21</sup> European Commission for the Efficiency of Justice, Council of Europe European Judicial Systems : Efficiency and Quality of Justice (CEPEJ Studies No 26, 2018) p 16.  
<<https://rm.coe.int/overview-avec-couv-18-09-2018-en/16808def7a>>