Working Group on a Court of Appeal

REPORT

May, 2009

Report of the Working Group on a Court of Appeal

May 2009

BAILE ÁTHA CLIATH
ARNA FHOILSIÚ AG OIFIG AN tSOLÁTHAIR
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Table of Contents

(b) "To address and consider such legal changes as are necessary for the purposes of establishing a Court of Appeal."

CONSTITUTIONAL REFORM

STATUTORY REFORM

(c) "To make such other recommendations as are appropriate for the purposes of ensuring greater efficiencies in the practices and procedures of the Superior Courts."

APPENDICES

Conclusions and Recommendations of the Working Group as to the necessity for a general Court of Appeal for the purpose of processing certain categories of appeals from the High Court:—

1. **The present Superior Court structure was appropriate for Ireland in the 20th Century.**

2. **While the infrastructure of the High Court has been developed to meet the growth in litigation, no similar development has occurred in the Court of Criminal Appeal or the Supreme Court.**

3. **The High Court has grown from seven judges in 1971 to 36 in 2007 and remains at that figure today. There has not been a proportionate development in the Supreme Court, which in 1961 consisted of five judges and today consists of eight. Yet the Supreme Court is receiving all civil appeals from an expanded High Court.**

4. **More capacity is needed at the appellate level.**

5. **The cost of additional judges, courts and staff at appellate level, will be essentially the same whether they are in the Supreme Court or a Court of Appeal.**

6. **The establishment of a Court of Appeal is a necessary infrastructural reform which would have a transformative effect on the efficiency and effectiveness of the Irish court system.**

7. **The best option for Ireland in the 21st Century is to have a Court of Appeal, amalgamating the Court of Criminal Appeal into a new Court which would also hear civil appeals from the High Court.**

8. **The alternative, an increase in the number of judges and number of divisions of the Supreme Court, is not recommended because it runs the risk of inconsistency and would not address the appropriate role of the Supreme Court.**

9. **Procedural measures governing appeals will need to be devised. In particular, leave requirements for appeals from a new Court of Appeal will be necessary to ensure that the Court of Appeal results in actual efficiencies in the administration of justice.**

10. **The new Court of Appeal should be established in law and provided for in the Constitution.**

11. **The Court of Appeal should be established on the basis of a consolidating amendment to the Constitution.**

12. **A consolidating amendment would avoid any uncertainty arising about the status of the new Court of Appeal and would ensure the coherence of the constitutional text.**

13. **Article 34 should be amended to set out clearly the powers and jurisdiction of the Court of Appeal.**

14. **Article 34 should also be amended in a way which clarifies any changes to the jurisdiction or powers of the High and Supreme Courts.**

15. **A consolidating amendment should describe clearly the relationship between the Superior Courts so as to ensure that any new appellate procedures may be understood easily by the public.**

16. **As part of the process of introducing a consolidating amendment, changes should be made also to a number of other Articles where that is necessary to secure the status and independence of the new Court of Appeal.**

17. **Proposals as to amendments are enclosed in the Report, to assist the drafting process.**

18. **The Working Group supports the extensive changes that are ongoing in the Courts Service, especially in the Reform and Development Directorate and also in the Courts Rules Committees and the Committee on Court Practice and Procedure, to modernise and improve systems in the Courts, and recommends, in particular, the further extension of information technology, e-courts and case management.**

The Working Group has recommended the establishment of a Court of Appeal in order to remedy the systemic backlog that will otherwise continue to build in the Irish court system. Remedying this problem will be of benefit to the economy as well as to individual litigants and to the community at large. It will also have the effect of clarifying the role of the Supreme Court.

The primary role of the Supreme Court is not to engage in error correction. It is primarily to engage in explaining the Constitution to the People. This happens, in the adversarial system, by allowing an open, transparent and reasoned dialogue between advocates and judges and then the publishing of the reasons for the decision. We need to ensure that the process of dialogue which occurs in the Supreme Court is brought to as many of the people as possible and explained as thoroughly as possible.

If we really believe in a Constitution where the People gave the law to themselves then we must allow the Court in which the Constitution is interpreted to function as well as it possibly can. We need to ensure that the Constitution remains vital, engaged, and well understood.

It is for this reason, as well as the gains in efficiency described in the Report, that the Working Group is in favour of the establishment of a Court of Appeal.

In conclusion, the establishment of a Court of Appeal as discussed above would benefit litigants, the community and the economy of Ireland by:

- **Eliminating undue delay in processing appeals**
- **Creating an appeals structure which would be cost effective**
- **Enhancing the administration of justice in the Superior Courts**
- **Improving certainty in the law through the prompt publication of reasoned decisions from the Supreme Court**

Introduction

A. Background and Terms of Reference

In recent years there have been significant changes in Irish society. Ireland's population has grown from 3.5 million in 1991 to over 4.2 million in 2006. There has been an increase in economic activity and demographic diversity. Changes in social and public policy have occurred. International developments now have a greater impact on Irish affairs and the courts.

These changes have had important implications for the Irish legal system. In particular, the High Court and Supreme Court have experienced a significant expansion in litigation. Despite the relative success of the courts in introducing procedures to deal with these developments, the current Superior Court structure was not designed to cope with developments of such a profound nature. There has been a need for some time to conduct a strategic review of the current Superior Court structure.

In December 2006 the Government decided to set up a Working Group to consider the question of establishing a Court of Appeal, with the following terms of reference:

> **"(a) to review and consider the necessity for a general Court of Appeal for the purpose of processing certain categories of appeals from the High Court.**
>
> **(b) to address and consider such legal changes as are necessary for the purposes of establishing a Court of Appeal, and**
>
> **(c) to make such other recommendations as are appropriate for the purposes of ensuring greater efficiencies in the practices and procedures of the Superior Courts."**

The Working Group advertised in national newspapers, inviting submissions from interested persons, organisations and groups in relation to the matters in the terms of reference.[1] Five submissions were received and considered carefully.[2]

1 A copy of the advertisement is to be found in Appendix A.
2 See Appendix B for list of persons or groups who sent submissions.

B. Members of the Working Group

The Members of the Working Group are:

The Hon. Mrs. Justice Susan Denham, Judge of the Supreme Court, Chairperson;

The Hon. Mr. Justice Iarfhlaith O'Neill, Judge of the High Court;

Mr. Turlough O'Donnell, S.C., Chairman of the Bar Council 2006 — 2008, Nominee from the Bar Council;

Mr. Ken Murphy, Director General of the Law Society, Nominee from the Law Society;

Mr. Eoin O'Leary, Assistant Secretary, succeeded in July 2008 by Mr. Philip Hamell, Assistant Secretary, Nominee from the Department of the Taoiseach;

Mr. Liam O'Daly, Deputy Director General, Nominee from the Office of the Attorney General;

Mr. Bob Browne, Assistant Secretary, Nominee from the Department of Justice, Equality and Law Reform;

Ms. Helen Priestley of the Courts Service, Executive Officer to the Working Group, and Mr. Anthony Lawlor of the Courts Service, Secretary to the Working Group.

Dr. Ailbhe O'Neill, B.L. of Trinity College Dublin and Dr. Eoin Carolan, B.L. of University College Dublin, Research Assistants to the Working Group.

CHAPTER 1

The Structure of the Superior Courts

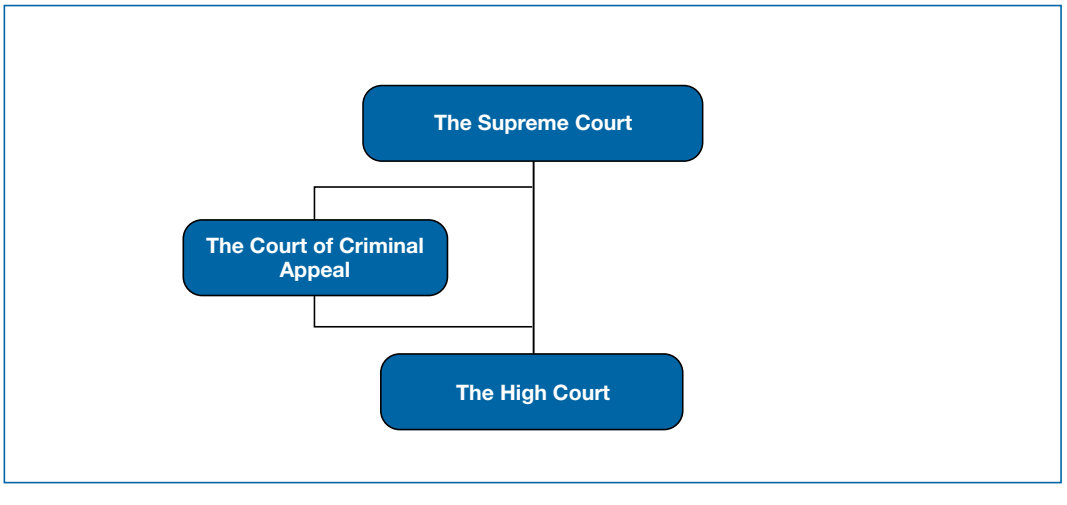
A. Introduction

There are three fundamental organs of the State — the Legislature, the Executive and the Courts. This governmental structure and the nature of the organs that comprise it have a profound effect on our community and the State's economy. The Courts, in their administration of justice, impact on individuals, businesses (both national and international), society and the economy generally.

The current structure of the Superior Courts is as it was when established in 1922 and re-established in 1937 by the Constitution of Ireland and in 1961 by the Courts (Constitution and Establishment), Act. It was an entirely appropriate and adequate structure for the Ireland of the 20th Century. However, as Chapter 3 will show, it is struggling to cope with today's increased volume and complexity of litigation.

This chapter describes the current structure of the Superior Courts — i.e. the Supreme Court, the Court of Criminal Appeal and the High Court. It also describes the jurisdiction and composition of these courts and their expansion since they were re-established in 1961. In so doing, it provides the context for the remainder of the Report.

Fig. 1.1: Structure of the Superior Courts



B. The Jurisdiction of the Superior Courts

1. Jurisdiction under the Constitution

Article 34.1 of the Constitution of Ireland, 1937 provides that:

> **"Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public."**

Article 34.2 of the Constitution goes on to make provision for "Courts of First Instance" and a "Court of Final Appeal".

(i) The High Court

The Superior Court of First Instance is the High Court. Article 34.3.1° of the Constitution provides that the High Court enjoys "full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal".

(ii) The Court of Criminal Appeal

There is no reference in the Constitution to the Court of Criminal Appeal: it is a creature of statute. It is discussed at greater length in Chapter 6.

(iii) The Supreme Court

Article 34.4 sets out the jurisdiction of the Supreme Court. As the court of last resort in the State, the Supreme Court enjoys only a limited original jurisdiction. Article 26 is a notable illustration of this original jurisdiction: it gives the Supreme Court jurisdiction to adjudicate on a Bill or provisions of such Bill referred to it by the President.

Generally, however, the Supreme Court operates as an appellate court only. Its appellate jurisdiction is extremely broad. Article 34.4.3° provides that the Supreme Court shall, with such exceptions and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court. A generous interpretation has generally been given to the term "decisions" in this context.

Article 34.4.3° envisages some exceptions to this broad appellate jurisdiction and statutory exceptions have been created and upheld.[3] Any exceptions created by the Oireachtas must, however, be created in a manner that is "clear and unambiguous".[4] Furthermore, Article 34.4.4° provides that the appellate jurisdiction of the Supreme Court in cases involving questions as to the validity of any law under the Constitution cannot be excluded.

Article 34.4.3° allows appellate jurisdiction from decisions of courts other than the High Court to be vested in the Supreme Court and there are examples of this in statutes.[5] Nevertheless, the vast majority of the Court's workload comes from High Court appeals in civil matters. This reflects the fact that, with some exceptions, there is no general

3 See s. 39 of the Courts of Justice Act, 1936, as re-enacted by s. 48 of the Courts (Supplemental Provisions) Act, 1961, which provides that decisions of the High Court on appeal from the Circuit Court cannot be appealed. The constitutionality of that exclusion was upheld by the Supreme Court in *Eamonn Andrews Productions Ltd. v. Gaiety Theatre Enterprises Ltd* [1973] I.R. 295.

4 *People (AG) v. Conmey* [1975] I.R. 341, Walsh J., at 360. See also *Hanafin v. Minister for the Environment* [1996] 2 I.R. 321.

5 Section 16 of the Courts of Justice Act, 1947, for example, confers jurisdiction on judges of the Circuit Court to state a case to the Supreme Court.

requirement to seek leave to appeal High Court decisions in civil matters to the Supreme Court.[6] This means that the Supreme Court is usually unable to manage the content of its civil caseload. This is not the position in any of the other common law jurisdictions discussed in this Report.[7]

Appeals in criminal matters, on the other hand, are subject to leave requirements. Leave will be granted to appeal to the Supreme Court from the Court of Criminal Appeal only if the appeal raises a point of law of exceptional public importance, and it is in the public interest that the appeal be allowed to proceed.[8] This limitation means that the majority of cases heard by the Supreme Court are appeals from decisions of the High Court in civil matters and that there are relatively few appeals from the Court of Criminal Appeal.

2. Jurisdiction under statute

Article 58 of the 1937 Constitution provided that the court system established under the 1922 Constitution of the Irish Free State would continue to exist under the 1937 Constitution. The courts were re-established in 1961 by the passing of the Courts (Establishment and Constitution) Act of that year.[9] That Act regularised the existing courts by placing them within a legislative framework under the 1937 Constitution. The same year, the Oireachtas passed the Courts (Supplemental Provisions) Act, 1961, which updated and clarified the different jurisdictions of the courts.

(i) The High Court

The High Court was re-established under s. 2(1) of the Courts (Establishment and Constitution) Act, 1961.[10] It consists of the President of the High Court and such number of ordinary judges as may from time to time be fixed by Act of the Oireachtas.[11] The expansion of the Court from 1961-2009 is considered below in greater detail. The Chief Justice and the President of the Circuit Court are *ex officio* members of the High Court.[12] In the event of the illness of a High Court judge or where there is for any other reason an insufficient number of High Court judges to carry out the functions of the Court, the Chief Justice may, upon the request of the President of the High Court, request a Supreme Court judge to sit as an additional judge of the High Court.[13]

In general the High Court is a single member Court. The High Court, when sitting in criminal matters, is known as the Central Criminal Court. In such cases a single judge sits with a jury.

Occasionally the High Court sits as a bench of three judges, usually in cases of significant importance. Also, Article 40.4.4° of the Constitution provides that the President of the High Court may direct a panel of three judges to sit in cases concerning an inquiry into the

6 Section 52 of the Courts (Supplemental Provisions) Act , 1961 is an example of an exception to this. It imposes a leave requirement for appeals from decisions of the High Court on a consultative case stated. There are other statutory instances of this, for example, s. 5 of the Illegal Immigrants (Trafficking) Act, 2000 and s. 50 of the Planning and Development Act, 2000 (as amended by s. 12 of the Planning and Development (Amendment) Act, 2002). These provisions impose leave requirements for judicial review in the areas of asylum law and planning law respectively.

7 See Chapter 7.

8 Section 29 of The Courts of Justice Act , 1924, as substituted by s. 22 of the Criminal Justice Act , 2006.

9 Until that was done the courts in existence were those established in 1922. See *The State (Killian) v. Minister for Justice* [1954] I.R. 207.

10 This replaced s. 4 of the Courts of Justice Act, 1924.

11 Section 2(2) of the Courts (Establishment and Jurisdiction) Act, 1961.

12 Section 2(3) and s. 2(4) of the Courts (Establishment and Jurisdiction) Act ,1961, replacing s. 6 of the Courts of Justice Act, 1924 and s. 9 of the Courts of Justice (District Courts) Act, 1946.

13 Section 2(5) of the Courts (Establishment and Jurisdiction) Act, 1961.

validity of a person's continuing detention in custody. In civil cases, Order 49, rule 1 RSC[14] provides that the President may direct two or three judges to hear any civil case.

The High Court ordinarily sits in Dublin. The Courts Service's extensive renovation of provincial courthouses means that there are now adequate facilities to allow the Court to sit outside Dublin on an increasingly frequent basis. For example, the Central Criminal Court sat in Cork, Limerick, Galway and Castlebar over the last three years. President Johnson has also recently directed that non-jury and chancery cases may be heard at venues outside Dublin. Non-jury and chancery cases were heard during 2008 in Trim, Dundalk, Tullamore, Castlebar, Galway, Limerick, Nenagh, Cork and Tralee.

(ii) The Court of Criminal Appeal

The Court of Criminal Appeal is the only intermediate appellate court in Ireland. It was re-established by s. 3 of the Courts (Establishment and Constitution) Act 1961. This provides, *inter alia*, that the Court shall consist of not less than three judges. One of the judges shall be the Chief Justice or an ordinary judge of the Supreme Court, sitting with two ordinary judges of the High Court.

This Court deals with criminal matters, and is considered in greater detail in Chapter 6.

(iii) The Supreme Court

The current Supreme Court was established in 1961 by s. 1(1) of the Courts (Establishment and Constitution) Act, 1961.[15] The Chief Justice is the presiding judge and has responsibility for the general organisation of the work of the Court.[16] There are also seven ordinary judges.

The President of the High Court is *ex officio* a member of the Supreme Court.[17] Where there are insufficient Supreme Court judges available to enable the Court to act, e.g. due to illness of one or more judges, the Chief Justice may request the President of the High Court to nominate a High Court judge to sit as an additional judge of the Supreme Court.[18]

When the Court is performing its duties under Articles 12[19] and 26[20] of the Constitution, the Supreme Court sits as a panel of at least five judges. In appeal cases concerning the constitutionality of a statute, the Supreme Court sits as a five-judge court. In other cases the Chief Justice may direct that the Court sit in a panel of three judges.[21]

Until 1995, the Court sat as either a five-judge or a three-judge Court. Section 7 of the Courts and Courts Officers Act, 1995 altered this by providing that the Supreme Court "may sit in two or more divisions and they may sit at the same time".[22] The position post-1995 remains the same with regard to cases where the validity of statutes is challenged, i.e., such a case shall be heard and determined by not less than five judges of the Supreme Court.[23] The Court occasionally sits as a seven-judge court.[24]

14 S.I. No. 15 of 1986, the Rules of the Superior Courts.
15 This replaced the Supreme Court which had been established by s. 5 of the Courts of Justice Act , 1924.
16 Section 8 of the Courts and Courts Officers Act 1995, amending s. 18(1)(a) of the Courts Act, 1981.
17 Section 1(3) of the Courts (Establishment and Constitution) Act, 1961.
18 Section 1(4) of the Courts (Establishment and Constitution) Act , 1961, replacing s. 7 of the Courts of Justice Act, 1924.
19 Article 12.3.1° refers to the role of the Court in the removal of the President for permanent incapacity.
20 Article 26 makes provision for the referral by the President of a Bill (or part of a Bill) to the Supreme Court to assess its constitutionality prior to its passing into law.
21 In the absence of the Chief Justice, that direction may be given by the senior ordinary judge available at the time.
22 Section 7(3) of the Courts (Supplemental Provisions), Act as inserted by s. 7 of the Courts and Court Officers Act, 1995.
23 Section 7(5) of the Courts (Supplemental Provisions) Act 1961, as inserted by s. 7 of the Courts and Court Officers Act, 1995.
24 For example, a seven-judge Court sat in *Curtin v. Dáil Éireann* [2006] 2 I.R. 556.

C. Expansion of the Courts 1961-2009

1. The High Court

When the High Court was established, under Article 34 of the Constitution, in 1961, it consisted of a President and six ordinary judges. That number has been increased on several occasions since 1961. (A table is provided at **Fig. 1.2**.)

Thus in 1961 there were seven High Courts from which appeals lay to the Supreme Court. Today there are 36 High Courts from which appeals lie to the Supreme Court. In other words, the increase in High Court judges has been five-fold since 1961 (**Fig. 1.2**). The increase in the number of High Court judges has improved the capacity of the court system to process cases at that level.

Fig. 1.2: Number of High Court Judges 1961-2009

1961	President	+	6
1973	President	+	7
1979	President	+	12
1981	President	+	14
1985	President	+	15
1991	President	+	16
1995	President	+	19
1997	President	+	22
2002	President	+	26
2003	President	+	28
2004	President	+	31
2007	President	+	35[25]

2. The Supreme Court

In 1961, the Supreme Court comprised five judges — the Chief Justice and four ordinary judges. The Courts and Courts Officers Act 1995 increased the number of ordinary judges to seven, thus bringing the total membership of the Court up to eight (See **Fig. 1.3**). The three additional judges were added to the composition of the Supreme Court because of the increased workload and in anticipation of the transfer to the Supreme Court of the functions of the Court of Criminal Appeal.[26]

25 Section 2 of the Courts and Court Officers (Amendment) Act, 2007 provides that the number of ordinary judges of the High Court shall not be more than 35. However, subject to the special provisions contained in s. 14 of the Law Reform Commission Act, 1975 (as amended) in respect of the holding of Office of the President of the Law Reform Commission and the special provisions contained in Schedule 4 of s. 5 of the Garda Síochána Act 2005 in respect of the holding of Office of the Chairman of the Ombudsman Commission, the number of ordinary judges of the High Court may be exceeded. There are therefore 37 current judges of the High Court. However, as this report is concerned with the regular output of the High Court, the figure of 36 is used as it more accurately reflects the number of sitting judges.

26 It was envisaged at one time that the Supreme Court would have the capacity to take over the case load of the Court of Criminal Appeal.

In the same time period the capacity of the Supreme Court has not increased proportionately, moving only from five to eight judges.

Figure 1.3: Number of Supreme Court Judges 1961-2009

1961	Chief Justice	+	4
1995	Chief Justice	+	7

D. Summary and Conclusions

The situation illustrated in **Figs. 1.2** and **1.3** demonstrates that the court structure has not developed in a manner that can provide an efficient appeals process from High Court decisions. As will be shown in Chapter 3, that flaw in the court system is compounded by the trend towards more complex and lengthy litigation in the High Court.

CHAPTER 2

The Role of the Courts

A. Introduction

The focus of this Report is on whether there should be reform of the court system by establishing an intermediate appellate court. In order to set the material considered in this Report in context, the Group considered the role of the courts.

B. The Role of the Courts in Society

1. The Separation of Powers

The establishment and maintenance of an independent court system is a necessary element of the separation of powers between the great organs of State, i.e. the Legislature, the Executive and the Courts. The separation of powers is a democratic principle of critical importance. It has two key benefits:

- It protects citizens against potential abuses of public power
- It promotes the smooth and efficient functioning of the State.

(i) Protecting the Individual

From the individual's point of view, the separation of powers ensures that there is a check on the powers of the State. This provides essential protection for the individual's rights and liberties. The significance to liberty was explained by Montesquieu in *De l'Esprit des Lois*, where he wrote:

> **"When the legislative and executive powers are united in the same person or body, there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner.**
>
> **Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then**

be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor."[27]

From this perspective, the courts perform the role of providing a check on the other organs of the State and ensuring that they do not abuse their powers.

(ii) Promoting efficient government

The separation of powers is also designed to ensure that the different powers of government are exercised by the most appropriate organ of the State. It protects each branch of government from the unwarranted intervention of other bodies into their area of expertise. This promotes efficient government.

In this context, the courts have a particularly important responsibility to secure a prompt resolution to any inter-institutional arguments. Delay harms everyone's interests by hindering government in the carrying out of its responsibilities.

2. Certainty and Social Stability

The courts provide a forum in which disputes may be resolved. The performance of that function provides certainty in the law for the parties in an individual case. It also offers a public explanation of the law. This provides a level of certainty for parties external to the litigation.

The doctrine of precedent provides legal certainty for the public at large. Legal certainty is a vital social value. The public can see how a case has been decided and orient its conduct accordingly. Certainty allows individuals or companies to arrange their affairs in a way which is free from the threat of legal challenge. It also provides confidence that other people will generally do the same.

This aspect of the law was explained most famously by Hart. In *The Concept of Law*,[28] he explained how legal rules (including judge-made rules) "make certain types of behaviour a standard"[29] for society as a whole, thereby providing individuals with a yardstick against which, they are aware, their own behaviour is likely to be publicly assessed:

"[W]here rules exist, deviations from them are not merely grounds for a prediction that hostile reactions will follow or that a court will apply sanctions to those who break them, but are also a reason or justification for such reaction and for applying such sanctions."[30]

This explanation captures the critical importance of legal certainty. It is an essential prerequisite for social stability and cohesion. Its absence generates uncertainty, which inevitably leads to instability and greatly increased economic and social costs.

27 Passages from Montesquieu, *De l'Esprit des Lois*, cited by Murray J. in *T.D. v. Minister for Education* [2001] 4 I.R. 259, at 329.
28 *Hart, The Concept of Law* (Clarendon, 1961).
29 *Ibid.,* at 83.
30 *Ibid.*, at 82.

3. Dispute Resolution

The courts provide a mechanism for resolving disputes between parties. This is a matter of great significance to those involved in a case. Unresolved legal actions cause uncertainty. Parties are unable to move on from the subject-matter of the dispute. This can impose an enormous emotional burden on individuals. For companies, commercial actors or government agencies, delays and uncertainty can have significant administrative and economic costs. It is therefore vital for all members of society that the dispute resolution system provided by the courts operate in a speedy and efficient manner.

4. Conclusions and Analysis

The courts fulfil a number of important roles in society. In particular, it is essential that a legal system provide:

- Security against abuses of power
- Speedy and efficient dispute resolution
- Legal certainty.

The relevance of these characteristics may vary from case to case. The case studies set out below provide examples of areas in which one or other of these values is particularly important. Each represents, however, an essential characteristic of a successful and effective legal system.

C. CASE STUDIES

1. Constitutional Law

The courts play a vital role in upholding the Constitution. In terms of litigation, constitutional law is concerned, amongst other issues, with protecting the ''personal rights'' of the citizen against ''unjust attack''.[31]

The 1937 Constitution, with its emphasis on personal rights was, ''in advance of its time'' and ''presaged a move towards modern constitutions'':[32]

> **''The Constitution of Ireland, 1937 was prescient of European Constitutions and international instruments to follow. In 1937 the Constitution of Ireland protected fundamental rights, fair procedures and gave to the Supreme Court a role as guardian of the Constitution. A decade later, after World War II, the United Nations Charter and the Universal Declaration of Human Rights were brought into being and in Europe the European Convention on Human Rights followed. Over the succeeding decades of the twentieth century, courts, through judicial review, have sought to protect human rights.''**[33]

31 Article 40. 3. 1°.
32 *Maguire v. Ardagh* [2002] 1 I.R. 385, at 570.
33 *Ibid.*

It is the courts that are charged with protecting the fundamental rights of citizens under the Constitution:

> **"The Constitution commits to the judicial organ of government the ultimate guardianship of the Constitution itself and of the vindication of the rights which are either guaranteed by it or conferred by it."**[34]

That function has involved the Superior Courts in upholding important rights such as freedom of expression, association and assembly,[35] the right of every citizen to his or her life, good name and property,[36] the right to liberty[37] and the inviolability of the dwelling.[38] It also sees the courts guaranteeing equality before the law for its citizens.[39]

A number of the provisions of the Constitution have required judicial exposition to explain their meaning and content. For example, the requirement that a criminal trial be held "in due course of law"[40] has been fleshed out by case law guaranteeing a variety of specific protections for accused persons, including a number of principles that ensure that trial courts observe fair procedures.[41]

The courts have played a key role in interpreting the Constitution and identifying the personal rights of the citizen which are guaranteed by it. In particular, the development of a fundamental rights jurisprudence under Article 40.3 has ensured that the following rights are protected in the State: bodily integrity,[42] the right to marital privacy,[43] the right to individual privacy,[44] the right to work and to earn a livelihood,[45] the right of autonomy,[46] the right to dignity,[47] the right to litigate and the right of access to the courts,[48] the right to justice and fair procedures,[49] the right of free movement within the State,[50] the right to travel outside the State[51] and the right to communicate.[52]

The courts have also indentified a number of rights which impact on individuals in the context of their family relationships. These include the right to marry,[53] the right to beget children,[54] the right to independent domicile,[55] the right to maintenance[56] and the rights of children.[57]

34 *S.P.U.C. v. Coogan* [1989] I.R. 734, Walsh J., at 743.
35 Article 40.6.
36 Article 40.3.2°.
37 Article 40.4.
38 Article 40.5.
39 Article 40.1.
40 Article 38.1.
41 See discussion in Hogan & Whyte, *Kelly: The Irish Constitution* (4th ed., Lexis-Nexis, 2003), at 1042-1143.
42 *Ryan v. A.G.* [1965] I.R. 294.
43 *McGee v. Attorney General* [1974] I.R. 284; (1974) ILTR 29.
44 *Norris v. A.G.* [1984] I.R. 36; *Kennedy v. Ireland* [1987] I.R. 587; [1988] ILRM 472.
45 *Murtagh Properties v. Cleary* [1972] I.R. 466.
46 *Re a Ward of Court (withholding medical treatment)(No.2)* [1996] 2 I.R. 79; [1995] 2 ILRM 401.
47 *Re a Ward of Court (withholding medical treatment)(No.2)* [1996] 2 I.R. 79; [1995] 2 ILRM 401.
48 *The State (Quinn) v. Ryan* [1965] I.R. 70; (1966) 100 ILTR 105; *Macauley v. Minister for Posts and Telegraphs* [1966] I.R. 345; *Tuohy v. Courtney* [1994] 3 I.R. 1; [1994] 2 ILRM 503.
49 *Glover v. BLN Ltd.* [1973] I.R. 388.
50 *Ryan v. Attorney General* [1965] I.R. 294.
51 *The State (M) v. Attorney General* [1979] I.R. 73.
52 *Murphy v. Independent Radio and Television Commission* [1999] 1 I.R. 12; [1998] 2 ILRM 360.
53 *Ryan v. Attorney General* [1965] I.R. 294; *McGee v. Attorney General* [1974] I.R. 284; (1974) ILTR 29.
54 *Murray v. Ireland* [1985] I.R. 532; [1985] ILRM 124.
55 *CM v. TM (No.2)* [1990] 2 I.R. 52; [1991] ILRM 268.
56 *CM v. TM (No.2)* [1990] 2 I.R. 52; [1991] ILRM 268.
57 *Re Article 26 and the Adoption (No.2) Bill 1987* [1989] I.R. 656; [1989] ILRM 266.

These are all valuable rights for the individual. The constitutional jurisprudence of the Irish courts are a good example of the legal system fulfilling its important protective function.

2. Commercial Law

In addition to the contribution that the courts make to the development and understanding of constitutional law, they can also affect the economic climate within the State. Legal certainty and the speedy resolution of disputes are both of critical importance to a successful economy.

Commercial law is an area of social activity in which certainty is essential. Companies and commercial actors must have confidence that they are acting in a lawful way. A company seeking to develop a new product or to adopt new financial or administrative arrangements must be able to do so in the confidence that its actions will not attract legal criticism or challenge. Legal certainty simplifies the commercial decision-making process. It allows a clear and considered assessment of the advantages or disadvantages of a proposed course of action to be conducted.

Uncertainty leads to disputes, which generate unnecessary economic and administrative costs. Inconsistency in the law can require a company to engage in an expensive overhaul of its affairs. This explains why companies seeking to invest overseas attach such importance to the presence in a country of a stable and consistent body of laws and stable and consistent interpretation by the courts.

Commercial life also requires speedy resolution of legal issues. Indeed, former Attorney General David Byrne expressed the view that ''business people . . . are more concerned with the speed of resolution of a dispute, and cost containment, than they are with the legal precision of the result''.[58] Delays create costs and are bad for business.

In recognition of this, it was decided to set up a dedicated Commercial Court with specific rules of procedure.[59] The Court has been very successful in expediting commercial matters in the High Court. It is discussed further in Chapter 5.

It is worth noting, however, that the gains in time that are made in the High Court are lost if and when commercial cases enter the Supreme Court List. The two-chamber Supreme Court is required to deal with appeals from 36 High Court judges. This creates a bottleneck in the processing of appeals. The result is that:

> **''[w]hile a speedy hearing may be guaranteed at first instance, the pressures on the Supreme Court List mean that the process can still be delayed on appeal. As a result, the benefit of having proceedings expedited in the Commercial Court can be lost.''**[60]

3. Family Law

The speedy and efficient resolution of disputes is a value of particular importance in family law. Family law litigation often involves the welfare of children. Parties in such family law cases are under great pressure. A delay in the hearing of a family law action, either at first

58 Byrne, ''Ireland's Place in International Commercial Arbitration'' (1998) 3 (9) BR 422.
59 S.I. No. 2 of 2004 brought into force Order 63A of the Rules of the Superior Courts. These govern procedure in the Commercial Court.
60 Dowling, *The Commercial Court* (Thomson Round Hall, 2007), at 8-9.

instance or on appeal, prolongs this pressure and places a very considerable strain on individuals and families.

This underlines the importance of having a legal system that is capable of responding quickly to the needs of parties to these disputes. These cases provide examples of the court system impacting upon the lives of individual citizens in a particularly deep and personal way. It is crucial that finality be reached in these cases *via* an effective court system which can deal with such cases within an appropriate timeframe.

D. The Impact of the Legal System

The previous section considered the abstract normative question of what role the courts ought to play in society. It identified society's need for a prompt, efficient, effective and stable mechanism for resolving disputes.

This section, on the other hand, will assess the ways in which Ireland's legal system has impacted upon Irish society. It will also identify the benefits that could flow from the development of a more efficient legal system. These may not all be connected with the previous section's more philosophical conceptions of the place of the courts. In the way in which they affect Irish society, however, they are just as significant.

1. The "Business Ecosystem"

It is an essential part of the business ecosystem that there be access to efficient and effective courts, should it be necessary to seek a decision on a legal matter arising. The courts may be requested to resolve all issues, or they may operate in conjunction with alternative forms of dispute resolution. Either way they are an essential structure for the business community.

Foreign investment has made a considerable contribution to Ireland's economic success. The benefit to commercial actors of an effective legal system has already been discussed.

The recent National Development Plan 2007-2013: *Transforming Ireland — A Better Quality of Life for All*[61] (NDP) reiterated its importance. It states that the development in Ireland of an attractive "business ecosystem"[62] is essential to the success of the Foreign Direct Investment Sub-Programme. According to the NDP, foreign investment:

> **"will be attracted by a business-friendly and efficient operating environment, with good education facilities, quality access infrastructure, world-class telecommunications and pro-business public policy."**[63]

The availability of prompt court dates is undoubtedly a critical aspect of any such "business ecosystem". This has been realised, to a certain extent, by the establishment of a special list for commercial cases at the High Court stage — the Commercial Court.

As previously discussed, there is currently no fast-tracking mechanism available at the appeal stage for commercial cases. The Supreme Court, already operating under a disproportionately onerous appellate workload, is the only body entitled to deal with

61 Available at <www.ndp.ie> (last visited 27 January 2009).
62 NDP, at 169.
63 *Ibid.*

commercial appeals. This leads to considerable delays, effectively depriving commercial parties in these cases of the benefits of the Commercial Court reforms.

Delays in processing these appeals may undermine the attractiveness of Ireland's ''business ecosystem''. This underlines the economic importance of providing a swift and effective method of disposing of these cases, whilst maintaining the equally important values of legal certainty and consistency.

2. Regulatory Bodies

The courts perform an important task in supervising the activities of regulatory bodies. The Oireachtas has in recent years entrusted these expert bodies with responsibility for regulating many crucial areas of social and economic activity. It is important when their decisions are disputed that the supervisory jurisdiction of the courts be exercised in a prompt and efficient manner. Delays in the processing of legal challenges to the decisions of these bodies can impede the effective performance of their regulatory functions. The prompt resolution of legal issues is crucial to the optimal functioning of any regulatory regime.

The National Development Plan (NDP) acknowledges the role of regulators in supporting the economic infrastructure. One example is the Commission for Energy Regulation,[64] which facilitates competition as well as performing an overall monitoring and regulatory function under the Electricity Regulation Act, 1999 and the Gas (Interim) (Regulation) Act, 2002.

Reference is also made in the Plan to the role of the Communications Regulator (ComReg) in ensuring compliance in that sector and in actively promoting competition. The NDP makes specific reference to new legislation to strengthen ComReg's powers to promote Local Loop Unbundling in order to accelerate broadband take-up.[65] This program is critically important to Ireland's economic future. An efficient court system would assist in this scheme.

3. Progressing Infrastructural Projects

Another important issue highlighted by the NDP is the potential for lengthy court proceedings to hold up large-scale infrastructural projects.[66] Delays in the legal system have an impact upon these projects. Infrastructural projects take a significant amount of time to plan and to develop. They are also usually needed to address an existing or imminent structural deficit. Delayed provision of these projects can exacerbate these difficulties and adversely affect the economy as a whole. Delays also generate significant additional costs.

Litigation involving infrastructural projects currently encounters many of the same problems as commercial litigation. Such cases are dealt with by way of judicial review proceedings in the High Court. These challenges often concern the decisions of administrative bodies. These decisions have usually been reached at the end of a lengthy and detailed hearing process. While judicial review proceedings are dealt with relatively promptly due to good case management in the High Court, there is usually at least a 12 month delay before an appeal is heard in the Supreme Court. The logistical pressures on that Court make it difficult

64 NDP, at 139.
65 NDP, at 148.
66 NDP, at 276.

to expedite these appeals. Even with priority, they may not be heard for up to 12 months. Without priority, they may not be heard for as long as 30 months.

If there were a Court of Appeal, these delays would be avoided, along with the associated social and economic costs. This option is not, however, available under our present two-tier Superior Court system.

4. Environmental Legislation

The need for an effective court system is also evident in the context of the environmental concerns of the NDP. The Environmental Protection Agency's Office of Environmental Enforcement is referred to as a key part of the NDP's environmental strategy.[67] The need for better enforcement of environmental legislation will obviously engage the courts. Efficient enforcement mechanisms are essential if the objectives of environmental regulation are to be achieved.

An effective system for the processing of environmental disputes would also be of benefit to the many commercial entities operating in this area. Pharmaceutical, mining and waste management companies are examples of commercial actors with a particular interest in environmental legislation. It is essential for such firms that legal disputes be resolved with speed and clarity. Complying with obligations under environmental law can often be an expensive process, requiring the establishment of elaborate safety procedures. Legal certainty is very important. Companies must have confidence that, in establishing their compliance systems, they will not be at risk of future civil or criminal action. They must also have confidence that they will not be required to undertake expensive overhauls of their systems on a regular basis. A legal system must address any uncertainties clearly and promptly, thereby allowing companies to organise themselves accordingly.

5. The Legal Quarter

The Four Courts has long been an important public monument in the capital and the area around the building has been transformed into an identifiable part of the city — the Legal Quarter. The extension of this quarter is planned with the construction of a new Criminal Courts Complex, due for completion in 2010. The 200,000 criminal cases[68] that come before the criminal courts in Dublin each year will be dealt with in the new complex from 2010 onwards. This development will include state-of-the-art facilities to allow judges to introduce efficient case-management and the more efficient hearing of criminal trials under one roof.

As the Chief Justice has pointed out, the new complex will bring "a great change in the axis of activity in our capital's legal quarter".[69] This development will mean that the existing Four Courts building will have more capacity to deal with civil cases. It will be an excellent opportunity for developing the civil courts so as to provide a more efficient service, with better facilities, and more available space for courtrooms.

The construction of the new complex will see the expansion of the Legal Quarter from Inns Quay towards the Phoenix Park. It may also lead to additional capital development by the legal profession between the court complexes, which should bring more investment into the area.

67 NDP, at 117-122.
68 *Courts Service News* (June 2007), at 21.
69 Comments of Murray C.J. reported in *Courts Service News* (June 2007), at 20.

The development of the Legal Quarter will also facilitate the growth of arbitration facilities and alternative dispute resolution in general. The plans of the Bar of Ireland to expand in this area will be facilitated by the development of an efficient court structure.

E. Summary and Conclusions

The courts play an important role in the State. They are entrusted with the task of upholding the Constitution. Their decisions impact both on the personal lives of individuals and on the business world. An efficient and effective court system is an important part of the infrastructure of the State.

CHAPTER 3

The Increase in Litigation

A. Population Change in Ireland

The infrastructure of our Superior Courts was first established in the Constitution of the Irish Free State, 1922. The same Superior Court structures were repeated in the Constitution of Ireland, 1937, and were re-established in the Courts (Establishment and Constitution) Act, 1961. However, there has been significant growth in the population in recent decades. In 1926 the population was 2,971,992; in 1946 it was 2,955,107 and in 1961 it was 2,818,341, representing a relatively static and somewhat declining population. However, that has changed since the 1960s.

There has been a very significant growth in the population of Ireland in recent years. When the current court system was established in 1961, the population of the State was 2.8 million. The most recent census in 2006 found that the population of Ireland at that point was 4.2 million. Thus the population has increased by 50% since the last structural reform of the court system.

The significant increase in population, especially in the last fifteen years, has created demands upon the courts and explains, in part, why the court system has come under pressure in recent times.

B. The Nature of Modern Litigation

The current Irish court structure was established almost 90 years ago. Litigation has changed considerably in that time. This chapter will describe the increased volume and complexity of litigation, the growing specialisation of law and the greater length of court hearings. The chapter will consider also the nature of those changes and the implications they have for the effectiveness of the Irish legal system.

1. Increase in the number of cases

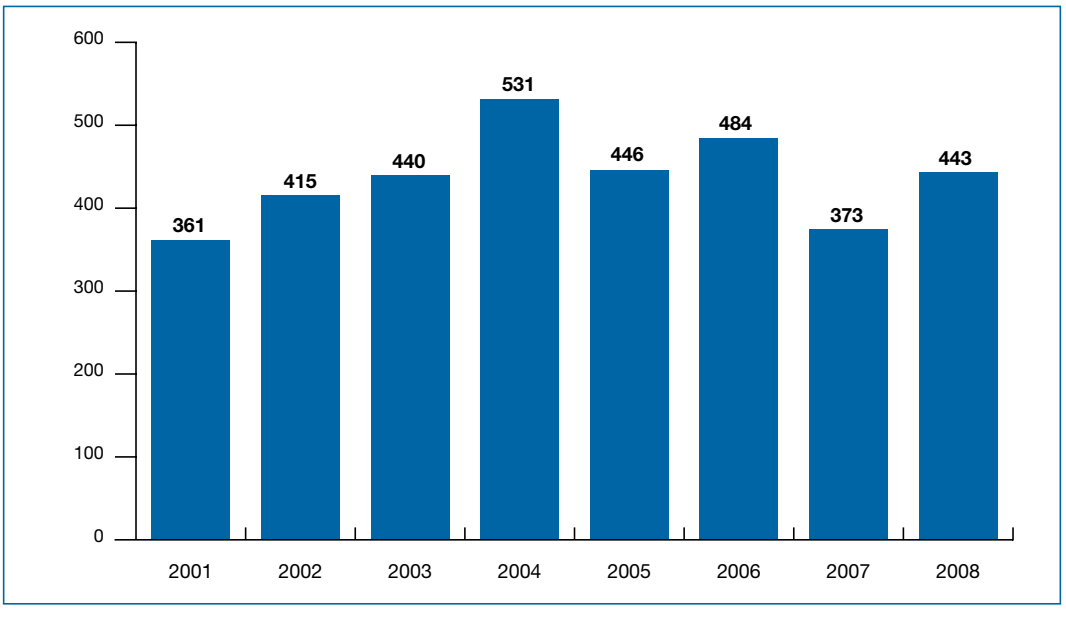
(i) High Court

There has been an increase in the volume of civil litigation initiated in the High Court. As the figures from the Courts Service Annual Reports demonstrate, the number of civil cases initiated in the High Court has risen from 10,160 in 2005, to 11,825 in 2006 and 16,025 in 2007. These figures[70] represent new cases initiated. They do not reflect the backlog before the High Court in any given year.

(ii) Supreme Court

There has also been a rise in the number of appeals to the Supreme Court each year. The Supreme Court deals with all appeals from the High Court and in 2008 it received 443 appeals. It disposed of 229 matters that year. A similar backlog occurs each year so that there is a growing logjam of cases awaiting a hearing.

Fig. 3.1: Appeals received by the Supreme Court 2001-2008



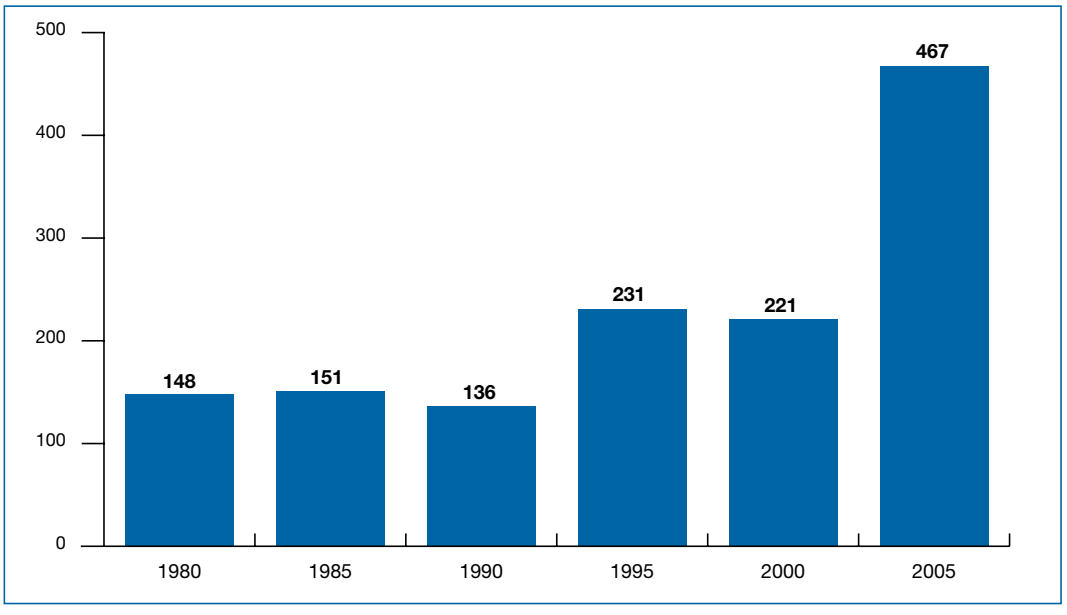
2. Complexity

As well the large number of cases received by the courts, cases have become increasingly complex in recent years. An analysis of the number of written judgments being delivered by the courts indicates that this is the case. Written decisions are handed down in cases where the issues and law are relatively complex. The number of written decisions delivered by the High and Supreme Courts (reproduced in **Figs. 3.2** and **3.3**) provides a means of gauging the complexity of their caseload in an individual year.[71]

70 These figures have been compiled from the "cases initiated" sections of the Courts Service *Annual Reports* for the relevant years. They do not count all proceedings and may count some categories more than once.

71 The figures cited in this section of the report are based on a comprehensive audit of the number of written judgments held by various bodies. The Working Group are grateful for the assistance of the Department of Justice, Equality and Law Reform, the Courts Service, the Law Society of Ireland and the Incorporated Council of Law Reporting for Ireland in compiling these figures.

Fig. 3.2: Written decisions of the High Court 1980-2005[72]

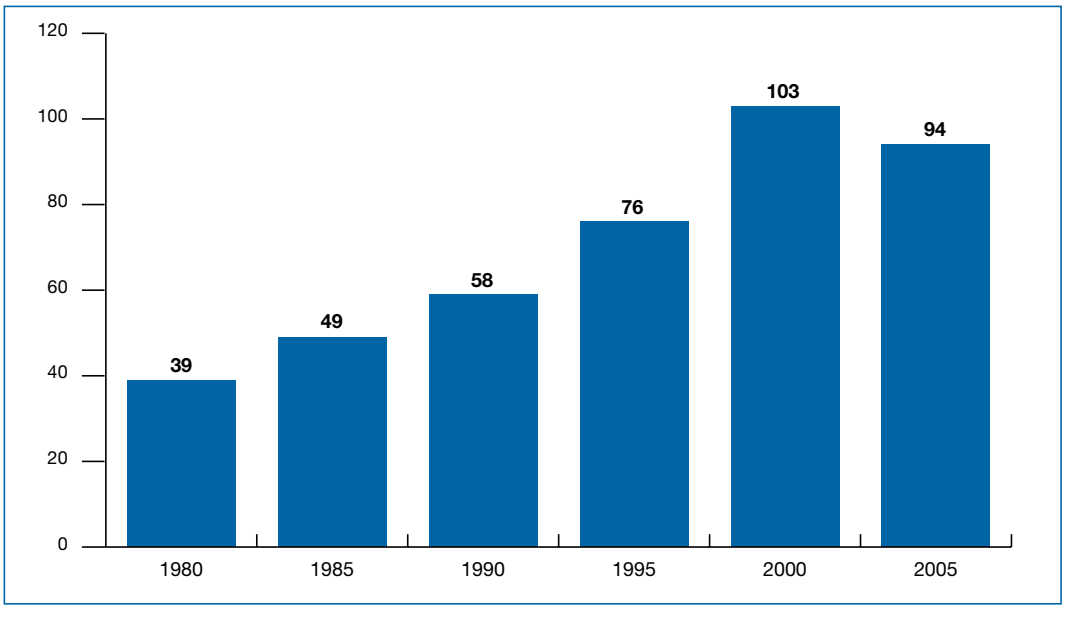


At the time of writing, 447 written decisions had been received for 2008.[73]

These figures show that the number of written decisions of the High Court has more than doubled in the five years from 2000 to 2005. The number of written decisions in 2005 was more than three times what it was 20 years previously in 1985. This demonstrates the extent to which the High Court is today confronted with many more complex cases than any of its predecessors.

The figures for the Supreme Court show a substantial increase over the equivalent 25-year period.

Fig. 3.3: Written Decisions of the Supreme Court 1980-2005



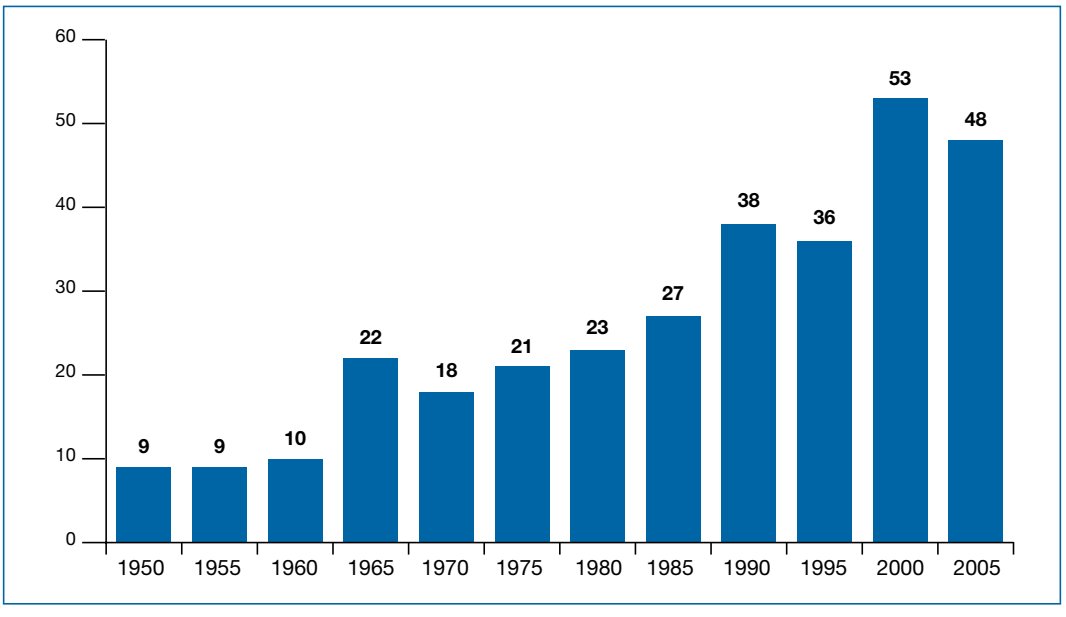
In 2008, the Supreme Court delivered 101 written decisions.

72 The figures from 2005 and 2008 were provided by the Courts Service. Earlier figures are based on a review of the number of written decisions held by various law libraries for those years.

73 Provisional figure for 2008, provided by the Courts Service.

The trend of increasing complexity of litigation is evident also from an analysis of the Irish Reports. This series of reports is designed to cover the most significant cases in a given year.[74] The Irish Reports exclude decisions "which are substantially repetitions of what is already reported". The numbers of cases included in the Irish Reports provide some indication of the extent to which the decisions of the courts in an individual year involved novel legal questions of some general significance. **Fig. 3.4** below illustrates the rise in the number of reported Supreme Court decisions between 1950 and 2005.

Fig. 3.4: Reported Decisions of the Supreme Court 1950-2005



Taking the criteria for reporting into account, the increase in recent years of the number of cases reported indicates that the Supreme Court is required to deal with a greater number of novel legal issues than was formerly the case.[75]

3. Specialisation

One factor which has contributed to the greater complexity of contemporary litigation has been the growing specialisation of the law. There are two primary causes for this.

Technological and social changes have led to a general increase in specialisation across society. For the legal system, this means that a larger number of disputes involve areas of specialist expertise. A medical negligence action or a scientific intellectual property dispute may, for example, concern very technical issues. For the non-expert court, these cases are more difficult to understand and investigate than was formerly the case. This obliges the courts to hear and consider expert evidence to adequately inform themselves about these issues.

74 The selection criteria for the Reports state that they ought to include:

1. All cases which introduce, or appear to introduce, a new principle or a new rule.
2. All cases which materially modify an existing rule or principle.
3. All cases which settle, or materially tend to settle, a question upon which the law is doubtful.
4. All cases which for any reason are peculiarly instructive.

These criteria were kindly provided by Sinéad Ní Chulacháin B.L., Editor of the Irish Reports.

75 The figure for 2005 excludes two pre-2005 decisions which were reported in that year's volume.

The second cause of this specialisation has been the creation of new statutory or regulatory regimes by the Oireachtas. The courts have been given responsibility for a wide range of additional matters. Competition Law, Planning and Environmental Law, Divorce Law and Judicial Review are examples of new jurisdictions which have been created.

Similarly, the Oireachtas has in recent years created a number of specialist administrative bodies or tribunals. Notable examples include the Equality Tribunal, ComReg, the Information Commissioner, the Competition Authority, the Director of Corporate Enforcement and the Financial Regulator. The courts often exercise a supervisory jurisdiction over these expert bodies. They can therefore find themselves considering arguments about the disputed assessments of these expert agencies.[76]

One illustration of the extent of this process is the growth of specialist textbooks published in recent years. Twenty years ago there was no such Irish legal library. The following sample provides some indication of the extent to which practitioners and the courts are required to obtain specialist knowledge on increasingly discrete and technical areas of the law. These titles are comprehensive texts which have been published for the first time since 1996.

Fig. 3.5: Selected Specialist Publications 1996-2009

- Shannon, *Child Law* (Round Hall, 2001).
- Charleton, McDermott & Bolger, *Criminal Law* (Butterworths, 1999).
- Dowling, *The Commercial Court* (Round Hall, 2007).
- Lucey, *The Competition Act 2002* (Round Hall, 2003).
- Canny, *Construction and Building Law* (Round Hall, 2001).
- Canny, *The Law of Transport and Road Haulage* (Round Hall, 1999).
- Long, *Consumer Law* (Round Hall, 2004).
- Haigh, *Contract Law in an E-Commerce Age* (Round Hall, 2001).
- Cahill, *Corporate Finance Law* (Round Hall, 1999).
- McDonagh, *Freedom of Information Law in Ireland* (Round Hall, 1998).
- Ryan & Cubie, *Immigration, Refugee and Citizenship Law in Ireland* (Round Hall, 2004).
- Finucane, *Irish Pensions Law & Practice* (Round Hall, 1996).
- McGonagle, *Media Law* (Round Hall, 1996).
- Donnelly, *The Law of Banks and Credit Institutions* (Round Hall, 1999).
- Delany & McGrath, *Civil Procedure in the Superior Courts* (Round Hall, 2002).
- Maddox, *Mortgages Law and Practice* (Round Hall, 2007).
- Little, *Public Procurement Law* (Round Hall, 2007).
- Bolger & Kimber, *Sex Discrimination Law in Ireland* (Round Hall, 2001).
- Meaney, *Special Education Needs and the Law* (Round Hall, 2005).
- Clarke, *Takeovers and Mergers Law in Ireland* (Round Hall, 1999).
- O'Laoghaire, *Waste Management Legislation* (Round Hall, 2001).
- Hutchinson, *Arbitration Law and Practice* (Tottel, 2007).
- Twomey, *Partnership Law* (Tottel, 2000).
- Power, *Competition Law and Practice* (Tottel, 2001).

76 See, for example, *Orange Communications v. Office of the Director of Telecommunications Regulation (No. 2)* [2000] 4 I.R. 159.

- Kelleher, *Privacy and Data Protection* (Tottel, 2006).
- Simons, *Planning and Development Law* (Round Hall, 2004).
- Kelleher, *Information Technology Law in Ireland* (Butterworths, 1997).
- Madden, *Medicine, Ethics and the Law in Ireland* (Tottel, 2001).
- Cox & Schuster, *Sports Law in Ireland* (FirstLaw, 2004).
- Heffernan, *Scientific Evidence: Fingerprints and DNA* (FirstLaw, 2006).
- McHugh, *Public Relations and Corporate Communications Law in Ireland* (FirstLaw, 2006).
- Wood, *Divorce in Ireland* (FirstLaw, 1997).
- Ashe & Reid, *Money Laundering: Risks and Liabilities* (FirstLaw, 2000).

Many of the leading older texts have also been re-issued in updated editions since 1996.

Fig. 3.6: Selected updated specialist texts 1996-2009

- Hogan & Whyte, *JM Kelly's The Irish Constitution* (4th ed., Butterworths, 2003).
- Shatter, *Shatter's Family Law* (Wolfhound Press, 4th ed., 1997).
- McMahon & Binchy, *The Irish Law of Torts* (3rd ed., Butterworths, 2000).
- Delany, *Equity and the Law of Trusts in Ireland* (4th ed., Thomson Roundhall, 2007).
- Hogan & Morgan, *Administrative Law in Ireland* (3rd ed., Round Hall, 1998).
- Courtney, *The Law of Private Companies* (2nd ed., Butterworths, 2002).
- Clark, *Contract Law* (4th ed., Round Hall, 1998).
- Friel, *The Law of Contract* (2nd ed., Round Hall, 2000).
- Scannell, *Environmental and Land Use Law* (2nd ed., Round Hall, 2005).

4. Length

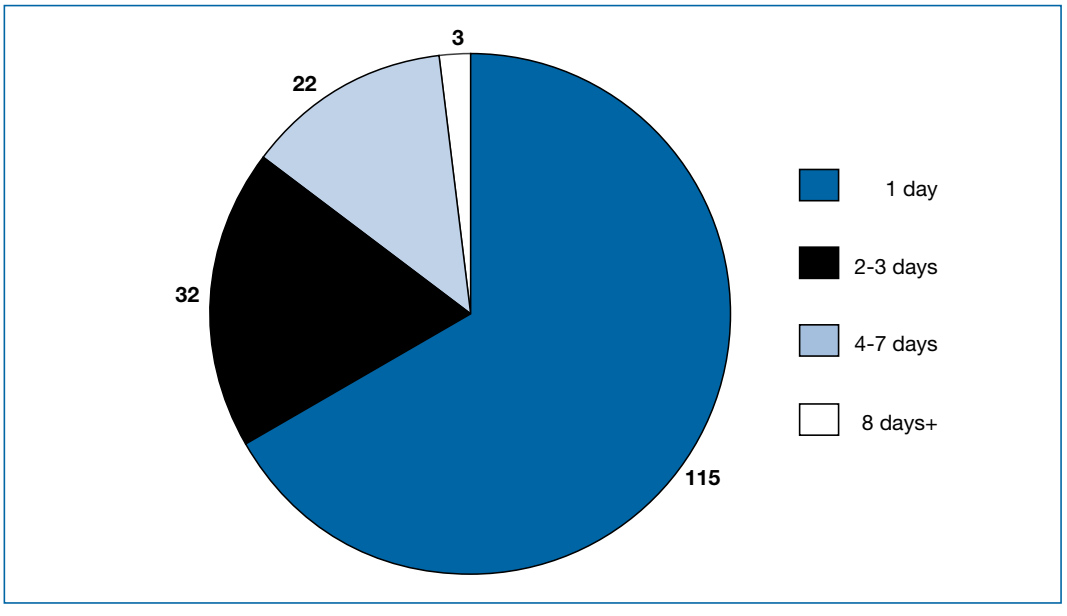
The complex and specialised nature of much modern litigation has also led to an increase in the length of court hearings. This is unsurprising. A court will have to spend longer dealing with a case where it involves extensive expert evidence or complicated contests of fact. Some modern cases involve matters of such complexity that the High Court has had to devote extensive court time to examining them at first instance.

Fig. 3.7: Selected Long Cases in the High Court

Title	Subject matter	Days
Bula v. Crowley	Receivership	277
Superwood v. Sun Alliance	Insurance	276
Fyffes Plc v. DCC Plc	Insider trading	87
Orange Communications v. ODTR	Telecommunications/Administrative Law	50
Bupa v. H.I.A.	Risk equalisation	35
N. v. H.S.E.	Child custody	18

These cases are amongst the most complex to have come before the Irish courts. An analysis of the operation of the High Court demonstrates that it is required to hold multi-day hearings in respect of a significant proportion of its caseload. This is becoming a more common factor.

Fig. 3.8: High Court Hearings Easter Term 2007



The figures for the six-week Easter sittings of the High Court indicate that 57 cases took more than one day to hear. This was almost exactly one-third of the total caseload of the Court for the Easter Sittings. Furthermore, almost 15% of cases (25 actions) took more than five days to be heard. Of these, the longest case was a personal injuries action which took 12 days, and which continued into the Trinity Term.

5. Alternative Dispute Resolution (ADR)

Measures have been implemented in an attempt to stem the tide of litigation and to have matters decided out of court. For example, on 13 April 2004, the Government established the Personal Injuries Assessment Board to assess damages in personal injuries cases. Similar specialist bodies, such as the Private Residential Tenancies Board and the Equality Tribunal, have been established to deal with disputes which arise in particular specialised contexts.

Other initiatives to reduce the pressure on the court system include various legislative initiatives in the area of ADR — alternative dispute resolution — and case management.

In respect of ADR, there is already legislative provision which facilitates parties entering into binding arbitration and the Government has recently published an Arbitration Bill (No. 33 of 2008) which will repeal the existing legislation[77] and replace it with a comprehensive Act based on the provisions of the UNCITRAL Model Law on International Commercial Arbitration.[78]

The availability of arbitration as a method of ADR takes a number of commercial disputes out of the court system but not all these cases can be dealt with *via* arbitration alone. The

77 The Arbitration Acts 1954-1998.
78 As amended by the United Nations Commission on International Trade Law on 7 July 2006.

High Court is still required to deal with some issues that may arise during the course of an arbitration. It dealt with 39 arbitration matters in 2007. However, while developing alternative areas of decision making, an effective and efficient court system remains essential. As the Committee on Court and Practice Procedure noted in the context of comments on the need for a dedicated Commercial Court:[79]

> **"There is both a considerable financial imperative and financial benefit to the State in establishing a Commercial Court. Notwithstanding the past buoyancy of the Irish economy, the current realities of international trading, both for established domestic companies and enterprises considering an inward investment in the State, demand an efficient and relevant legal system to enable the speedy resolution of commercial disputes. The need for such a system can never be replaced by alternative dispute resolution procedures and/or arbitration."**

6. Case Management

As well as taking cases out of the court system, there has also been an increased focus on case management within the court system. The example of the Commercial Court is dealt with at length in Chapter 5. Case management is not confined to the commercial arena, however. As the Chief Justice has pointed out:

> **"To meet the increasing demands being made on the courts as well as to permit the more efficient hearing and disposal of cases, the judiciary have introduced continuous improvements and changes in practice and procedures and in particular case management techniques."**[80]

In 2008, rules for case progression of family law proceedings[81] were made by the Circuit Court Rules Committee to enable Country Registrars to perform case management duties which ensure that proceedings are prepared for trial in a way that is just, expeditious and likely to minimise costs. It means that the County Registrars can ensure that the time and other resources of the family courts are used optimally. Further case management proposals were made in the Civil Law (Miscellaneous Provisions) Act 2008 to allow County Registrars exercise concurrent jurisdiction when assigned to provide back-up in busy counties.

7. Information Technology

There has also been an increased use of technology as a means of reducing the strain on the court system. The Courts Service launched a pilot of the *Small Claims Online* system which allows applicants to lodge claims at any time over the internet, pay the court fee online and track the progression of their application using a personal identification number (P.I.N.). The system is currently in use in 16 pilot offices. At the end of 2007, 46% of all claims filed in the pilot offices were filed online.

There is also now in place a High Court Case Tracking System which enables members of the public to obtain details of High Court cases using the internet: see www.highcourtsearch.courts.ie.

In addition, the Courts Service is currently developing an integrated computerised civil case management system. The first phase of the project reviewed civil and family law processes

79 Committee on Court Practice and Procedure: *27th* Report: Commercial Court, 13 February 2002. Available on www.courts.ie.
80 Courts Service, *Annual Report 2007*, at 7.
81 S.I. No. 358 of 2008.

to standardise and simplify processes and court forms across jurisdictions in order to improve efficiency.

The Courts Service has also introduced a computerised Criminal Case Management system. This supports the District Court and the Service is currently making a business case for its extension to the Circuit Criminal, Central Criminal and Special Criminal Courts.

Efficiencies in the practices and procedures of the courts are considered further in Chapter 23.

Such initiatives assist in alleviating some of the pressure on the court system. They are not, however, a panacea for all its ills. The establishment of statutory bodies such as the Personal Injuries Assessment Board, the Private Residential Tenancies Board, the Equality Tribunal and so on does remove a significant amount of administrative work from the judicial system. In reality, however, much of this work would formerly have been done at the lower levels of the system. Questions of law which arise in the course of the operation of these system still generally fall to be resolved by the Superior Courts. These reforms thus have a less significant impact than might be expected on the workload of the High Court and, in particular, of the Supreme Court. This explains in part why the caseload of the Irish Superior Court system continues to be overburdened.

8. Conclusions

Modern cases regularly concern matters of specialist expertise or involve complicated factual disputes. As a result of this, many cases require the holding of a lengthy first instance hearing.

Long and complicated first instance hearings are likely to affect adversely the court system's ability to process cases in a speedy and efficient manner. Apart from being slow in their own right, such hearings also reduce the capacity of the court system to deal with other, shorter, matters.

The analysis of the High Court's workload in Easter Term 2007 is an instructive example on this point. In that term there were 25 actions which took more than four days. These cases occupied the attention of a High Court judge for at least one week, thereby removing him or her from the panel of available judges. Each case therefore had a significant impact on the capacity of the Court to process its workload.

The long and complicated nature of these cases reduces the processing capacity of the court system. A significant backlog exists in the Supreme Court. As a two-chamber court, it has significantly less processing capacity than the 36 judge High Court.

C. The High Court

1. Organisation of the Court

The workload of the High Court has increased significantly in recent decades. This is evidenced by the number of High Court lists which are now in operation. It is instructive to compare the organisation of the contemporary Court with that of the High Court in the late 1950's and early 1960's.

For example, the Legal Diary of Thursday, 18 July 1957 shows four High Courts sitting. The President was hearing a list of the Wards of Court. Three High Court judges were presiding

over three jury trials. The Supreme Court was not sitting that day. It had cases listed for the following Monday, 22 July, and there were two cases in the list awaiting hearing dates.

Also, as an example, the Legal Diary of Wednesday, 14 January 1959 listed five High Courts. One Court was hearing Circuit Court Appeals. A Divisional Court of the High Court, comprising a panel of three High Court judges, was hearing two cases stated. A High Court judge was hearing a list to fix dates (seven cases were in the list) and also had an action at hearing. There was a list for *ex parte* applications, and in Court 6 a case stated was listed. Again, it is interesting to note that the Supreme Court had a workmen's compensation case at hearing. There were three cases listed for hearing in the future.

Today there are 36 sitting judges in the High Court, with over 37 different types of lists. They include the specialist lists in **Fig 3.9**.

Fig. 3.9: Specialist Lists in the High Court

Admiralty
Asylum
Bail
Bankruptcy
Chancery
Chancery Summonses
Circuit Appeals (Dublin)
Commercial
Common Law Motions
Competition
Dental Council
European Arrest Warrants
Examiner's Court List
Extradition
Family Law
Garda Compensation
Hague — Luxembourg Convention
Hepatitis C
Judicial Review
Jury List
Land Registry
Master's List
Medical Council
Non Jury List
Nursing Council
Personal Injuries (Dublin)
Personal Injuries (Provincial)
Probate List
Proceeds of Crime Act
Provincial — High Court Personal Injuries
Rulings
Section 150 Companies Act
Solicitors Act
Taxing Master's List
Wards of Court

The fact that the High Court has developed such an extensive array of specific lists provides some indication of the complex nature of its current caseload. A new list is created when the number of cases involving a particular issue have grown to such an extent that they require the dedicated attention of a division of the High Court. The creation of a list is a reflection of the fact that the volume of cases in the relevant area has reached such a point that a judge (or judges) ought to be allocated to that category of case on a regular basis.

It indicates, in many ways, that another *tranche* of High Court activity has proliferated to such an extent that it has acquired some degree of litigious permanence.

The High Court today encounters a wider and more diverse range of issues than was formerly the case. An examination of some of these lists illustrates the ways in which this has occurred.

2. Case Study — Asylum

Many of the 37 lists were established as a result of statutory developments. The Asylum List is a good example. Until the establishment of the Office of the Refugee Applications Commissioner (ORAC) and the Refugee Appeal Tribunal (RAT) under the Refugee Act 1996, there was no formal legal process for asylum appeals outside the courts.[82]

Between the implementation of the Refugee Act in November 2000 and December 2005, the ORAC processed 48,632 applications and the RAT heard 22,806 appeals.[83] Since 2000, further appeals from decisions of the RAT may be made to the High Court by way of judicial review.[84] 909 applications for judicial review of asylum decisions were issued in 2006, an increase of 151 on the previous year's figures. Judicial review proceedings in this area are subject to specific leave criteria.[85]

This list, of course, did not exist prior to the formalisation of asylum procedures in the State. It is a useful example of a situation in which the structures and organisation of the courts have had to evolve to deal with statutory developments which have generated a significant amount of new litigation.

3. Case Study — Section 150 List

One of the additions to the High Court lists has been the introduction of the Section 150 List. This list contains cases concerning proceedings under s.150 and s.160 of the Companies Act 1990, which relate to the restriction and disqualification of company directors.

Again, this is a list which has grown in recent years following the enactment of the Company Law Enforcement Act, 2001, which created a new enforcement body for Company Law — the Office of the Director of Corporate Enforcement (ODCE). The creation of the ODCE led to an increase in the number of s. 150 and s. 160 proceedings against company directors and the creation of a new High Court list to hear cases in this specific area of regulatory law.

This list is a useful example of the fact that the establishment of specialist regulatory bodies necessarily involves a change in the caseload of the courts. The courts have a supervisory jurisdiction over these bodies, and therefore they generate more litigation. This litigation may also require the courts to rule on novel questions involving specialist knowledge or expertise.

82 The State established an Interim Appeals Board in 1993. The Board heard no cases prior to 1997 due to judicial review proceedings which sought to challenge the lack of legal aid available in respect of appeals. See Farrell, ''Law and Practice Relating to the Interim Refugee Appeals Authority'' (1997) 3 (2) *Bar Review* 50.

83 Statistics provided by the Department of Justice. Available also from the Irish Refugee Council *Statistics Report 2005* (13 January 2006) at Section F. This report is available on-line at http://www.irishrefugeecouncil.ie/refugee—stats/stats05.html (Last visited 27 January 2009).

84 See s. 5 of the Illegal Immigrants (Trafficking) Act, 2000. While the leave requirements are stricter than the usual standard in judicial review proceedings, a substantial number of applications are still made to the High Court from the RAT.

85 See s. 5 of the Illegal Immigrants (Trafficking) Act, 2000.

4. Case Study — Planning

It is important to bear in mind that, in addition to dedicated lists such as the Proceeds of Crime Act List, or Competition List, several areas of specialist expertise are dealt with in the more general Common Law, Chancery or Judicial Review lists. Planning cases, for example, are generally dealt with in the Judicial Review list with specific requirements as to leave.[86]

Prior to 1963,[87] there was no dedicated statutory planning code. The law on planning and development has now expanded to the point, however, where there are a number of substantial textbooks on the market which cover the Irish law in this area.[88]

Planning applications are dealt with at first instance by the relevant planning authority. Appeals as of right may be made to An Bord Pleanála. There is no automatic right to a further appeal from An Bord Pleanála and any appeal to the High Court must be taken by way of judicial review under the Planning and Development Act 2000.[89]

In 2006, 50 judicial review proceedings involving planning issues were instituted. This was an increase of three on the previous year. There were also 16 cases issued concerning unauthorised developments.[90] This list of planning cases illustrates the fact that the introduction of a novel statutory regime may not lead only to a short-term increase in litigation. Issues may continue to arise for decades afterwards. Cases occurring in the aftermath of a statutory enactment may become permanent features of the Court's caseload.

These figures also emphasise that the establishment of specialist regulatory bodies, such as An Bord Pleanála, does not absolve the courts of responsibility for these matters. Cases continue to be brought before the courts, and judges continue to be asked to judicially review these specialist matters.

5. Analysis and Conclusions

The caseload of the High Court exhibits the increased volume of litigation, its complexity, its specialisation, and its length. In 2007 there was a 26% increase on 2006 in cases commenced in the High Court.

The case studies describe a number of the ways in which the caseload of the Court has evolved. The acquisition of new competences over statutory regimes or regulatory bodies generates increased litigation for the Courts. Furthermore, this litigation may be complex or difficult to resolve. Investigating and adjudicating on novel or technical cases may involve a lengthy hearing. This necessarily occupies a great deal of court time, which delays the hearing of other pending proceedings.

The appointment of additional High Court judges has been an important step in addressing this issue. It facilitates the establishment of dedicated lists to deal with these difficult cases. These judges who are specifically allocated a list are likely to acquire specialist expertise

86 See s. 50 of the Planning and Development Act 2000 (as amended by s. 12 of the Planning and Development (Amendment) Act, 2002.
87 The Local Government (Planning and Development) Act, 1963 introduced a planning regime in the State.
88 See Simons, *Planning and Development Law* (Round Hall, Sweet & Maxwell, 2004), O'Donnell and O'Sullivan, *Planning Law* (Butterworth, 1999), Galligan, *Irish Planning Law and Procedure* (Round Hall, Sweet & Maxwell, 1997), Keane & Walsh, *Planning and Development Law* (Incorporated Law Society of Ireland, 1984).
89 Section 50 of the Planning and Development Act, 2000.
90 Using the procedure under s. 160 of the Planning and Development Act, 2000.

in that role, thereby reducing the necessity to conduct lengthy technical hearings afresh in each proceedings.

However, the increase in complexity, specialisation and length of cases has not been confined to certain specialised lists. They may be the most obvious examples of this trend, but the same characteristics are observable in relation to all litigation. Cases in general are becoming longer and more complex.

This explains the considerable increase in the High Court's output of written judgments. These are often needed to resolve the complex factual disputes, novel legal issues, or questions of specialist expertise which arise in modern litigation. Processing such cases inevitably takes time. This reduces the availability of judges, and thus the system's capacity to provide speedy and efficient dispute resolution. As the next section will show, however, this difficulty is much more acute in the case of the Supreme Court.

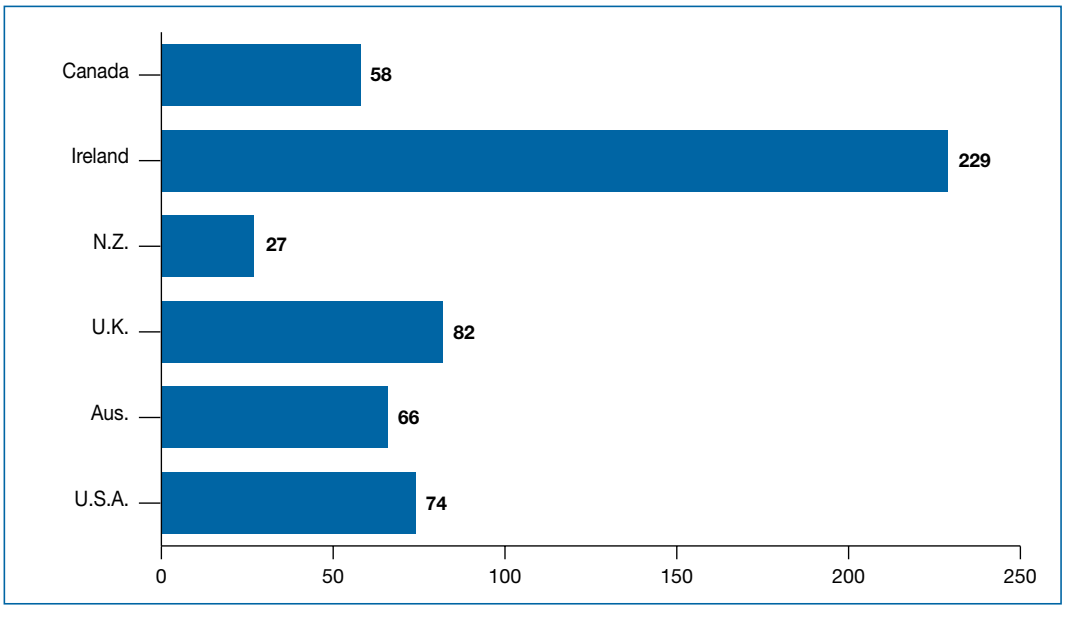
D. Supreme Court

1. Volume of Appeals

The characteristics discussed above have also led to significant changes in the nature and volume of cases coming before the Supreme Court. The High Court's output of written and reported decisions has increased, relative to previous years. This illustrates the extent to which Supreme Court litigation today raises novel issues and complex disputes.

There has also been a considerable increase in the volume of cases coming before the Supreme Court with the figure for 2008 standing at 443 appeals (See **figure 3.1**). To put this in international perspective, the Irish Supreme Court deals with significantly more matters than other equivalent common law courts.[91]

Fig. 3.10: Matters disposed of by Courts of last resort in 2007



91 The figure for New Zealand in the diagram below reflects the fact that 2005 was the first year of operation of the new Supreme Court. It is to be expected that it will take a number of years for new cases to proceed all the way to that new court of last resort. This is borne out by the steady increase in the number of appeals being taken to the New Zealand Supreme Court. In 2006, for example, the Court disposed of 17 appeals. The figures cited for other jurisdictions concern cases fully argued before each court. For example, the figure for the United States Supreme Court does not include cases dealt with summarily. The figures also only relate to decided cases. Courts in other jurisdictions usually also have a number of additional specialist functions. The House of Lords, for example, hears a number of cases each year as the Privy Council.

The Supreme Court continues to function at this elevated level of activity. In 2008, 229 matters were disposed of by the Supreme Court.[92]

It is clear that, in comparison with its international counterparts, the Irish appellate system is operating under serious institutional pressures. The number of appeals being taken to, and processed by, the Supreme Court is significantly greater than any other equivalent common law court of last resort. This situation exists in spite of the fact that Ireland appears to have one of the lowest rates of appeal in the common law world. As the following figures indicate, appeals are taken from first instance civil Superior Court proceedings in Ireland in only 2-4% of cases. This compares, for example, to 6-8% of cases in Canada and approximately 20-30% of cases in New Zealand.

Fig. 3.11: Appeals Taken as a Percentage of First Instance Proceedings[93]

Ireland:

2007:
Civil claims issued[94] in the High Court: 16,025
Appeals lodged with Supreme Court: 373
Percentage of appeals: **2.32%**

2006:
Civil claims issued in the High Court: 11,825
Appeals lodged with Supreme Court: 484
Percentage of appeals: **4.1%**

2005:
Civil claims issued in the High Court: 10,160
Appeals lodged with Supreme Court: 446
Percentage of appeals: **4.39%**

Australia:[95]

2007/2008:
Matters filed at first instance in Federal Court: 3,076
Federal Court appeals to Full Federal Court: 356
Percentage of appeals: **11.57%**

2006/2007:
Matters filed at first instance in Federal Court: 3,543
Federal Court appeals to Full Federal Court: 339
Percentage of appeals: **9.57%**

2005/2006:
Matters filed at first instance in Federal Court: 4,827
Federal Court appeals to Full Federal Court: 283
Percentage of appeals: **5.86%**

2004/2005:
Matters filed at first instance in Federal Court: 3,133
Federal Court appeals to Full Federal Court: 409
Percentage of appeals: **13.05%**

92 Figures provided by the Courts Service.

93 These figures are based, where possible, on the number of civil claims issued in the relevant court of first instance in any given year. The figures do not take account of the number of proceedings in which, for various reasons, no first instance decision is ever given. As the figures relate to a particular 12 month period, they are illustrative only — they do not purport to suggest that the figures for first instance cases and appeals necessarily involve the same proceedings.
It should also be borne in mind that a number of the jurisdictions referred to are federal systems, in which many matters which would be dealt with in Ireland by the High Court are instead heard by state courts. Some jurisdictions also have courts or tribunals dealing with specific areas that are more usually heard by the High Court in Ireland. This leads to a lower civil workload for these courts, when compared to the Irish High Court. These factors partly explain, for example, why the Irish High Court deals with a much greater number of civil claims than its New Zealand counterpart.

94 These figures have been compiled from the "cases initiated" sections of the Courts Service *Annual Reports* for the relevant years. They do not count all proceedings and may count some categories more than once.

95 Figures taken from the Annual Reports of the Federal Court of Australia available at http://www.fedcourt.gov.au (Last visited 17 January 2009).

New Zealand:[96]
2007:
Civil matters filed in High Court: 911
Civil appeals filed with Court of Appeal: 208
Percentage: **22.8%**

2006:
Civil matters filed in High Court: 792
Civil appeals filed with Court of Appeal: 285
Percentage: **35.98%**

2005:
Civil matters filed in High Court: 939
Civil appeals filed with Court of Appeal: 288
Percentage: **30.67%**

Canada:[97]
2007:
Proceedings instituted in Federal Court: 7,241
Appeals from Federal Court to Federal Court of Appeal 669
Percentage: **9.24 %**

2006:
Proceedings instituted in Federal Court: 8,521
Appeals from Federal Court to Federal Court of Appeal: 724
Percentage: **8.5 %**

2005:
Proceedings instituted in Federal Court: 9,731
Appeals from Federal Court to Federal Court of Appeal: 738
Percentage: **7.58 %**

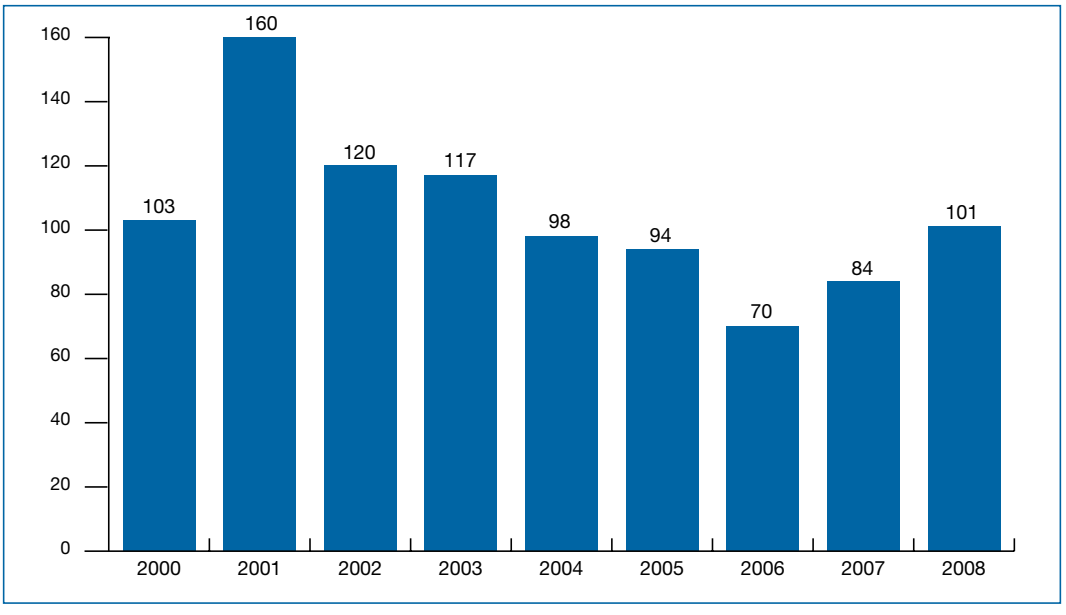
Ireland's appellate system is under severe pressure. Although proportionately fewer appeals are taken in Ireland, with an equivalent of only 2.32% of High Court cases being appealed to the Supreme Court in 2007, the Irish Supreme Court receives far more appeals per year than any of its international counterparts. The Supreme Court processes considerably more actions than other Supreme Courts as it has the dual role of a Supreme Court and a Court of Appeal. It is required to rule on complicated and lengthier matters while simultaneously dealing with a larger caseload. These pressures inevitably impact on the Court's output. The next section will examine how these changes have affected the Court's output in recent years.

96 Figures taken from the Annual Reports of the Court of Appeal of New Zealand and the annual High Court statistics (January-December) available at http://www.courtsofnz.govt.nz (last visited on 27 January 2009).

97 Figures from quarterly reports of the Federal Court of Appeal available at http://www.fca-caf.gc.ca (Last visited 27 January 2009) and end of year reports from the Federal Court of Canada available at http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc—cf—en/Index (Last visited 27 January 2009).

2. Output of the Supreme Court

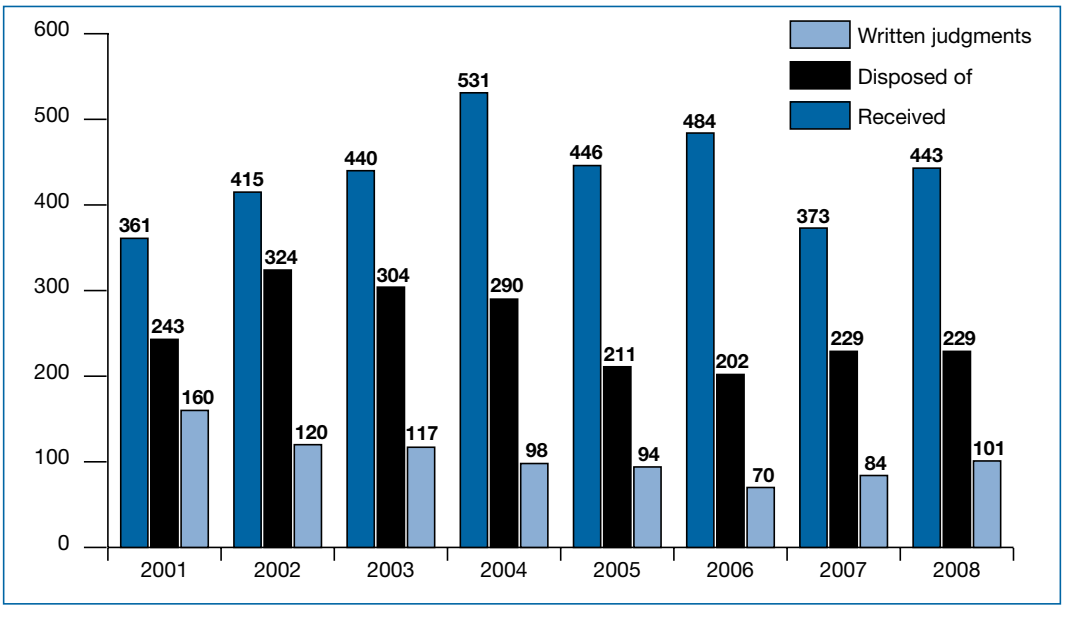
Fig. 3.12: Written Judgments of the Supreme Court 2000-2008



3. Output Analysis

What are the implications for the legal system of the Court's current output levels? **Fig. 3.13** considers the Court's inputs and outputs over an eight year period.

Fig. 3.13: Supreme Court inputs and outputs 2001-2008



As can be seen from these figures, the Court's outputs, like its inputs, are consistently and significantly greater than those of other Supreme Courts. In addition, as detailed in the preceding sections, the Supreme Court is consistently producing significantly more judgments than other Supreme Courts. The Court's outputs are at a historical and an international high. However, the Court is still disposing of considerably fewer matters than

it receives in a given year. In spite of the fact that it is producing more outputs than ever before, it is unable to keep pace with the inputs.

The picture that emerges from these figures is of a Supreme Court which has increased its output performance significantly in recent years but which has still been unable to keep pace with its inputs. This suggests that a reform process which focuses only on the Court's output performance will not, of itself, provide a solution to the system's current problems. As the recent experience of the Irish courts shows, reforms which produce improvements in outputs are beneficial but are not a panacea for the system's problems. This is illustrated by the fact that the Court is functioning at a higher output level than any other comparable Supreme Court. Yet a delay is developing in the Supreme Court which suggests the presence of more profound and systemic structural problems in the Irish court system. These may include the following matters:

(i) Type of matters

The disparity between the number of cases disposed of, and the number of written or reported decisions, demonstrates that the Court is dealing with a significant number of matters on an *ex tempore* basis. This is reflected in the Court's practice of holding a list on Fridays which is exclusively dedicated to motions and short cases.

The Irish Supreme Court is unique in having to deal with such a large volume of cases.[98] That so many matters coming before it may be disposed of quickly underlines the veracity of Mr. Justice Geoghegan's analysis of the Court's caseload, as outlined in Chapter 9.

This suggests that the Court may be dealing with many matters which are more suitable for an intermediate appellate court.

It should be noted also that the processing of these short cases adversely impacts upon the Court's capacity. One day each week is dedicated to dealing with these matters. This means that the Court, in dealing with the more complex cases, is operating, at best, at only 80% of its potential capacity.

(ii) Complexity of cases

As discussed in the section on the High Court, proceedings today have become longer and more complex. They often require longer hearings in which areas of complicated facts, or specialised expertise, must be addressed. The complexity of these appeals frequently obliges the Court to spend more time reaching its conclusions. This is even more relevant where the proceedings raise novel or technical issues which require a written judgment.

In considering the High Court, it was observed that this can be dealt with, in part, by assigning such cases to dedicated lists, or dedicated divisions of the Court. These options are not, however, available to the Supreme Court.

The increasing length of modern litigation places significant pressure on the Court's ability to process its growing caseload. These cases take time to hear and to decide. They necessarily occupy a great deal of Court time. To hear a complex case and to draft and deliver a written judgment in respect of it reduces the time available to the Court to perform the many other tasks which it is currently obliged to undertake.

98 See Chapter 7.

The level of written and reported decisions delivered by the Court has remained at (decreasing but) historically high levels. This means that the Court is currently required to operate under time and logistical pressures greater than at any period in the past, at the same time as it is being asked to process a historically high number of appeals.

(iii) Judicial resources

One of the features of common law court systems is the employment of judicial researchers (sometimes referred to as law clerks) to assist judges in the research for and preparation of their written judgments. In this jurisdiction, ten researchers are employed as a pool of researchers for all the judges, that is 145 judges. This is in contrast to the position in other common law court systems where significantly more research support is available. For example, in Canada, each Supreme Court Justice has three clerks. In the United States, the Chief Justice of the Supreme Court is entitled to five clerks and other Supreme Court justices may employ four each. The comparative lack of such professional assistance, i.e., law clerks, constrains the capacity of the Irish Supreme Court to deal with complex cases in a timely manner. In the High Court, there are now ten judicial fellows to assist the judiciary. Each fellow is assigned to a specific judge. Discussions are underway in relation to the provision of law clerks for the Supreme Court.

4. Conclusions

This analysis has a number of implications for the Supreme Court's future performance:

(i) Delays

The nature and character of the Court's caseload is increasingly unsustainable. The number, duration and complexity of appeals is growing. The result is that as the number of appeals is escalating so too are many of them occupying more Court time. As a two-chamber Court, the Supreme Court has only limited court time available. This inevitably leads to delays in the processing of cases.

The legal system's current problems were correctly anticipated by the Constitution Review Group. In its 1996 Report, the Constitution Review Group (CRG) considered the question of whether the power to judicially review legislation ought to be conferred upon intermediate appellate courts. A majority of the Group expressed the view that this should not be done.

However, it is instructive to note that the CRG warned that changes in litigation could create a situation in which it would be necessary to establish an intermediate appellate court. The CRG noted the ''huge increase'' in litigation up to 1996, and commented that this had placed the existing court structure ''under strain''.[99]

It concluded, therefore, that ''it is not inconceivable that in the future, with further increase in litigation, it would be desirable to establish intermediate appellate courts''.

The ''further increase'' in litigation, to which the Group referred, has, of course, occurred. Cases have increased in both volume and complexity. In 1995, the High Court delivered 231 written decisions. In 2005, it issued 484. This is an increase of almost 110% in ten years.

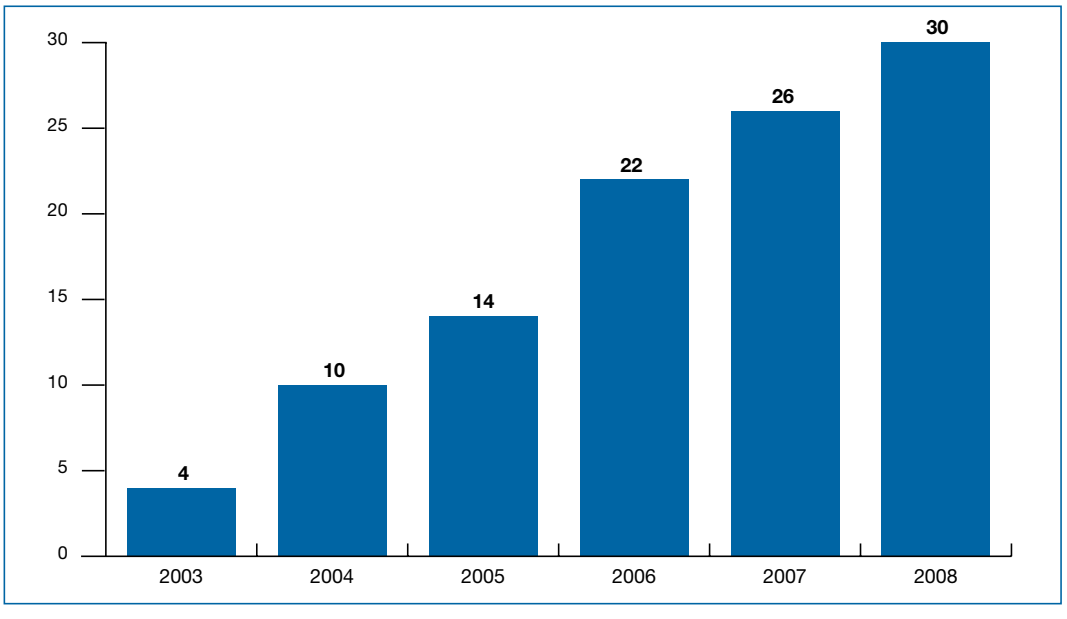
99 Constitution Review Group, The Report of the Constitution Review Group (Stationery Office, 1996), at 158.

As this Report has already noted, the High Court has been expanded in an effort to address these difficulties. This has, however, put further strain on the Supreme Court. When the CRG was writing its report, the Supreme Court was dealing with appeals from 19 High Court judges. Today, it receives appeals from 36.

The pressures which the CRG identified have thus become increasingly acute. As the CRG itself acknowledged, the case for an intermediate appellate court has much greater force in those circumstances than it did in 1995.

This is illustrated by a consideration of the increase in waiting times in recent years:

Fig. 3.15: Supreme Court waiting times 2003-2008



The waiting time in 2008 for cases to be heard in the Supreme Court is up to approximately 30 months. Cases with priority in Michaelmas 2008 had a waiting period of up to 12 months.

This is in spite of the fact that the Court has adopted a number of procedural innovations to expedite the processing of these appeals. Parties are now required, for example, to provide written submissions to the Court in advance, in an effort to reduce the time taken on appeal hearings.

Delays have increased. The Supreme Court has consistently enhanced its procedures for processing cases over the last few years, but faced with longer and more complex appeals, it has, in a very real sense, been running to stand still. This increasing delay is a matter of concern. It has a serious effect on individuals and families who are involved in appeals to the Supreme Court. Further, it raises concern in relation to litigants in business and commercial matters.

(ii) Uncertainty

With the Supreme Court operating under such significant pressure, there must be a risk that it will be forced to hold shorter hearings, or to deliver more *ex tempore* decisions. This may be suitable for some of the Court's caseload. However, it would be problematic for cases concerning new or emerging questions of social, commercial or legal conduct.

If the sheer volume of Supreme Court appeals forces the Court to deal with cases on the basis of a short hearing and an *ex tempore* judgment, that may be unsatisfactory. *Ex tempore* decisions are not a problem in themselves. They create difficulties only if delivered in cases to which they are inappropriate. If this did occur in the future, it would be detrimental for those directly involved and for economic and commercial life in Ireland. This would be especially unhelpful in the newer fields of commercial and regulatory activity, where it is critically important that the courts provide speedy clarification of the way in which the law will, in written and reported judgments, treat new concepts or innovations.

(iii) Specialisation

The Supreme Court is required to process all appeals from the High Court. The Court is thus obliged to rule on complex questions across all areas of legal activity.

Many of the cases appealed to the Supreme Court under the current system would be more appropriately dealt with by a specialist division of an intermediate appellate Court. This would facilitate the speedy and expert processing of cases.

For example, a planning list in a Court of Appeal would be dedicated entirely to dealing with such cases. The judges assigned to it would be familiar with the technical matters involved, and with the wider social and infrastructural issues raised by planning appeals. These often complex cases would not be delayed by, or delay, the hearing of other cases as they would be heard in a Court of Appeal and not be part of the list in the Supreme Court.

(iv) Suitability

The current system involves the Supreme Court dealing with a range of cases which are not suitable for a court of final appeal. The figures for reported decisions suggest that the Court is dealing with 50-60 cases raising issues of general public importance each year. Mr. Justice Geoghegan's analysis of the Supreme Court's current caseload suggested a similar figure of 70-75. This would be broadly in line with international standards.

However, the Court is also processing many other matters. It is required to deal with many cases which would be more suitably allocated to another court.

Cases which do not involve any novel point of law, or of legal or constitutional importance, and where the Courts' only function is possible error correction, are not appropriate for a Supreme Court. As with short motions, these appeals could be more suitably processed by a multi-divisional intermediate appellate court.

E. Summary and Conclusions

Increased specialisation and complexity in the law have led to a growth in lengthy litigation. The existence of an automatic right of appeal from the High Court to the Supreme Court in many cases means that the court of final appeal is dealing with a large volume of cases. Many of these are, of necessity, dealt with on an *ex tempore* basis. Many of the cases appealed to the Supreme Court under the current system would be more appropriately dealt with by an intermediate appellate court.

CHAPTER 4

Time Limits and International Obligations

A. Introduction

One of the consequences of a two-tier Superior Court system is that all appeals necessarily proceed to the sole appellate court. The entire appellate workload of a two-level court structure must be borne by a solitary institution. In Ireland, that institution is the eight-judge Supreme Court. The number of judges in the Irish Supreme Court is broadly comparable to that in other common law countries. This reflects the general desire in legal systems to avoid the increased inconsistency in decision-making that tends to accompany additional divisional sittings of a court.

This body is capable, at most, of sitting simultaneously as two divisions. This imposes very significant logistical constraints on the Courts. At the level of the Supreme Court, the legal system's capacity to process case-volume is considerably reduced. Yet all appeals from the High Court are at present funnelled into the Supreme Court. This means that the appellate output of 36 judges (usually sitting by themselves) is channelled directly into a two-chamber bottleneck. This has led to delays in the processing of appeals by the Court.

This is an unsatisfactory situation. A delay in the resolution of a legal dispute often places the parties involved under considerable emotional and psychological pressures. Where a case concerns commercial entities, delays also generate significant economic and administrative expense.

In addition, however, there are several discrete areas in which delays place Ireland in breach of its international obligations. Ireland is a party to a number of international agreements which oblige the State to deal with certain cases within a specified period of time. When first instance decisions in these cases are appealed, they join the already extensive range of High Court appeals which the Supreme Court is required to process.

This leaves the Supreme Court in the difficult position where it must choose between the imperfect alternatives of allowing these cases to take their place in the queue, or attempting to expedite them. If these cases are required to join the backlog of appeals, they will not be dealt with within the required time limits. The waiting time for cases to be heard in the

Supreme Court was 30 months in December 2008. This exceeds the time envisaged by each of the international regimes outlined below.

If, in the alternative, these cases are fast-tracked, this further postpones the hearing of those (already delayed) matters over which they have been allowed to take precedence. Furthermore, even if they are expedited, there is no guarantee that they will be processed within the requisite period of time. With such a large range of appeal cases, there will always be many other matters with good claims for a priority hearing. This is a particular problem when there is a long standard waiting list. The longer the prospective delay in having an appeal heard by the Supreme Court, the greater the incentive for the parties to apply for priority status. As the waiting time for non-priority cases increases, so priority will be asserted in more and more proceedings. This slows the priority list.

The result is that, at present, the waiting time for cases in the priority list can be up to 12 months. In Ireland's current two-tier system, therefore, to expedite a Supreme Court case is simply to place it on the shorter of two lengthy waiting lists.

This chapter will examine the problem of inappropriate delays in the Irish court system in view of Ireland's international obligations.

B. Conventions on Child Custody and Abduction

1. The Hague Convention

The Hague Convention on the Civil Aspects of International Child Abduction has the force of law in Ireland, by virtue of s. 6 of the Child Abduction and Enforcement of Custody Orders Act, 1991. The Convention provides an international framework for the resolution of cases in which children are wrongfully removed to, or retained in, another jurisdiction.

Given the potentially traumatic character of child abduction cases, and the detrimental impact which any long-running inter-jurisdictional dispute may have on the development and well-being of a child,[100] the Convention aims to ensure that these matters are dealt with expeditiously. To that end, Article 11 requires that:

> **''The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.''**

The Convention particularises this obligation by providing that a requesting State can require an explanation for any failure to reach a decision within six weeks.[101]

The importance of adhering to these time limits is indicated by Article 12, which creates an exception in cases in which proceedings are commenced more than 12 months after the wrongful removal or retention of the child, and in which it can be demonstrated that the child ''is now settled in its environment''. This reflects the fact that, for developmental reasons, it may be unsatisfactory to involve a child in the upheaval of removing them from a situation

100 In *R.K. v. J.K.* [2000] 2 I.R. 416, at 452, Barron J. pointed out that delay heightens the emotional aspects of the case with corresponding harm to the parents and to the children.

101 Article 11 provides: ''If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be''.

to which they have become accustomed. This underscores the necessity of promptness in Hague Convention cases.

2. The Luxembourg Convention

Similar considerations of expedition and speed apply to cases arising under the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (the Luxembourg Convention). Here again, to delay the processing of a case is to risk grave emotional and developmental damage to the children in question.

This Convention is given force of law in Ireland by s. 21 of the Child Abduction and Enforcement of Custody Orders Act, 1991. It governs situations in which a custody decision has already been made, and a child has been removed or retained in breach of a court order made on foot of that decision. As in the Hague Convention, the Luxembourg Convention is concerned to ensure that these cases are dealt with in a prompt and expeditious manner, so as to minimise the potential detriment to the child in question.

Article 3 obliges Contracting States to ''act with all necessary despatch''. By reference to Article 14, this must involve the application of ''a simple and expeditious procedure for recognition and enforcement of decisions relating to the custody of a child''. As with the Hague Convention, provision is made for an exception where there is delay in the making of an application. Where an application is made within six months of the removal, the Convention is clear that a return should usually be ordered. Where an application is made after that time, however, Article 10 of the Convention allows for enforcement to be refused if, *inter alia*:

> **''[I]t is found that by reason of a change in the circumstances including the passage of time but not including a mere change in the residence of the child after an improper removal, the effects of the original decision are manifestly no longer in accordance with the welfare of the child.''**

3. Irish Case Law

The necessity for expedition in cases concerning child abduction is a consideration which the Irish courts have emphasised repeatedly. The necessity for a fast-track management process was noted in **A.S. v. P.S. (Child Abduction)**[102] and **T.M.M. v. M.D.**[103]

With this objective in mind, specific procedural rules apply to these cases in the High Court. An application for the return of a child under the Hague or Luxembourg Conventions must be brought by way of special summons grounded on affidavits.[104] A respondent has seven days after service of the grounding affidavit to file any replying affidavits. An applicant is then allowed seven days from the receipt of any such replies to file further affidavits on any issue or matter raised.

In the Supreme Court applications are listed for mention on the Thursday immediately after they have been lodged. At this stage, practitioners indicate to the court how the matter is

102 [1998] 2 I.R. 244, at 265.
103 [2001] 1 I.R. 149
104 Order 133, rule 5 (2).

being expedited, and directions on the filing of submissions and fixing of an early hearing date are given by the Court.

The specific procedural rules have become especially valuable as the numbers of Hague and Luxembourg Convention cases has increased. There has been a steady increase in the number of Hague/Luxembourg (Child Abduction) cases, with 46 new cases in 2006, compared with 31 in 2005 and 27 in 2004. In 2008, there were 45 new cases.

Fig. 4.1: Hague/Luxembourg Convention Applications

Year	Number
2004	27
2005	31
2006	46
2007	45
2008	45

As the following examples illustrate, the taking of an appeal against the decision of the High Court formerly slowed the processing of these applications. The more recent decision of the Supreme Court in **S.R. v. M.M.R**.[105] shows that the Court has had considerable success in fast-tracking this type of appeal. As the introduction to this chapter notes, however, this necessarily creates additional delays for other proceedings in the Supreme Court's caseload.

Fig. 4.2: Processing of Hague/Luxembourg cases (selected)

Case name	Summons issued	High Court decision	Supreme Court decision
T.M.M. v. M.D.	11 March 1998	20 January 1999	8 December 1999
Re E.M.	8 October 2001	18 July 2002	9 July 2003
S.R. v. M.M.R	October 2005	25 January 2006	16 February 2006

4. Brussels II Bis Regulation

Council Regulation (EC) No. 2201/2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, repealing Regulation (EC) No. 3147/2000, otherwise known as the Brussels II bis Regulation, came into force on 1 March 2005. Applying to EU Member States, the Regulation reformed the law in relation to inter-jurisdictional access or custody disputes, enhancing the role of the State of habitual residence in child abduction cases, and expediting proceedings in such cases. As with other legislation in this area, the Regulation provided for rigorous time limits and simplified procedures.

As with the Hague and Luxembourg Conventions, Brussels II bis imposes strict obligations on Ireland which our two-tier Superior Court system is ill-equipped to meet.

105 [2006] IESC 7.

C. The European Arrest Warrant

1. Background

Introduced in the immediate aftermath of the September 11th attacks on the United States, the European Arrest Warrant (EAW) was designed:

> **"[T]o abolish all existing extradition arrangements between the member states of the European Union and to substitute a new and expeditious system of surrender."**[106]

The EAW originated in a:

> **"[M]ovement among the member states of the European Union . . . to establish, as between themselves, a simpler, quicker, more effective procedure**, founded on member states' confidence in the integrity of each other's legal and judicial systems."[107] (Emphasis added)

Speedy resolution is therefore of the essence for the European Arrest Warrant Regime. The Council *Framework Decision on the European Arrest Warrant and the Surrender Procedures between Member States* (2002/584/JHA), which brought the EAW into existence, makes repeated references to the importance of expedition. Effect was given to the Framework Decision by the passing by the Oireachtas of the European Arrest Warrant Act, 2003. As the European Court of Justice confirmed in **Pupino**,[108] the Act falls to be interpreted in light of the provisions of the Framework Decision.

The time limits contained in the Act are similar to those in the Framework Decision. Section 13 obliges the High Court to fix a date for hearing within 21 days of an accused's arrest. Section 16 requires the Court to direct the giving of reasons to Eurojust and to the requesting State where an order has not been made within 60 and 90 days.[109]

The Supreme Court found in **Dundon**[110] that the 60 and 90 day time limits set out in s. 16 were not to be interpreted as mandatory requirements but noted the emphasis attached to expedition in the Framework Decision and, by implication, in the 2003 Act.

2. Administration of the EAW system

Several procedural steps have been taken to try and ensure that these applications are dealt with in a timely manner. Evidence is usually adduced by affidavit.[111] Objections must

106 *Dundon v. Governor of Clover Hill Prison* [2006] 1 I.R. 518, at 545, *per* Fennelly J.
107 *King's Prosecutor (Brussels) v Cando Armas* [2005] UKHL 67, at para. 2
108 (Case C-105/03) [2006] Q.B. 83.
109 Section 16 (10) and (11) state that:

> "(10) If the High Court has not, after the expiration of 60 days from the arrest of the person concerned . . . made an order . . . or has decided not to make an order under this section, it shall direct the Central Authority in the State to inform the issuing judicial authority and, where appropriate, Eurojust in relation thereto and of the reasons therefore specified in the direction, and the Central Authority in the State shall comply with such direction.
> (11) If the High Court has not, after the expiration of 90 days from the arrest of the person concerned . . . made an order . . . or has decided not to make an order under this section, it shall direct the Central Authority in the State to inform the issuing judicial authority and, where appropriate, Eurojust in relation thereto and of the reason therefor specified in the direction, and the Central Authority in the State shall comply with such direction."

110 [2006] 1 I.R. 518.
111 Order 98, rule 7, RSC.

be raised in summary form in writing in advance.[112] Furthermore, these objections must be genuine and substantial and not merely formulaic.[113]

Statistically a great number of applications in the High Court are successful, with an order for surrender made. However, the respondent has the right to appeal, on a point of law. Many respondents exercise this right. In the cases in which an order for surrender is refused, the Minister for Justice, Equality and Law Reform will often appeal such refusal.

The Supreme Court has taken steps to expedite these appeals. The Practice Direction of 27 April 2006 provides that a case will be listed for mention on the Thursday after the lodging of a notice of appeal. At this hearing, the Court will enquire as to ''what steps have been taken in order to ensure the expeditious hearing of the appeal'' and give directions on the filing of written submissions ''with a view to the earliest date possible being fixed for the hearing of the appeal''.

Even allowing for these procedures, however, there may be some lapse of time before an appeal is resolved.

3. Ireland's Performance

A recent Commission report on the EAW has found that Ireland lags significantly behind its European counterparts in complying with the time limits envisaged by the Framework Decision. The Commission's *Report on the Implementation since 2005 of the Council Framework Decision on the European Arrest Warrant and the Surrender Procedures between Member States*[114] was critical of Ireland and the United Kingdom for systematically failing to process requests in a suitably expeditious manner.

The Report found that it takes, on average, 11 days to execute a request where the accused consents, and 43 days to do so where no consent is forthcoming. These averages did not include the relevant figures for Ireland. Ireland's response to enquiries was that it took ''between a week and a year'' to execute requests.

The Commission was of the view that the execution of warrants in Ireland ''take[s] much longer and even exceed[s] the maximum time limits set in the Framework Decision''. It noted that this was a situation which ''it very much regrets''. Across the E.U., these time limits are exceeded in only 5% of cases.

In contrast to Ireland, some Member States are achieving orders for surrender in even shorter periods of time. Estonia, for example, processes European Arrest Warrants in an average of nine days. This average time is inclusive both of those cases which are appealed and of those which are not. Estonia does not have a pre-endorsement stage and has only once refused to order surrender on foot of a European Arrest Warrant.[115]

112 Order 98, rule 5, RSC.
113 *Minister for Justice, Equality and Law Reform v. Draisey* [2006] IEHC 375.
114 SEC (2007) 979. The report is available at www.eur-lex.europa.eu (Last visited 27 January 2009).
115 Evaluation report on Estonia ''The fourth round of mutual evaluations on the practical application of the European arrest warrant and corresponding surrender procedures between member states'' (5301/2/07 REV 2), available at: <http://www.consilium.europa.eu/ueDocs/cms—Data/docs/polju/EN/EJN714.pdf> (Last visited 27 January 2009).

The situation is exacerbated by the significant increase in the number of EAW applications being made since the scheme was introduced in 2004. This has been a Europe-wide phenomenon. The Commission's Report comments that:

> **"For the whole of 2005, 6,900 warrants were issued by the 23 Member States that sent in figures, twice as many as 2004 . . . . Unofficial figures for 2006 confirm this upward trend."**

This trend is also confirmed by the experience of the Irish courts. There were 31 applications in 2004, 61 in 2005, 171 in 2006, 207 in 2007 and 234 in 2008.

Fig. 4.3: High Court EAW Applications

Year	Received	Final Orders[116]
2004	31	26
2005	61	24
2006	171	78
2007	207	95
2008	234	94

The numbers are likely to increase further, thus putting further pressure on the Irish court system.

Fig. 4.4: Supreme Court EAW Appeals

Year	Received	Disposed of
2004	1	1
2005	6	3
2006	13[117]	5
2007	20	18
2008	27	24

4. Analysis

(i) It is inappropriate that Ireland be regarded as being in default of the spirit of the European Arrest Warrant system. The Evaluation Report on Ireland specifically

116 These figures are the cumulative totals for final orders granted by the Court, final orders to which there was consent, and cases where the Court refused the application.

117 16 appeals or cross-appeals were received by the Supreme Court in 2006. However, four of them related to a single set of proceedings in *Minister for Justice, Equality and Law Reform v. Stapleton*. These appeals and cross-appeals were heard together by the Supreme Court in a single sitting. For the purposes of reflecting the relative workload of the Court, they have therefore been treated as a single appeal.

identified delays in the processing of appeals as a contributing factor to Ireland's poor performance.[118]

(ii) Another problem is that referred to in the introduction to this chapter. If European Arrest Warrant cases are to be expedited in the High Court and, on appeal, to the Supreme Court, they will leap-frog many other matters, thereby creating additional delays for other cases. If the number of EAW requests continues to increase, this may create a significant appellate logjam in the future.

D. The European Convention on Human Rights

In contrast to the international agreements considered above, the European Convention on Human Rights (ECHR) does not establish specific time limits for the processing of civil or criminal cases. It does, however, impose a general requirement that legal proceedings be dealt with in a timely and expeditious manner. As this section will show, Ireland has been held to have breached this obligation several times in recent years.

Article 6 of the ECHR provides that:

> **"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing *within a reasonable time* . . . ."** (Emphasis added)

1. State Responsibility

Although Ireland's adversarial system is one in which the parties retain a significant control over the progress of a case, the European Court of Human Rights has emphasised that it is for the State to organise its legal system in such a way that it ensures the reasonably timely determination of legal proceedings. This is a long-standing principle of the Court's caselaw,[119] which was re-endorsed in **Price & Lowe v. U.K**.[120] In that case, the Court unanimously found that there had been a violation of Article 6 in circumstances in which a 12 year period had elapsed between the commencement of the proceedings in question and the final refusal of leave to appeal to the House of Lords.

Significantly, the Court held the United Kingdom to be responsible for the delays which occurred before the matter was set down for trial. However, in the common law system, the parties have dictated the pace of the proceedings up to this point. The courts do not act of their own motion to expedite matters before trial. The delays complained of were therefore at least in part attributable to the conduct of the parties themselves. As the Court observed, the complainants in the case had chosen not to apply for an expedited hearing. In fact, the Court was satisfied that the English courts successfully processed the case within a "reasonable time" once it had actually been set down for trial. The complaint was thus one in which the impugned delay related only to the period during which the parties themselves had control over the proceedings.

118 Recommendation 12 of the Report suggested it would be appropriate "to undertake a review of the appeal remedies available to requested persons, in order to explore how those rights may be streamlined and brought more closely into line with the time limits set out in the FD and to ensure adequate notification of any breaches to Eurojust". See Evaluation Report on Ireland 11843/2/06 REV 2 available at <http://www.consilium.europa.eu/ueDocs/cms—Data/docs/polju/EN/EJN717.pdf> (Last visited 31 January 2009).

119 *Salesi v. Italy,* 26 February 1993, Series A no. 257-E; *Hornsby v. Greece* (1997) E.H.R.R., at 495.

120 *Price & Lowe v. U.K.*, Unpublished, 29th July 2003, Second Section-3636.

The Court nonetheless decided that the United Kingdom was in breach of Article 6, and accordingly awarded damages against it. The Court emphasised that it is for the State to ensure that its legal system operates in such a way that these delays do not occur.

Ireland has been found in breach of Article 6 in a series of decisions.

In **McMullen v. Ireland**,[121] delays in resolving an action in negligence against the applicant's solicitors were found to have violated Article 6 of the Convention.

An infringement of Article 6 was also held to have occurred in another case concerning alleged solicitor negligence. In **Doran v. Ireland**,[122] delays of a year in the hearing of the matter and in the delivery of the judgment of the High Court (which the President of the High Court had attributed to a shortage of judges) were found to contravene the Convention.

Ireland was also found to be in default in **O'Reilly & Ors. v. Ireland**.[123] The delays in this case also occurred in the context of the President of the High Court's comments about a shortage of judges. Judgment was not delivered in the High Court for almost 20 months, while the caseload of the Supreme Court was such that a year elapsed between the first day of the hearing and the next available date to conclude it.

In **Barry v. Ireland**,[124] the European Court of Human Rights again found that Ireland had been in breach of Article 6 in circumstances where judicial review proceedings took over six years to conclude.

A common feature of these cases is that they involved civil litigation in which the violations of Article 6 were, in large part, attributed to delays occurring as a result of a shortage of judges, relative to the caseload of the courts. This underlines the fact that any logistical difficulties encountered by the courts may result in a breach of Ireland's obligations under the ECHR.

2. Ireland's Efforts to Comply

The increase in judicial appointments to the High Court has alleviated these difficulties at that level. As this chapter has already noted, however, the fact that the two-division Supreme Court is obliged to deal with all Superior Court civil appeals means that there is a significant risk of delays of the sort impugned in **McMullen**, **Doran**, **O'Reilly** and **Barry** occurring at appellate level.

Some steps have been taken to address the issues highlighted by these cases. The introduction of S.I. No. 63 of 2004 on the Rules of the Superior Courts (Order 27) (Amendment) Rules, 2004 was designed to encourage parties to prosecute their cases with due expedition. These amendments "signalled a change of attitude to procedural delay"[125] .

The European Court of Human Rights has identified delays caused by the courts themselves (as a result of logistical pressures) as the key factors offending the requirements of Article 6 in each case. Violations have been found, as in **Price & Lowe**, where the courts

121 *McMullen v. Ireland* No. 42297/98, Unpublished, 29 July 2004, Third Section-4329.
122 *Doran v. Ireland* No. 50389/99, Unpublished, 31 July 2003, Third Section-3653.
123 *O'Reilly & Ors. v. Ireland* No. 54725/00, Unpublished, 29 July 2004, Third Section-4330.
124 *Barry v. Ireland,* No. 18273/04, Unpublished, 15 December 2005.
125 *Morrisey v. Analog BV* [2007] IEHC 70. See also the decision of Hardiman J. in *Gilroy v. Flynn* [2005] 1 I.L.R.M. 290.

themselves were held to have acted reasonably in respect of the relevant proceedings. The State is obliged to organise its system to avoid the risk of parties unduly delaying their proceedings. It must also therefore be required to ensure that the structure of the legal system itself does not generate undue delays. The institutional bottleneck at Supreme Court level has just such an effect on our system.

E. Liability under EU Law

1. Fundamental Rights under EU Law

The growing emphasis on fundamental rights in the law of the European Union could increase Ireland's exposure to potential actions for undue delay in the domestic processing of legal proceedings. Fundamental rights have been recognised as an element of Community law since the decisions in **Stauder**[126] and **Internationale Handelsgesellschaft**.[127] The European Court of Justice (ECJ) in these decisions acknowledged that fundamental rights protection was an aspect of ''the constitutional traditions common to the Member States''.[128] This commonality also applied to the European Convention of Human Rights (ECHR) which has, accordingly, been used on occasions by the ECJ. as a repository of fundamental rights guarantees.

There has also been a growing movement in favour of providing some degree of human rights competence in the political instruments upon which the EU is founded. The original EEC Treaty made no provision for the protection of fundamental rights. The Treaty of Amsterdam, on the other hand, established a general commitment to human rights and fundamental freedoms in Article 6. Article 6(2) of the Treaty pledged to respect those rights which were, *inter alia*, ''guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms''. This provides a clear role for the ECHR in identifying and determining the rights protected under Community law. The extent of its influence is evident from decisions like that in **Roquette Freres**,[129] where the ECJ departed from its own precedents to take account of more recent judgments of the ECJ. The ECJ has also, on occasions, referred to the Charter of Fundamental Rights. Adopted in December 2000, it was to become legally binding with the introduction of the Constitutional Treaty. With the collapse of the Constitutional Treaty, this has not, however, occurred.

These last references highlight an important issue from the point of view of Ireland's potential liability under Community law for delays in dealing with cases. The legal status of human rights texts (especially the ECHR) and the scope of their application under Community law have gradually been expanded by the ECJ. The Court has held that the Member States are bound by fundamental rights when acting within the scope of Community law.[130] This applies not only to the positive implementation of Community measures,[131] but also to national attempts at derogating from the Treaties.[132] This vests an extensive human rights competence in the Court over domestic measures.

126 Case 29/69 *Stauder v. City of Ulm* [1969] E.C.R. 419.
127 Case 11/70 [1970] E.C.R. 1125.
128 Case 11/70 [1970] E.C.R. 1125, at para. 4.
129 [2002] E.C.R. I-9011.
130 Case 292/97 *Kjell Karlsson*, 13 April 2000.
131 Case 5/88 *Wachauf* [1989] E.C.R 2609; Case C-139/01 *Osterreichischer Rundfunk* [2003] E.C.R. I-4989.
132 Case C-368/95 *Familiapress* [1997] E.C.R. I-3689; Case C-260/89 *ERT* [1991] E.C.R. I-2925; Case 36/75 *Rutili v. French Minister for the Interior* [1975] E.C.R. 1219.

For example, in **Carpenter v. Secretary of State for the Home Department**,[133] the ECJ found that a deportation order constituted an unlawful infringement with the individual's right for respect for his family life. This, of course, is a value derived from Article 8 of the ECHR, to which the Court expressly referred. Although the United Kingdom authorities retain domestic control over deportation, the impact which the deportation would have on the free movement of the couple in question was regarded as sufficient to bring it within the scope of the Community's human rights guarantees.

From the point of view of Article 6 of the Convention, this creates the possibility that delays in the hearing of cases concerning rights established under Community measures could be submitted to constitute an infringement of the fundamental rights respected by Community law. This could even apply to delays involving cases which do not concern specific Community measures but which impact on areas in which the Community has an interest. This raises a risk that delays in the legal system will be found to violate not only Article 6 of the Convention, but also the equivalent rights guaranteed under Community law.

2. State Liability

Breaches of European Union law may, of course, be actionable in domestic courts.[134] In **Francovich v. Italian Republic**, it was held that an individual would have a right of action against a Member State for damage caused by the State's infringement of European law.

Subsequent cases made clear that a State's relative culpability will be a significant factor in the determination of liability for damages.[135] Any systemic failing is unlikely to be viewed with indulgence by the ECJ.

3. Liability for the Judicial Branch

Furthermore, the recent case law of the ECJ has made it clear that Member States will be held liable for violations which are attributable to the judicial branch of government. Judicial independence will not exempt the State from being held to account for these infringements.

In **Köbler v. Austria**[136] the Court insisted that a decision of a court of last resort which breached Community law could give rise to an action in damages. The State, in the Court's view, was a single legal entity, which would be held responsible for the actions of any sub-State institution. The Court did, however, accept that the decisions of a court of last resort would give rise to a right of redress only in very limited circumstances. This reflected ''the specific nature of the judicial function and . . . the legitimate requirements of legal certainty''. In the context of court decisions, the ECJ thus directed that a sufficiently serious breach would be found ''only in the exceptional case where the court has manifestly infringed the applicable law''.[137]

The Court's subsequent decision in **Traghetti del Mediterraneo SpA v. Italy**[138] emphasised, however, that no additional limitations on liability could be imposed under Community law.

133 [2002] E.C.R. I-6279.
134 Cases C-6/90 and C-9/90 *Francovich v. Italian Republic* [1995] ICR 722; *Brasserie du Pecheur SA v. Germany; R. v. Secretary of State for Transport, ex. p. Factortame Ltd (no. 4).* [1996] Q.B. 404.
135 Cases C-6/90 and C-9/90 *Francovich v. Italian Republic* [1995] ICR 722; *Brasserie du Pecheur SA v. Germany; R. v. Secretary of State for Transport, ex. p. Factortame Ltd (no. 4).* [1996] Q.B. 404.
136 [2004] 2 W.L.R. 976.
137 [2004] 2 W.L.R. 976, at 1032.
138 [2006] ECR I-05177.

From the point of view of the delays in Ireland's current legal structure, this line of authorities may become significant if the ECJ in future acquires a clear competence to adjudicate on alleged violations of Article 6 of the ECHR. The **Kobler** and **Traghetti del Mediterraneo** rulings relate, it must be remembered, to the actual adjudications of domestic courts. The constrained nature of these restrictions reflects the fact, however, that the notion of judicial liability impinges directly upon the independence and decisional autonomy of domestic courts. The Court made clear that it was mindful of these important values.

No such considerations would, of course, arise in relation to the organisation of the business of the court. The Court's recurring insistence on ensuring the vindication of the rights of the individual under Community law would be relatively unencumbered by the countervailing factors at issue in **Köbler** and **Traghetti del Mediterraneo**. It is possible that a citizen initiating an action against the State for a breach of Article 6 would not have to satisfy such difficult threshold criteria. Rather, it is arguable that the normal **Francovich** criteria would apply. The incorporation of the Convention into EU law would therefore expose Ireland to further risk in respect of the potential infringements of Article 6.

F. Summary and Conclusions

The discussion above indicates that the delays in the current court system are placing Ireland at risk of breaching a number of its international obligations. The specific areas of concern include child abduction and the European Arrest Warrant regime. As well as these areas, there is the risk that the Irish State may be held responsible for damages by both the European Court of Human Rights and the ECJ for specific delays in the legal system.

CHAPTER 5

The Commercial Court

A. Introduction

One of the challenges facing the Irish court system in the 21st century is how to eradicate delays and maintain a court system that is not susceptible to excessive backlogs.

One example of an effective court reform is the establishment of the Commercial Court. This shows the way in which procedural reforms can be used to increase efficiency in the court system. It has also demonstrated the benefits of having a dedicated division which hears a particular category of cases.

However, the problems encountered by cases appealed from the Commerical Court also underline the problem of our two-tier structure. There is a clear need to ensure that cases dealt with promptly in the High Court and then appealed are not left waiting for long periods of time to be heard on appeal.

Commercial life, in particular, requires speedy resolution of legal issues, whether to guide decision making or to resolve disputes. In recognition of this, the Commercial Court was established on the advice of the Committee on Court Practice and Procedure by the creation of a specialist list within the High Court. The success of this initiative demonstrates that procedural reform can have a material impact on reducing the length of time of litigation. This has been the experience in other jurisdictions. The Commercial Court proves that such reforms can also be successful in Ireland.

B. The Advantages of a Specialist Court

The Committee on Court and Practice Procedure in its *27th Interim Report*,[139] recommended the establishment of a dedicated commercial court. It pointed out that:—

> **"Specialisation would facilitate the public, the State, the major institutions, Irish companies and multinational corporations. The convenience of the**

139 Committee on Court Practice and Procedure: *27th* Report: Commercial Court, 13 February 2002. Available on www.courts.ie (Last visited 31 January 2009)

public and the efficient dispatch of court business would be more effectively secured by such a development.''

It went on to explain that:—

> **''There is both a considerable financial imperative and financial benefit to the State in establishing a Commercial Court. Notwithstanding the past buoyancy of the Irish economy, the current realities of international trading, both for established domestic companies and enterprises considering an inward investment in the State, demand an efficient and relevant legal system to enable the speedy resolution of commercial disputes. The need for such a system can never be replaced by alternative dispute resolution procedures and/or arbitration.''**

The Committee considered that the benefits of the Commercial Court would be:

> **''1. The return to the State from employment in new business attracted by the advantages of a jurisidiction with a functioning Commercial Court which offers a court system that accomodates modern business commercial needs.**
>
> **2. The return to the State from employment in existing business which benefit in the availability of the services of a Commercial Court.**
>
> **3. The savings to businesses which will flow from using the modern communication techniques of e-commerce when involved with a dispute resolution before the Court.**
>
> **4. Maintaining the State's desire to be a global leader and player in e-commerce through the provision of court e-services. The attraction to other existing State initiatives that will benefit from the existence of a Commercial Court are obvious.''**

C. Procedures in the Commercial Court

The Commercial Court having been established, one of its key features is its ability to deal with cases promptly. To achieve that, it has its own procedures designed to expedite the matters which appear in that list. Its practice and procedure are governed by a specific Order of the Rules of the Superior Courts: Order 63A.[140] Application of these rules has proved to be very effective in reducing waiting time in that list. Cases which are appealed from the Commercial Court are, however, dealt with under the ordinary rules applicable in the Supreme Court. They are therefore susceptible on appeal to the same delays as all other High Court litigation. The waiting list for Supreme Court appeals presently stands at up to 30 months.

1. Entry into the Commercial List: Private Parties and Public Bodies

The Commercial Court is effectively a special division of the High Court. It deals with matters which are categorised as ''commercial proceedings'' under Order 63A, r.1. Rule 1(a) covers a wide variety of disputes including company law, insolvency law, intellectual property,

140 S.I. No. 2 of 2004 brought into force Order 63A of the Rules of the Superior Courts. These govern procedure in the Commercial Court. S.I. No. 31 of 2008 amended Order 63A. See note below.

construction, arbitration, administrative law and constitutional law.[141] To be admitted to the Commercial List under rule 1(a), the claim or counterclaim in the action must be worth at least €1,000,000.[142] There is no threshold limit in respect of cases admitted under rule 1(b), which gives discretion to the Commercial Court Judge.[143]

The definition of ''commercial proceedings'' under Order 63A is quite broad. In **Mulholland v. An Bord Pleanála**[144] Kelly J. noted that it includes not only disputes which are ''commercial in the sense which that term might be commonly understood as involving a private law dispute between two commercial entities''.[145] The rules seek to identify those cases which have commercial implications for one or more of the parties.

141 The full list is as follows:

(a) proceedings in respect of any claim or counterclaim, not being a claim or counterclaim for personal injuries, arising from or relating to one or more of the following:

(i) a business document, business contract or business dispute where the value of the claim or counterclaim is not less than €1,000,000;

(ii) the determination of any question of construction arising in respect of a business document or business contract where the value of the transaction the subject matter thereof is not less than €1,000,000;

(iii) the purchase or sale of commodities where the value of the claim or counterclaim is not less than €1,000,000;

(iv) the export or import of goods where the value of the claim or counterclaim is not less than €1,000,000;

(v) the carriage of goods by land, sea, air or pipeline where the value of the claim or counterclaim is not less than €1,000,000;

(vi) the exploitation of oil or gas reserves or any other natural resource where the value of the claim or counterclaim is not less than €1,000,000;

(vii) insurance or re-insurance where the value of the claim or counterclaim is not less than €1,000,000;

(viii) the provision of services (not including medical, quasi-medical or dental services or any service provided under a contract or employment) where the value of the claim or counterclaim is not less than €1,000,000;

(ix) the operation of markets or exchanges in stocks, shares or other financial or investment instruments, or in commodities where the value of the claim or counterclaim is not less than €1,000,000;

(x) the construction of any vehicle, vessel or aircraft where the value of the claim or counterclaim is not less than €1,000,000;

(xi) business agency where the value of the claim or counterclaim is not less than €1,000,000;

(b) proceedings in respect of any other claim or counterclaim, not being a claim or counterclaim for damages for personal injuries, which the Judge of the Commercial List, having regard to the commercial and any other aspect thereof, considers appropriate for entry in the Commercial List;

(c) any application or proceedings under the Arbitration Acts 1954 to 1998 (other than an application in pursuance of section 5 of the Arbitration Act, 1980, to stay proceedings in respect of a matter referred to arbitration) where the value of the claim or counterclaim is not less than €1,000,000; (d) any proceedings instituted or any application or reference made or appeal lodged under the provisions of the Patent Acts, 1992, not including an application under section 108(4) of that Act;

(e) any proceedings instituted, application made or appeal lodged under —

(i) the Trade Marks Act, 1996;

(ii) the Copyright and Related Rights Act, 2000;

(iii) the Industrial Designs Act, 2001;

(f) any proceedings instituted for relief in respect of passing off;

(g) any appeal from, or application for judicial review by a person or body authorised by statute to make such a decision or determination or give such direction, where the Judge of the Commercial List considers that the appeal or application is, having regard to the commercial or any other aspect thereof, appropriate for entry into the Commercial List.

(h) any proceedings by or against the Registrar (within the meaning of Article 1 of the Cape Town Convention) in connection with any function exercised or exercisable by the Registrar under the Cape Town Convention or the Aircraft Protocol (each as defined in section 3 of the International Interests in Mobile Equipment (Cape Town Convention) Act 2005) or any regulations or procedures made thereunder.'' (inserted by S.I. No. 31 of 2008).

142 The same threshold applies to proceedings under the Arbitration Acts 1954 to 1998.

143 This covers:

''proceedings in respect of any other claim or counterclaim, not being a claim or counterclaim for damages for personal injuries, which the Judge of the Commercial List, having regard to the commercial and any other aspect thereof, considers appropriate for entry in the Commercial List''. Similarly, no threshold applies in respect of intellectual property disputes under rule 1(d), (e) and (f) or administrative law proceedings under rule 1(g) or proceedings under rule 1(h).

144 [2005] 2 ILRM 489.

145 [2005] 2 ILRM 489, at 491.

Important public law cases are also dealt with in the Commercial Court. Rule 1(g) allows for the admission of judicial review proceedings where, having regard to the commercial or any other aspect thereof, the Commercial Court Judge deems it appropriate. This rule was relied upon to admit judicial review proceedings in a planning law matter in respect of a large retail development in **Mulholland v. An Bord Pleanála**.[146] The discretion to admit judicial review proceedings to the Commercial Court is peculiar to the Irish Commercial Court. Its inclusion recognises the increasing impact of regulatory bodies on the commercial world.

Many of the judicial review proceedings which have been admitted to the Commercial Court list concern decisions of An Bord Pleanála.[147] A judicial review of a decision of the Environmental Protection Agency has also been taken into that list.[148] Apart from planning and environmental bodies, a number of other public bodies make decisions that impact on the commercial life of the State, e.g., the Competition Authority, the Office of the Director of Corporate Enforcement, the Irish Financial Services Regulatory Authority and the Financial Services Ombudsman. Order 63A, r. 1(g) means that judicial review proceedings against such bodies can be dealt with promptly — at least at the initial stage.

Apart from r. 1(g), there is also a more general discretion to admit cases to the Commercial List under r.1(b).[149] This discretion was relied upon in **Kinsella v. Revenue Commissioners**,[150] where the plaintiff sought declarations that she was not required to pay capital gains tax in respect of a sale of shares due to the existence of a double taxation agreement which she claimed exempted her from such tax.

2. Case Management in the Commercial List

As discussed in Dowling,[151] the rules of the Commercial Court see the interests of justice as being served not only by a fair trial on the merits but also by ensuring that cases are heard without undue delay and in a cost minimising manner. The key to the success of the new list lies in the provision made in Order 63A for case management under rules 5 and 6. These rules allow the High Court judge to take control of the proceedings and case manage them so that they can be disposed of "in a manner which is just, expeditious and likely to minimise the costs of the proceedings".[152] This is done by means of initial direction hearings which essentially set out a timetable for pre-trial preparation by the parties and directions during the substantive proceedings also.

146 [2005] 2 ILRM 489.
147 For example, *Arklow Holidays Ltd. v. An Bord Pleanála* Unreported, High Court, Clarke J., 3 August 2005, 18 January 2006 and 29 May 2006; *Friends of the Curragh Environment v. An Bord Pleanála* Unreported, High Court, Kelly J., 14 July 2006; *Cosgrave v. An Bord Pleanála* [2004] 2 I.R. 2004 and Unreported, High Court, Kelly J., 27 May 2004.
148 *USK District Residents Association Ltd. v. Environmental Protection Agency* Unreported, Supreme Court, 13 January 2003.
149 Rule 1(b) specifically excludes personal injuries actions from its ambit.
150 Unreported, High Court, Kelly J., 19 June, 2006, *ex tempore*.
151 Dowling, *op. cit.*, at 11-41.
152 Rule 5 reads as follows:

> "A Judge may, at any time and from time to time, of his own motion and having heard the parties, give such directions and make such orders, including the fixing of time limits, for the conduct of proceedings entered in the Commercial List, as appears convenient for the determination of the proceedings in a manner which is just, expeditious and likely to minimise the costs of those proceedings."

Control of a case in the Commercial Court lies with the judge. This shift of control from the traditional common law approach, where the parties initially control the pace of litigation, is designed to reduce the length and cost of proceedings.[153]

Successful case management requires the co-operation of the parties both with the Court and with each other. The Commercial Court judge has a number of powers at his disposal to encourage such co-operation. For example, he has the the power to strike out or limit a party's case, to make conditional orders, to require explanations for default and to make costs orders. All of the powers are designed to make case management more effective and ultimately to reduce costs.

3. Modern Technology

One of the significant features of Order 63A is its facilitation of the conduct of proceedings using modern technology, and in particular electronic communications. A courtroom at Bow Street has been fitted out to facilitate hearings that may require video link evidence or other special facilities.

Order 63A, r.6(1)(x) allows the Commercial Court Judge to make directions for:—

> **"The exchange of documents or information between the parties, or for the transmission by the parties to the Registrar of documents or information electronically on such terms and subject to such conditions and exceptions as a Judge may direct."**

The case booklet — prepared for the case management conference — may also be maintained in electronic form.[154] The President of the High Court may also issue practice directions in relation to the electronic service, exchange and lodgment of documents.[155]

D. The Success of the Commercial Court and its Frustration on Delay in Cases that Proceed to Appeal

The introduction of the Commercial Court has been a highly successful intiative. It has been particularly effective in ensuring the speedy resolution of commercial cases at the trial stage. The vast majority of cases in the Commercial List have been resolved, with the average wait for allocation of a trial date standing at just ten weeks in 2007.[156] In 2006 the Court was awarded a *Public Service Excellence Award* by the Department of the Taoiseach in recognition of its achievement. The rules are an example of the potential for procedural reforms to generate greater efficiency in the court system.

The Commercial Court has been very effective in ensuring the speedy resolution of commercial cases at the trial stage. While the Commercial Court has been a success,

153 The Commercial Court Judge has the power to fix time limits to speed up the delivery of pleadings, discovery etc. He can make directions in respect of pleadings and he can give directions to fix certain issues to be dealt with as preliminary issues. He can also make a number of rulings in respect of evidential matters which are designed to cut down the time taken at trial. For example, he can control the admissibility and presentation of evidence pre-trial, and at the trial he can limit examination-in-chief. He may also direct that documents be listed and agreed before trial. He can also require that any expert witnesses meet and discuss the issues in contention before the trial. As well as making directions in respect of evidence, the Commercial Court Judge can also adjourn proceedings to give the parties time to consider alternative dispute resolution. Such a direction may potentially lead to the settlement of a case without the need for a full trial.

154 Order 63A, r. 14(11).

155 Part VII of Order 63A. No such practice direction had been issued as of 11 January 2009.

156 Courts Service, *Annual Report 2007*, at 23.

there remains the delay in appeals from that Court to the Supreme Court. As has been pointed out:—

> **"[w]hile a speedy hearing may be guaranteed at first instance, the pressures on the Supreme Court List mean that the process can still be delayed on appeal. As a result, the benefit of having proceedings expedited in the Commercial Court can be lost."**[157]

Thus, the positive impact of the establishment of the Commercial Court on the procedural reforms can be frustrated by long waiting lists for appeals to the Supreme Court. In 2005, the Supreme Court received eight appeals from the Commercial Court and disposed of two. In 2006 and 2007, the respective figures were 14 and 22 appeals received and eight and one disposed of.

The key problem at the appellate level is that all actions must proceed to the Supreme Court. This Court has only two available chambers. It does not have the capacity to provide a dedicated appellate forum for commercial cases. To do so would cripple its capacity to process all other appeals. This systemic problem can only be addressed by providing additional appellate capacity in the Irish legal system.

E. Procedural Reforms in Other Jurisdictions

The use of procedural reforms to increase efficiency in the court system is an increasingly common feature of common law legal systems. The experience with the Commercial Court demonstrates the benefits of such reform in courts of first instance. Similar benefits could be realised at the appellate stage in this jurisdiction by introducing an intermediate appellate court, which would sit in several divisions and with strict procedures and maintaining rules in respect of final appeals. A number of other common law jurisdictions have introduced procedural reforms at the appeal stage to expedite the appeal process and reduce the issues before the court. The types of reforms introduced in Australia, Canada, England and Wales, New Zealand and the United States have generally focused on enforcing time limits through proactive case management, sanctions and reducing the issues between the parties prior to trial.

1. Time Limits: Pro-Active Case Management and Sanctions

Time limits have always applied to the various stages of the appellate process in most common law jurisdictions. However, the experience in some legal systems has been that they are not always rigorously enforced. Lord Woolf, for example, found this to be the case in his *Interim Report on the Civil Justice System in England and Wales*.[158] Strict enforcement of time limits in the appellate superior courts would be a crucial part of any reform in this area.

2. Reducing the Issues

There has also been a broad worldwide move towards reducing the scope of the controversies and material upon which an appeal court is asked to adjudicate. This has been done in a number of ways. As part of the pre-hearing or case management systems, parties are asked to provide submissions containing precise details about the issues raised,

157 Dowling, *The Commercial Court* (Thomson Round Hall, 2007), at 8-9.
158 Wolf, *Access to Justice: Interim Report on the Civil Justice System in England and Wales* (1995), Chapter 5, at para 5.

the relevant legislation or authorities to be relied upon, and the expected duration of the hearing. Often, these details must be agreed.

In a number of U.S. state courts systems, provision is made for ''preargument conferences'' which can be mandatory[159] or held at the request of the parties.[160] Such conferences are presided over by a judge and are designed to narrow the issues between the parties on appeal.

Rules also increasingly require counsel to submit reduced books of authorities and outline or skeleton submissions. The contents of such submissions are also quite closely controlled. Several jurisdictions have introduced strict upper limits for written submissions: 30 pages in New Zealand's Court of Appeal, for example, or ten pages in Australia's Federal Court.

F. Summary and Conclusions

The procedural rules governing cases increasingly emphasise the importance of:

(a) expediting the appeal process through a combination of case management and rule enforcement; and,

(b) requiring the parties to confine their pleadings, authorities and submissions to the most relevant and net issues.

Reforms in the Commercial Court have produced good results and demonstrated the potential for gains in efficiency.

Providing such reform at the first instance level only, however, is unsatisfactory. Reform is required at the appellate level also.

However, the Irish legal system needs additional appellate capacity. If more appeal courts were made available, the system would be able to facilitate the dedicated treatment of commercial appeals. This would allow the clear and proven benefits of Commercial Court-style reforms to apply to all phases of Irish commercial litigation.

159 This is the case in Connecticut.
160 This is the case in Colorado.

CHAPTER 6

The Court of Criminal Appeal

A. Introduction

The Court of Criminal Appeal is the only intermediate appellate court in Ireland's legal system. Thus it has significant relevance to this Report. The purpose of this chapter is to assess the way in which the Court of Criminal Appeal operates with a view to identifying and elaborating some of its positive and negative attributes. This will assist an analysis of whether a Court of Appeal, or what type of a Court of Appeal, should be recommended.

This assessment does, however, come with the significant *caveat* that the Court of Criminal Appeal exercises a limited range of functions in a specific area of the law. Parallels between its performance and that of a possible future Court of Appeal should be drawn with a degree of caution.

B. Jurisdiction

1. Establishment

The Court of Criminal Appeal was established by statute, under s. 3(1) of the Courts (Establishment and Constitution) Act, 1961. Section 12(2) of the Courts (Supplemental Provisions) Act, 1961 entrusted this new court with the jurisdiction of its predecessor which had been created by s. 8 of the Courts of Justice Act, 1924. As a creature of statute, the Court lacks any inherent jurisdictional powers, exercising only those powers and functions formally conferred upon it by the Oireachtas. Article 34.3 of the Constitution allows for the creation of courts of limited jurisdiction, in addition to the High and Supreme Court prescribed by the constitutional text.

Provision was made for the abolition of the Court of Criminal Appeal in s. 4 of the Courts and Courts Officers Act, 1995. This Act allowed for the transfer of the competences of the Court of Criminal Appeal to the Supreme Court upon its disestablishment. This section has never been brought into force. Given the scale of the Supreme Court's current caseload, and the large caseload in the Court of Criminal Appeal, that option is clearly no longer feasible.

2. Scope of Appeals

The Court of Criminal Appeal is entitled to deal with appeals in relation to:—

- Criminal convictions or sentences[161]
- Lenient sentences[162]
- Questions of mental capacity[163]
- Miscarriages of justice[164]

3. Powers

In an appeal hearing, the Court is entitled to:—

- Affirm the conviction[165]
- Quash the conviction without any further order[166]
- Quash the conviction and remit for a re-trial[167]
- Quash the conviction but replace it with a guilty verdict for another offence[168]
- Quash a sentence and make any order it considers appropriate[169]
- Quash a sentence but impose an appropriate one.[170]

In relation to appeals pursuant to the Criminal Law (Insanity) Act, 2006, the Court is entitled to:

- Order a retrial[171]
- Order an acquittal on the basis that an accused is unfit for trial[172]
- Order an acquittal without any further order[173]
- Substitute a verdict of guilty and sentence appropriately[174]
- Substitute an order of guilty of manslaughter on the grounds of diminished responsibility[175]
- Make an order of committal or any other order which a trial court could have made.[176]

161 See, for example s. 63 of the Courts of Justice Act, 1924; s. 44(1) of the Offences Against the State Act, 1939; s. 1 of the Criminal Procedure (Amendment) Act, 1973.
162 Section 2(1) of the Criminal Justice Act, 1993.
163 See ss. 7-9 of the Criminal Law (Insanity) Act, 2006.
Section 8(6). This can only be taken by the person tried.
Section 9(1).
164 Section 2 of the Criminal Procedure Act, 1993.
165 Section 3(1) (a).
166 Section 3(1) (b).
167 Section 3(1) (c).
168 Section 3(1) (d).
169 Section 3(2).
170 Section 3(2).
171 Section 7(3).
172 Section 7(3).
173 Section 7(3), Section 8 (7).
174 Section 8(8).
175 Section 8(8).
176 Section 9(2).

In applications for review against unduly lenient sentences, the Court may:[177]

- Reject the application
- Quash the sentence and impose such sentence as it considers appropriate.

C. Composition

The Court of Criminal Appeal is composed of one judge of the Supreme Court and two judges of the High Court.[178] The Court is constituted on a part-time basis. The judges who sit in the Court have significant additional obligations elsewhere. The implications of this changing curial corpus will be considered later.

D. Leave Requirements

A person who has been convicted of a criminal offence does not have an automatic right of an appeal to the Court of Criminal Appeal: he or she must obtain leave to appeal. This is done initially by way of an application to the trial judge to certify the case as one which is suitable for an appeal. In practice, however, the trial judge usually declines to grant such a certificate.

The majority of appeals to the Court are taken by way of an appeal against a refusal to grant leave. These can be rejected summarily by the court but ''such summary dismissals are relatively rare''.[179] This reflects the fact that the Court is usually the sole appellate option available to those convicted of a criminal offence. To deny an individual the opportunity to appeal a conviction, with all its attendant consequences, would constitute a very serious step.

Applicants for leave to appeal are entitled to canvass all issues before the Court. The leave requirement does not serve as a filter system. It is a somewhat archaic procedural requirement.

In contrast, the leave requirement for appealing decisions of the Court of Criminal Appeal to the Supreme Court is a strict filter system. Appeals may be taken only in cases involving ''a point of law of exceptional public importance'', where it is ''desirable in the public interest'' for the appeal to be taken to the Supreme Court.[180] The constitutionality of this type of restriction has been upheld by the Supreme Court.[181]

The number of appeals to the Supreme Court from the Court of Criminal Appeal has been consistently low. The Supreme Court received two such appeals in 2005, four in 2006, four in 2007 and two in 2008.

The cases excluded from a further appeal to the Supreme Court have already been considered and adjudicated on by at least two courts. In most common law systems, this is taken to exhaust the individual's inherent entitlement to an appeal. The same general approach would be adopted if a Court of Appeal were established; most cases would conclude in the Court of Appeal.

177 Section 2(3) of the Criminal Justice Act 1993.
178 Section 3(2) of the Courts (Establishment and Constitution) Act. 1961.
179 Byrne & McCutcheon, *The Irish Legal System* (4th ed., Tottel, 2003) at 254.
180 Section 29 of the Courts of Justice Act. 1924, as substituted by s. 22 of the Criminal Justice Act, 2006.
181 *Re Article 26 and the Illegal Immigrants (Trafficking) Bill. 2000* [2000] 2 I.R. 360.

E. Workload of the Court of Criminal Appeal

Fig. 6.1: Appeals Received and Disposed of in the Court of Criminal Appeal 1995-2008[182]

Year	Received	Disposed Of
1995	114	125
1996	197	149
1997	163	151
1998	194	139
1999	260	162
2000	237	233
2001	287	216
2002	237	273
2003	257	347
2004	257	266
2005	257	290
2006	244	329
2007	267	232
2008	306	281

Fig. 6.2: Potential Appeals to the Court of Criminal Appeal from Other Courts

(i) From the Central Criminal Court

Year	Offences	Convictions	Total appealable
2004	Murder (& other) Rape (& other) Insanity	47 36 2	85
2005	Murder (& other) Rape (& other) Insanity	31 40 3	74

(ii) From the Special Criminal Court

Year	Total appealable
2001	29
2002	19
2003	13
2004	23
2005	21

182 These figures show the Court of Criminal Appeal disposing, in some years, of more appeals than it receives. Notwithstanding this the Court is dealing with a significant backlog of appeals. This backlog has existed for over a decade. In late 1994, there were 169 cases on hand. The figures above show the Court's input and output since that time. The Court's ability to address this problem has been hampered in part by the fact that the judges who sit on it have significant commitments elsewhere and can only deal with Court of Criminal Appeal matters on a part-time basis.

(iii) From the Circuit Criminal Court (2005)

Venue	Type	Convictions	Total appealable
Dublin	Guilty plea	1,015	
	Convicted	75	
Provincial	Guilty plea	829	
	Convicted	124	2,043

In 2005, therefore, there were 2,138 cases in which appeals could have been taken to the Court of Criminal Appeal.

To place these figures in a comparative context, the New Zealand Court of Appeal heard 263 appeals from criminal sentences or convictions in 2005. In that year the Court of Criminal Appeal in Ireland received 257 appeals and disposed of 290.

F. Assessment of the Court

1. Workload and Output

The number of cases dealt with by the Court of Criminal Appeal has fluctuated from year to year. The Court's output has remained, however, largely within a range which approximates to the number of equivalent cases dealt with by the Court of Appeal in New Zealand. The two jurisdictions have comparable populations, suggesting that the Court of Criminal Appeal's caseload is not unusual, but that its output is high when it is considered that it is a part-time court.

The differences in the number of cases which the Court successfully disposes of from year to year may be influenced by the fact that the Court operates on a part-time basis. Judges from the High and Supreme Courts must be available for the Court to be able to sit. Without a dedicated judicial panel, the Court of Criminal Appeal's ability to organise and manage its caseload is necessarily dependent on the resources made available to it by the other Superior Courts.

2. Consistency of Decisions

From time to time criticism has been voiced of the Court of Criminal Appeal on the grounds of inconsistency, particularly in sentencing. In general all courts of criminal jurisdiction experience such criticism as an unavoidable result of the intense public interest in such matters.

Some consider that the practice of giving *ex tempore* judgments detracts from consistency. When fully understood however, it does not have that effect. In general *ex tempore* judgments are given only when the Court can resolve the issues arising in the appeal in that way, where no novel point of law arises — in other words, where the determination of the issues in the case involves the application of well settled legal principles. In these circumstances there is no need for a reserved judgment and the absence of one could not reasonably be said to give rise to any inconsistency with established jurisprudence.

However, it is also an important factor in processing the number of appeals, given the part-time nature of the Court.

A new Court of Appeal with a permanent cadre of judges would lead to a more cohesive development of criminal law jurisprudence with reserved judgments in the longer term. A dedicated panel of judges would approach criminal law issues with the specialised experience which prolonged exposure to this area would allow.

G. Summary and Conclusions

The Court of Criminal Appeal is a useful example of an intermediate appellate court in Ireland. It removes a large number of appeals from the caseload of the Supreme Court. This allows the Supreme Court to concentrate on the small number of criminal appeals each year which raise issues of exceptional public importance. This proves the value of an intermediate appellate court.

A Court of Appeal with permanent judges is likely to lead to more coherent development of criminal jurisprudence.

CHAPTER 7

Courts of Appeal in other Jurisdictions

A. Introduction

In considering whether to establish an intermediate appellate court, the experience of other common law jurisdictions can be instructive. In particular, other jurisdictions demonstrate that there is a degree of consensus about the appropriate role of the court of final appeal, which is of relevance to the reform considered in this Report. The potential for an intermediate appellate court to reduce waiting times for appeals from High Court decisions is also illustrated by reference to the workloads of courts of last resort in jurisdictions which have an intermediate appellate court and where leave must be obtained to appeal to the court of last resort. This chapter therefore also considers briefly how such leave requirements might work in Ireland as well as describing the composition of courts of appeal in other jurisdictions.

B. The Role of Appellate Courts

There is significant consensus across common law jurisdictions on the role of appellate courts in the legal system. Generally they are envisaged as fulfilling two functions: (i) correcting the errors of lower courts; and (ii) ensuring the ongoing and coherent development of domestic legal principles. A useful summary is provided in the report of New Zealand's Ministerial Advisory Group on this issue:—

> **"The purpose of appeals in the judicial system are:**
>
> - **Error correction: To provide a mechanism for correcting errors that occur at the court of first instance. These may be errors of fact or of law.**
> - **Law clarification and development: Appellate cases often concern uncertainties or gaps in the law, deal with issues where there are conflicting decisions of lower courts, or raise questions about the relevance of earlier authorities. In dealing with such matters, an appellate court plays an important role in the clarification and development of the law.**

While all appellate courts perform these functions to some extent, the balance between them varies from appellate court to appellate court."[183]

The difficulty is that the substantive and procedural requirements associated with the performance of these two functions may sometimes diverge. For example, the existence of an onerous filter mechanism is far more justifiable in the context of a court's efforts to clarify and develop the law than it would be when a court is seeking to ensure that an individual litigant is not exposed to the threat that errors made in their first instance adjudication will go uncorrected.

With a single appeal court, that court is burdened with two occasionally contradictory tasks. This confuses and obscures its role. Under a system with two levels of appeal court, the primary purpose of each court can be clearly and coherently defined. This model allows for the adequate performance of both functions, rather than requiring a single court to decide which one takes precedence where they come into conflict. In Ireland, of course, the Supreme Court must perform both functions. This can generate confusion over the role of the Supreme Court. It has implications also for that Court's substantive jurisdiction, procedural practices and workload. The result is that Ireland does not have a court whose primary function is clearly understood as being one of legal development. This is not in keeping with the trend in other common law jurisdictions.

C. Superior Court Structures in Other Common Law Jurisdictions

The advantages of the two-tier appeal court structure have inspired a clear common law trend towards it, either by the insertion of an intermediate court into the system (as effected in Australia and Canada), or by the creation of a new court of final appeal (as in New Zealand).

This trend was also inspired, in part, by the increased volume of litigation in each system. As the number of cases to be processed by the courts increased, the experience of other jurisdictions was, like Ireland, that the court of final resort became overburdened. As discussed in Chapter 3, this was a development which the Constitution Review Group predicted could occur in Ireland.

These factors have together encouraged most common law systems to move to a two-tier appeal court model.

Fig. 7.1: Two-tier appeal court models in common law jurisdictions

Jurisdiction	Court created	Nature of appeal	Year created
England/Wales	Court of Appeal	Intermediate	1875
Canada	Federal Court of Appeal	Intermediate	1971
Australia	Federal Court	Intermediate	1977
New Zealand	Supreme Court	Final	2004

183 Ministerial Advisory Group, *Replacing the Privy Council: A New Supreme Court* (Office of the Attorney General, 2002), at 19.

A comparative analysis demonstrates that Ireland is alone among the five jurisdictions in allowing so many first instance appeals to proceed directly to the court of last resort. The following diagrams detail the appellate structures in each system,[184] including the highest court of first instance, and the various appellate courts operating above it.

Fig. 7.2: England and Wales:

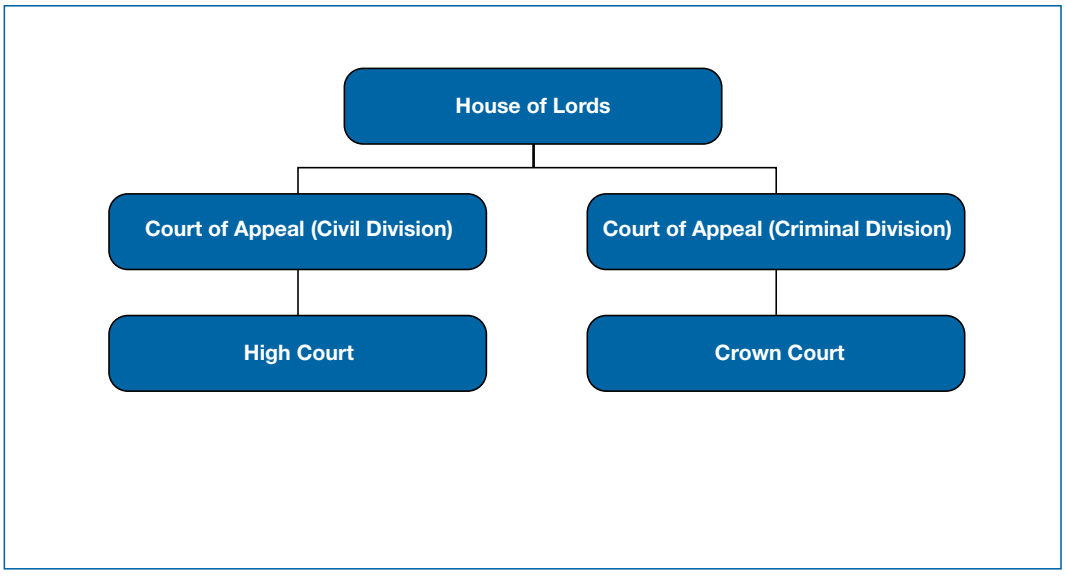
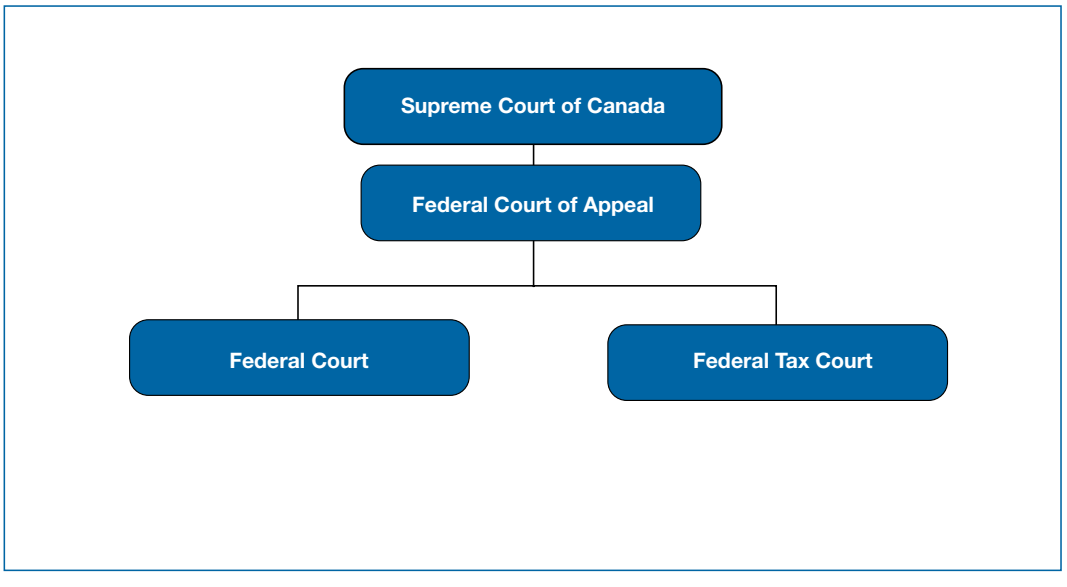


Fig. 7.3: Canada – Federal law



184 These models have been simplified for the sake of clarity. They do not include unusual procedures, such as the exercise by the Australian High Court of its power to remove constitutional questions from the lower courts.

Fig. 7.4: Canada – State and provincial law

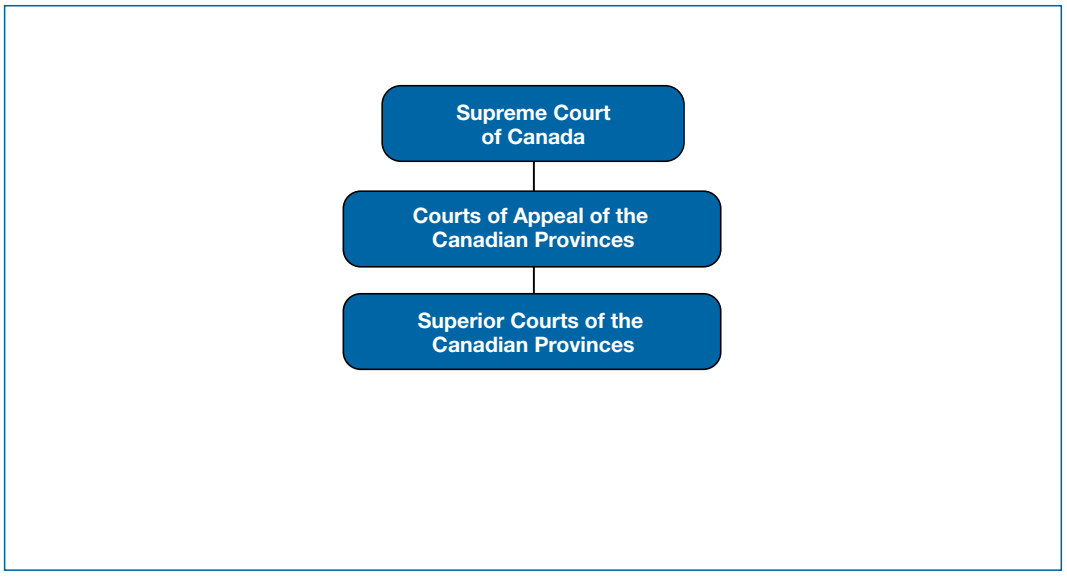


Fig. 7.5: Australia - Federal law

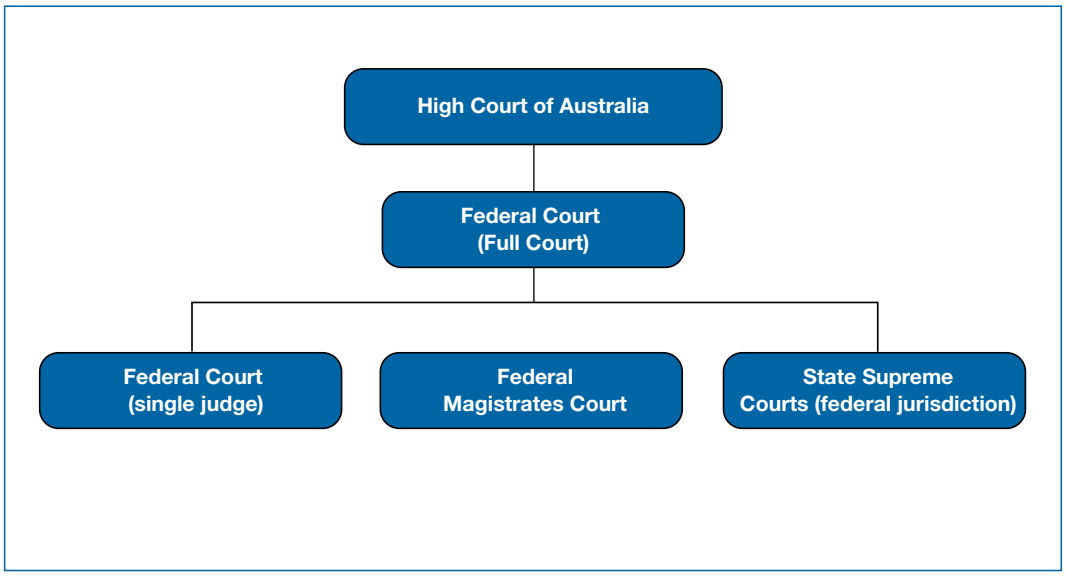
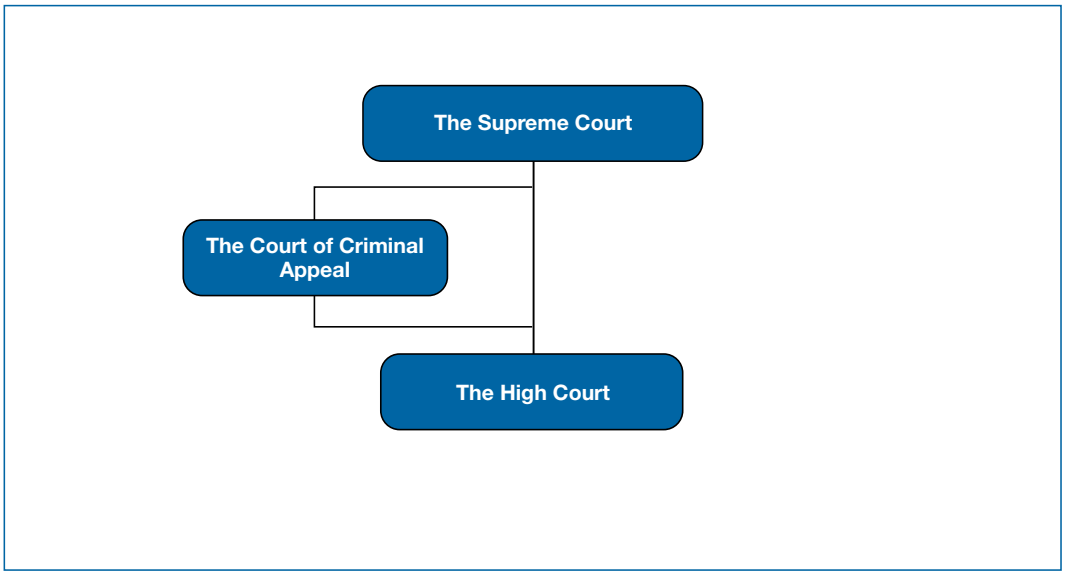


Fig. 7.6: New Zealand

Fig. 7.7: Ireland



D. Courts of Final Appeal in Other Jurisdictions

1. Role of the Court of Final Appeal

A two-tier appeal system allows the court of final appeal to focus its efforts on the broad development of legal principles. The courts in each of the jurisdictions illustrated above at Figures 7.2 to 7.6 have recognised this and acknowledged its importance. The Australian High Court has described its role as one which ''gives greater emphasis to [the Court's] public role in the evolution of the law than to the private rights or interests of the parties to the litigation''.[185]

The establishment of the Federal Court sparked similar reactions in Canada. The Chief Justice stated that the reform allowed the Supreme Court to adopt a new role as ''a supervisory tribunal rather than an appellate tribunal in the traditional sense''. This new role would, he felt, result in the re-calibration of its responsibilities. Although it was entitled to retain an error correction role, its priority would be to ensure the consistency and coherence of the law:—

> **''Now, even more in its supervisory role than in its heretofore more traditional appellate role, the Supreme Court's main function is to oversee the development of the law in the courts of Canada, to give guidance in articulating reasons and, indeed, direction to the provincial courts and to the Federal Court of Canada on issues of national concern.''**[186]

The presence of an intermediate appellate court thus allows for a more sophisticated division of labour between the appellate courts in each jurisdiction. The intermediate court is able to take primary responsibility for error correction. This frees the ultimate appeal court to concentrate its attentions on securing the clarification and consistency of the law.

185 *Smith Kline & French Laboratories Ltd v. Commonwealth* (1991) 103 A.L.R. 117.
186 Laskin C.J. ''The Role and Functions of Final Appellate Courts'' (1975) 53 C.B.R. 469, at 474-475.

2. Division of Labour

One consequence of freeing the court of last resort to concentrate on cases which raise matters of wider public concern is that number of cases heard decreases as the court concentrates on the exceptionally important cases for society.

The intermediate appellate court becomes the court of last resort for the majority of litigants. This means that the intermediate appellate court has enormous influence on the operation of the legal system as a whole. In a two-tier appellate system, the conduct of the intermediate appellate court tends to have the most significance for practitioners and for the public. Judges sitting in this court have considerable power and must accordingly be of the highest calibre.

E. Leave Requirements

To provide an automatic right of appeal to a court of final resort would defeat the purposes underpinning the establishment of a two-tier appellate system. As Martineau has commented:—

> **"To give a right of appeal from the intermediate appellate court to the Supreme Court is to do nothing other than provide a double appeal and compound rather than alleviate the problems that resulted in the creation of the intermediate court."**[187]

It is unsurprising, therefore, that those jurisdictions which have introduced this system have also established a filter mechanism capable of controlling which cases proceed to the court of ultimate appeal. These restrictions tend to be both substantive and procedural in nature.

1. Substantive Restrictions

All the common law jurisdictions referred to above impose stringent leave requirements on access to the ultimate court of appeal. Except in exceptional circumstances, leave is generally available only in respect of disputes which raise issues of public importance. Most jurisdictions also require the Court to be satisfied, in addition, that the grant of leave to appeal is "exceptional" or "necessary".

Unusually, New Zealand expressly includes matters of "general commercial significance" in its list of situations that may be suitable for a grant of leave. This was done in response to concerns expressed in the consultation process that the application of "public importance" criteria in other jurisdictions had favoured constitutional issues over commercial ones.

Most jurisdictions allow a residual area of discretion in the exercise of the court of final appeal's power to grant leave to appeal. The criteria for the grant of leave in New Zealand, for example, are illustrative and non-exhaustive in nature. The Supreme Court retains the discretionary ability to manage its own caseload. This provides an inbuilt safeguard against the Court being compelled to accept all cases which meet the stated criteria where to do so would overburden it. It is also an important acknowledgment of the independence of the Court in adjudicating on what constitutes legal questions of public importance or concern.

187 Martineau, *Fundamentals of Modern Appellate Advocacy*, (LC Pub, 1985), at 23.

A similar limitation applies in Ireland to appeals from the Court of Criminal Appeal to the Supreme Court. Leave will be granted only where the Court is satisfied that the appeal raises a point of law of exceptional public importance, and that it is in the public interest that the appeal be allowed to proceed.[188] This has successfully reduced the number of criminal appeals coming to the Supreme Court. Two appeals were lodged in 2008, four appeals were lodged in 2007, four in 2006 and two in 2005.

There is no general restriction on civil appeals from the Irish High Court to the Supreme Court. Thus the Supreme Court is required to deal with many more matters annually than any of its common law counterparts.

2. Procedural Restrictions

The imposition of onerous leave restrictions on the availability of an appeal to a court of last resort is a critical factor in a two-tier appellate structure. The procedure for applying for the leave of the court may be curtailed. For example, there is generally no right to a hearing in relation to an application for leave. In addition, where an oral hearing is held, the time available for argument tends to be severely circumscribed. A survey of various jurisdictions indicates that each party is generally allowed between 15 and 20 minutes.

3. Giving Reasons at the Leave Stage

To require the production of a lengthy judgment at the leave stage would again adversely impact on the court's ability to manage its caseload. The practice in several jurisdictions is therefore that the court does not generally explain the reasons for its grant of leave.

The jurisdictions diverge in their approach to the giving of reasons where leave is refused. The Australian High Court gives reasons for its refusals as a matter of practice. The New Zealand Supreme Court is obliged by law to do so. The reasons given can be brief, however, and of a general nature. The United Kingdom's House of Lords in April 2003 issued a practice direction indicating that it would give "brief reasons" for refusals of leave in general, and specially formulated reasons in the case of petitions raising issues of European Community Law.

In contrast, the Canadian and U.S. Supreme Courts do not give reasons for their refusals to consider a case. This has been the subject of some criticism on the grounds that the failure of the courts to explain their actions to a dissatisfied litigant could undermine public confidence in the legal system.

F. Workload of Courts of Appeal

Across the larger jurisdictions reviewed, intermediate courts of appeal generally have a significant caseload. In England, for example, 6,900 applications to appeal were received by the Criminal Division of the Court of Appeal in 2007. 5,295 applications were dealt with by a single judge court. 1,145 final civil appeals were filed with the Court of Appeal, which disposed of 1,114 final matters over the course of the year. In total, 3,006 appeals were set down before the Civil Division of the Court of Appeal in 2007, with 2,864 being disposed of in the same year. Of these, 201 were set down before a Full Court. The Full Court disposed of 215 matters that year.

188 Section 29 of The Courts of Justice Act, 1924, as substituted by s. 22 of the Criminal Justice Act, 2006.

Figures in other large jurisdictions are unlikely to be of much direct comparative relevance to Ireland. New Zealand is perhaps the best comparator in terms of its common law background and comparative size. In 2007 the Court of Appeal held oral hearings in respect of 407 criminal cases and 124 civil matters. This compared with the 438 criminal hearings and 151 civil hearings held in 2006, the 384 criminal cases and 125 civil cases heard in 2005, the 392 criminal hearings and 113 civil hearings held in 2004, and the 370 criminal hearings and 148 civil hearings held in 2003.

Given that the establishment of an intermediate court of appeal alters the role of the court of last resort, the difference in figures is unsurprising. The intermediate appellate court will effectively be the court of last resort for the majority of cases.[189]

G. Workload of Courts of Final Appeal

Courts of last resort in the jurisdictions reviewed generally have a markedly smaller caseload than that of the lower intermediate appellate court. This is undoubtedly as a result of the fact that these systems impose a strict requirement that leave be obtained before the taking of an appeal. The result is that the majority of cases on which courts of last resort are asked to rule are applications for leave. As these applications are generally subject to significant procedural constraints, the majority of ultimate appellate court hearings are, however, devoted to dealing with substantive appeal proceedings.

An overview of the figures is instructive. In 2007, 72 petitions were presented to the House of Lords, of which 44 came from the Civil Division of the Court of Appeal. In 2006, the equivalent figures were 73 and 49 respectively. In 2005, 87 petitions were presented to the House with the majority of these (59) again coming from the Civil Division of the Court of Appeal.

In Australia, the Full Court of the High Court heard 43 civil and 14 criminal appeals in 2006-2007. 72 civil and 16 criminal appeals were heard in 2005-2006. The Court also heard 177 special leave applications in civil matters and 72 special leave applications in criminal cases in 2006-2007. Seven further miscellaneous matters were also heard by the Full Court.

In Canada, in 2007, there were 629 applications for leave to appeal to the Supreme Court received. Leave was granted in 64 cases. The Court heard 53 appeals over the course of 2007 and delivered a decision in respect of 58 cases. In 2006, the Court heard 80 appeals and delivered 79 judgments while in 2005, it heard 93 appeals and delivered 89 judgments. In previous years, running from 1997-2006, the Court granted leave in an average of 11-13% of applications.

The total number of cases filed in the United States Supreme Court for the 2007 term was 8,241. During that year, 75 cases were argued and 72 disposed of. 67 signed opinions were delivered. In the 2006 term, 8,857 cases were filed, 78 cases were argued and 74 were disposed of. 67 signed opinions were issued.

The Supreme Court of New Zealand was established relatively recently. As a result, its statistics must be regarded with some degree of caution. In 2007, the New Zealand Supreme Court received 107 applications for leave to appeal a decision of the Court of

189 See, for example, Colorado, where 10-15% of the cases reviewed by the Court of Appeals end up in the Colorado Supreme Court.

Appeal.[190] Leave was granted in respect of 33 appeals, with the Court disposing of 27 matters. 33 cases were heard. This compares with the 101 applications for leave received in 2006. Leave was granted in 25 cases, with decisions delivered in 17. 27 cases were heard over the course of the year. The equivalent figures for 2005 were 69 applications for leave, 22 grants of leave, 13 cases heard and decisions delivered in respect of eight cases.

The Irish Supreme Court received 443 appeals in 2008 and disposed of 229. This compares with 373 appeals received and 229 disposed of in 2007. Of the cases received in 2007, 75 related to judicial review proceedings and only four came to the Supreme Court from the Court of Criminal Appeal.[191]

It is noticeable that the workload of courts of last resort is broadly similar across the larger jurisdictions, despite the variations of population between them (See **Fig 7.8**). The Irish Supreme Court deals with more cases per year than any of these courts. In terms of matters dealt with, the Irish Supreme Court disposed of 229 cases in 2007. This was almost three times greater than most of its common law counterparts. This was also the case in 2006 and 2005. Some of these cases are appropriate for a court of final appeal. Others are more appropriate to an intermediate appellate court.

In addition it should be noted that the professional resources available to the judges of the Supreme Courts of other States greatly exceed those available in Ireland. For example, see the discussion of law clerks Chapter 3 D. 3(iii).

Fig. 7.8: Comparative workload of courts of last resort for 2005, 2006 and 2007

Jurisdiction	Court	Appeals Heard 2005	Appeals Heard 2006	Appeals Heard 2007
Australia	High Court	88	57	N/A[192]
Canada	Supreme Court	93	80	53
England and Wales	House of Lords	87	73	72
New Zealand	Supreme Court	13	27	33
United States[193]	Supreme Court	87	78	75

Jurisdiction	Court	Judgments Delivered 2005	Judgments Delivered 2006	Judgments Delivered 2007
Ireland	Supreme Court	71	67	84

In 2008, the number of judgments given by the Irish Supreme Court was 101.[194]

190 This figure does not include applications for leapfrog appeals from the High Court of New Zealand, or proceedings in which applications for leave to appeal to the Court of Appeal were declined.
191 Courts Service, *Annual Report 2007*.
192 The current version of the High Court of Australia Annual Report 2007/08 as published on 24 November 2008 does not contain a figure for appeals heard by the Full High Court that year. There were 66 appeals decided by the Full High Court that year.
193 Figures for the United States Supreme Court taken from the Year-end Reports of the Chief Justice. These refer to figures by the legal year rather than the calendar year. The figures above are taken from the 2006, 2007 and 2008 Reports.
194 Statistics produced annually are of appeals disposed of by reserved/written judgment. One judgment covering two appeals is counted as two judgments. Multiple and dissenting judgments in one appeal are not counted separately.

H. Composition of Courts of Appeal

In most of the legal systems examined, the intermediate court of appeal typically sits as a collegiate court in panels of three judges. The Court of Appeal of England and Wales, however, can be duly constituted with one judge under s. 59 (1) of the Access to Justice Act 1999. In Australia, the full Federal Court may sit as a panel of five. In some of the U.S. state court systems, there is provision for intermediate appellate courts to sit ''*en banc*'' in important cases; in other words, all the judges of a court sit on a case.

The personnel of the intermediate courts of appeal varies but most systems have a mixture of permanent members of the court and some other judges who may sit on the court from time to time. In the Court of Appeal for England and Wales, the presidents of each of the three divisions of the High Court are eligible to sit on the Court of Appeal.

In each of the U.S. Federal Circuit Courts of Appeals, an associate justice of the U.S. Supreme Court is appointed as a Circuit Justice and may sit as a member of the Court of Appeals. This is rare in practice. The Court of Appeals for the Second Circuit has a number of visiting judges from different circuits and districts but a judge who presided at the trial of a case on appeal to this Court may neither hear nor determine an appeal from the resulting order or judgment.

I. Summary and Conclusions

Ireland is unusual among the common law jurisdictions in having a single civil appellate superior court. An analysis of other jurisdictions indicates that the establishment of an intermediate court of appeal clarifies the role of the court of last resort and allows it to focus on important cases and the coherent development of the law. In order to achieve this effect, some form of leave requirement is necessary. The result of establishing a court of appeal is to transfer the bulk of the appellate caseload to that court. To deal with this, a permanent Court with a permanent panel of judges has been the preferred option in other common law jurisdictions.

CHAPTER 8

Options and Implications of Reform

A. Options for Reform

This chapter considers various options for the future of the Superior Court structure in this jurisdiction.

1. Option 1 — Preserve the Existing Court Structure

The current backlog of appeals to the Supreme Court is a problem that is in large part attributable to Ireland's court structure. The decisions of 36 High Courts proceed on appeal to a Supreme Court which can sit in only two divisions. The Supreme Court simply does not have the capacity to cope with that number of appeals.

This problem is likely to get worse. Litigation in Ireland is growing in volume and becoming longer and more complex. In addition, the creation of new regulatory regimes and novel areas of law further increases the courts' workload. Asylum applications and European Arrest Warrant requests are examples of the sort of new legal developments that can lead to a significant amount of additional litigation.

The figures discussed in this Report demonstrate the scale of the problem. The Supreme Court received 484 appeals in 2006 and disposed of 202. In 2007, the Court received 373 appeals, disposing of 229. In 2008, the Court received 443 appeals and disposed of 229. Delays are endemic in the Irish legal system. These delays place considerable emotional strain on parties to litigation. For commercial entities, delays cause economic and administrative expense. Delays lead to legal and social uncertainty, preventing the prompt delivery of key social, commercial and infrastructural programs.

In short, the backlog in processing appeals restricts the ability of the Irish legal system to perform the critical function of providing legal certainty and speedy dispute resolution.

Apart from causing delays and increasing the expense of litigation, the automatic right of appeal from the High Court directly to the Supreme Court in civil matters is obscuring the role of the Supreme Court. It is requiring it to perform the function of correcting the errors

of lower courts and depriving it of the time to perform the proper function of a court of final appeal — developing the law in a principled and coherent way in the cases that come before it.

(i) Advantages:

- Minimal disruption to the *status quo*
- No need for constitutional reform.

(ii) Disadvantages:

- Status quo is increasingly unsustainable
- Further delays in the future
- Delays in the legal system produce adverse social and economic consequences
- Delays place Ireland at risk of breaching its obligations under various international agreements
- Obscures the role of the Supreme Court
- Out of step with international developments.

2. Option 2 — Increase the Number of Supreme Court Judges

One possible reform would be to appoint additional judges to the Supreme Court, thus allowing it to sit in more divisions. This would assist in clearing the current backlog of cases. The appointment of additional High Court judges successfully addressed a similar problem at that level by providing extra capacity to process cases.

This option would probably have a similar effect at appellate level. For example, if the number of judges were increased to 15 then the court could sit as a collegiate court of three in five divisions. This should significantly improve the current delays in the system.

Creating further divisions of the Supreme Court is problematic. One of the main risks is that it could create inconsistency in the rulings of the highest court in the jurisdiction. This could in turn generate great uncertainty in the law. This Report has repeatedly emphasised the critical importance of legal certainty to Ireland's social and commercial stability. Inconsistency and uncertainty would generate confusion which would have a particularly detrimental impact on commercial entities operating under Irish law.

Furthermore, it would not alter what has been identified as a flaw in the current court structure — the obscured role of the Supreme Court. Creating more divisions of the Supreme Court would mean that it would continue to perform the role of error correction. The modern view in common law jurisdictions is that the court of last resort should hear cases of significance and not concern itself with error correction. Moving the backlog through the Supreme Court at a faster rate would not address that problem in the current system.

While a Court of Appeal could comprise a core panel of judges with additional Superior Court judges sitting from time to time on an *ad hoc* basis, that flexibility would not be appropriate in the Supreme Court. Instead, a larger permanent panel of judges would be required. In addition to the appointment of additional judges to the Supreme Court, this

would also require additional Court rooms and Court staff. There could therefore be considerable cost implications involved in adopting this option.

(i) Advantages:

- Would increase the operating capacity of the Supreme Court
- Would be likely to significantly reduce delays on appeal.

(ii) Disadvantages:

- Could lead to uncertainty and inconsistency between different Supreme Court panels
- This could have adverse economic and social consequences
- Would be out of step with all international comparators
- Would continue to obscure the role of the Supreme Court
- Would lack flexibility
- Would require significant investment.

3. Option 3 — Establishing a Court of Civil Appeal Modelled on the Court of Criminal Appeal

This option would use the Court of Criminal Appeal as the model for reform. The option would be to set up an analogous Court of Civil Appeal to co-exist with the Court of Criminal Appeal.

Then, the new Court of Civil Appeal would be based on statute. The possibility of appointing judges to sit permanently on the new statutory court would be fraught with difficulty as such a court would have no constitutional status. Judges sitting on such a court would not be appointed as judges of that court. Rather, they would be judges of the High Court and/or the Supreme Court. Such a Court could be vulnerable to a constitutional challenge.

A statutory Court of Civil Appeal with no permanent panel of judges would be staffed by judges of various other courts on an *ad hoc* basis. It has already been noted that this is one of the less satisfactory aspects of the Court of Criminal Appeal. Inconsistency leads to uncertainty. This is especially damaging to economic and commercial activity.

The figures for the Court of Criminal Appeal also show that it has been unable to clear its backlog of cases over the last decade. This is, in part, a result of the fact that it is a part-time Court, staffed by judges of the High and Supreme Courts. There is no reason to suggest that this same problem would not apply to a Court of Civil Appeal. This option would be unlikely, therefore, to achieve the objective of securing efficiency gains in the courts.

Apart from that serious flaw, the inability of a Court of Civil Appeal to deal with constitutional issues would be a major drawback. The main purpose of introducing an intermediate appellate court for civil cases is to alter the flow of cases to the Supreme Court and reduce the backlog of appeals from the High Court. If the new Court of Civil Appeal could hear only those appeals in which no constitutional issue arose, then this would mean that a significant number of cases would continue to go automatically to the Supreme Court, thus frustrating the main purpose of the reform.

There would also be the ever present risk of a challenge being taken to the jurisdiction or status of the Court of Civil Appeal. While the Supreme Court rejected a constitutional challenge to the Court of Criminal Appeal in **People (A.G.) v. Conmey**,[195] that case is now of some antiquity.

It is instructive that the Constitution Review Group (CRG) expressed the view that the Constitution ought to be amended to ensure absolute clarity on this point. The CRG acknowledged the existence of the decision in **Conmey** but felt that it would be more prudent to amend the Articles in question. It noted, for example, that Article 34.2's use of the term ''comprise'' could plausibly be interpreted to prevent the establishment of statutory Superior Courts.[196] This indicated a clear reluctance on the part of the CRG to exclude forever the possibility of a successful challenge being taken on this issue.

This is no doubt due, at least in part, to the CRG's awareness of the grave public policy implications of any successful challenge. The decisions in cases such as **de Burca v. A.G**.[197] and **Murphy v. A.G.**[198] had demonstrated very clearly the potential repercussions of long-standing judicial or revenue regimes being struck down. Such a determination casts doubt on the validity of all previous decisions which inevitably creates great uncertainty. Rather than using the current Court of Criminal Appeal as a template, the opportunity to place that Court on a more solid footing is clearly preferable.

(i) Advantages:

- Would be quick to achieve as it would not require any constitutional amendment
- Would be flexible.

(ii) Disadvantages:

- Would not assist in the clearing of the backlog of cases to the Supreme Court
- Would generate significant costs in the long run as it would not be an efficient way of clearing the backlog of appeals to the Supreme Court
- Would be unable to deal with constitutional issues
- Would run the risk of challenge and the consequent disruption from that
- As judges cannot be statutorily appointed, judges would have to be appointed to other courts and assigned by Presidents of those Courts to the new court Such a court would lack its own dedicated judicial panel.

4. Option 4 — Establishing a Statutory Court of Appeal with both Civil and Criminal Jurisdiction

This option is essentially a slightly different version of option 3 considered above. It would involve the establishment by statute of a Court of Appeal which would enjoy both criminal and civil jurisdiction.

195 [1975] 1 I.R. 341.
196 *Report of the Constitution Review Group* (1996, Pn2632), at 158.
197 [1976] I.R. 38.
198 [1982] I.R. 241.

In the absence of a constitutional amendment, such a reform adds nothing by way of advantage to option 3 above and entails all of the disadvantages discussed therein.

5. Option 5 — Establishing a Combined Court of Appeal by Constitutional Amendment

This option involves the establishment of a Court of Appeal by constitutional amendment. Such a Court would enjoy both criminal and civil jurisdiction and would be entitled to consider constitutional issues.

Establishing a new intermediate appellate court by constitutional amendment would have many advantages.

First, by allowing a new Court of Appeal to exercise jurisdiction in constitutional matters, it would facilitate the more efficient flow of appeals through the Superior Courts.

Secondly, as a constitutionally established court, it could have a permanent core panel of judges appointed to it. This would obviate the disadvantages associated with an entirely *ad hoc* court.

Thirdly, a constitutional amendment would eliminate the risk of a *Conmey*-type challenge succeeding in the future, with all of the serious public policy consequences which that would entail.

Fourthly, this option also allows the possibility of establishing dedicated Court of Appeal divisions where that was considered appropriate. This could, for example, facilitate the fast-tracking of cases where time is of the essence. Commercial disputes, child abduction cases, or actions concerning infrastructural projects could all be dealt with promptly and efficiently by a dedicated and experienced appellate panel. Sufficient appeal panels should be available to deal with all cases in a suitably efficient way.

From the perspective of litigants, this model would not give rise to the costs difficulties described by the CRG. In its 1996 Report, the CRG expressed concern that litigation would become more costly if litigants were ''involved in three tiers of justice''. Under this proposed model, that would not be the case in the majority of cases. The majority of cases would conclude at the Court of Appeal stage. It is only in cases of national or public importance that three hearings could be held and extra costs incurred.

There are costs implications, as more judges involve the costs of additional court rooms, court staff, and judicial salaries. However, whatever option is taken by the State, more judges are needed at appellate level. So whether such judges are appointed as additional judges to the Supreme Court or to another type of appellate court, those costs will occur.

This option would require a constitutional amendment. The establishment of a new court would be an important reform of the institutions of the State, and it is fitting that the people — who are the ultimate sovereign authority of the State — have the opportunity to decide this issue.

(i) Advantages:

- Would reduce delays in the deciding of appeal cases
- Would increase the operating capacity of the Irish appellate system
- Would allow for the establishment of dedicated or specialist divisions of the Court of Appeal, where required
- Would be a coherent division of responsibility between Court of Appeal and Supreme Court
- Would enable the Supreme Court to focus on cases of general public importance
- Would facilitate the introduction of improved procedural practices
- Would conform to international best practice.

(ii) Disadvantages:

- Would require a constitutional amendment.

B. Conclusion/Recommendation

The Group recommends Option 5, i.e., that a combined Court of Appeal be established by Constitutional Amendment.

CHAPTER 9

Impact of a New Court of Appeal

A. Introduction

This chapter will consider the impact which a new appellate court might have on the case load of the Supreme Court. In particular, it focuses on the extent to which the introduction of a new appellate court would alter the types of cases heard by the Supreme Court as well as the number of cases listed before it. In essence, it considers what the Supreme Court might look like after the establishment of a Court of Appeal.

B. The Caseload of the Supreme Court

The breadth of the jurisdiction of the Supreme Court has led to an extraordinarily heavy workload. In 2005, the Supreme Court received 446 appeals and disposed of 211. Of the cases received, 120 related to judicial review proceedings and only two came to the Court from the Court of Criminal Appeal.[199] From 1 January 2006 to 31 December 2006, 484 appeals were lodged with the Supreme Court. During the same time period, the Court disposed of 202 appeals and delivered 67 reserved judgments. In 2007, the Court received 373 appeals and disposed of 229 matters. The Court received 443 appeals and disposed of 229 in 2008.

The court system in this jurisdiction is such that there is considerable strain on the resources of the Supreme Court. The volume of the Court's caseload means that many decisions are, of necessity, dealt with by means of unreserved judgments. When one considers that, at the same time, the number of reserved judgments delivered is comparable to other jurisdictions the acute nature of the problem becomes clear. The Court is overburdened. The extent to which the creation of an intermediate civil appellate court could alleviate this is considered below.

199 Courts Service, *Annual Report 2005*.

C. Division of Labour Between the Supreme Court and Proposed Court of Appeal

Drawing on the comparative analysis undertaken in Chapter 7, it may be seen that there is significant consensus across the jurisdictions reviewed about the role of appellate courts in the legal system. They are generally envisaged as fulfilling two functions: correcting the errors of lower courts; and ensuring the ongoing and coherent development of domestic legal principles in the course of judgments in the cases that come before them. The role of the court of ultimate appeal in such a legal system is typically to focus on the broad development of legal principles. The Supreme Court, under a new court structure which included a Court of Appeal with a jurisdiction in civil and criminal matters, would have a main function of advancing the principled development of the law.

For any new intermediate appellate court to have the effect of shortening litigation and enabling the role of the Supreme Court to be redefined, it is crucial that an appropriate filter for appeals from it to the Supreme Court be developed.

The most appropriate filter mechanism in this regard is to have a requirement to obtain leave to appeal to the Supreme Court. This would ensure that only the most important cases were dealt with in the highest court in the State. The purpose of a leave requirement is to provide some method of identifying those cases which are of sufficient significance to merit a Supreme Court ruling. A number of important policy choices are thus involved in the formulation and development of any leave requirement.

As discussed in Chapter 7, most of the common law jurisdictions surveyed require the court of last resort to be satisfied that a case is of ''public importance'' before granting leave. The fleshing out of more detailed criteria is generally left to the court of last resort itself to complete through its case law on leave. In Chapter 7, it was noted that there was a variation between courts of last resort when it came to giving reasons for granting or refusing leave.

In several jurisdictions, the criterion of ''public importance'' proved, in practice, to favour the consideration of constitutional rather than commercial cases. It was for this reason that matters of ''general commercial significance'' were specifically included in New Zealand's list of situations which may be suitable for a grant of leave.

A question which arises is whether appeals to the Supreme Court should be limited to questions of law. While many other jurisdictions have that restriction, Australia and New Zealand do not and its absence does not appear to have had a significant effect on the caseload of the courts of final resort in those legal systems.

Another question which arises is whether some role in the correction of errors should be reserved to the Supreme Court. As discussed above, the role of the court of last resort is ideally to develop the law in the cases that come before it and provide guidance to lower courts. The role of correcting errors is more properly dealt with by an intermediate appellate court. Again, looking back at Chapter 7, other jurisdictions have reserved a residual area of discretion in the exercise of the court's power to grant leave to appeal. This allows the court of last resort to correct the errors of lower courts where that is appropriate.

Article 34.4.4° of the Constitution precludes the restriction of the Supreme Court's appellate jurisdiction in cases concerning the validity of legislation. A decision to alter this in any way would require constitutional amendment.

One other issue which may arise is whether there should be some provision for cases proceeding directly from the High Court to the Supreme Court where there are exceptional circumstances. As set out in Chapter 22, such ''leapfrog'' mechanisms exist in other jurisdictions. If a similar provision was deemed appropriate in this jurisdiction, some distinct filter or special test would have to be formulated.

D. The Potential Impact of Leave Requirements on the Workload of the Supreme Court

The Hon. Mr. Justice Geoghegan, Judge of the Supreme Court, assisted by Ms. Maeve Kane, Registrar to the Supreme Court, undertook a general analysis of the cases which led to a written judgment before the Supreme Court during the legal year October 2005-July 2006. The purpose of this was to assess the impact of a Court of Appeal on the cases being appealed from the High Court by identifying which appeals would have been more appropriate for listing before a Court of Appeal. Of the 109 cases included in the survey, the view was taken that 38 would remain appropriate for consideration in the Supreme Court, whereas 71 would be more appropriately dealt with in an intermediate appellate court. The cases are listed and categorised in Appendix C.

What follows is an exploration of some of the cases surveyed by Mr. Justice Geoghegan to illustrate how the introduction of a leave requirement might impact on the workload of the Supreme Court.

1. Examples from the survey of cases in which leave would be appropriate to bring the case to the Supreme Court.

Where a case raises a new legal issue which has not been addressed by the Supreme Court in earlier cases, leave ought generally to be granted. An example from the survey is the case of **Lynch v. His Honour Judge Moran**,[200] which raised the unsettled issue of the application of issue estoppel in criminal proceedings in this jurisdiction. The question had been addressed by the Court of Criminal Appeal in **The People (Director of Public Prosecutions) v. Keith O'Callaghan**[201] but had never been considered by the Supreme Court. The judgment refers to authorities from a number of common law jurisdictions and the ruling clarified what was an important and undecided question by ruling that issue estoppel does not apply in criminal proceedings.

Mr. Justice Geoghegan's survey also highlights the importance of ensuring that cases which raise novel issues requiring consideration of changing social and scientific conditions reach the Supreme Court. Decisions which raise such questions are undoubtedly of sufficient ''public importance'' to merit the attention of the highest court in the State. One example from the survey is the case of **Lydia Foy v. An t-Árd Claraitheoir & the Attorney General**, which raised the question of whether a transsexual had the right to have her birth certificate amended to reflect her change of sex. These types of cases which involve difficult new questions that could not easily be predicted in earlier jurisprudence require definitive rulings by the court of final appeal.

Some cases are of such fundamental constitutional significance that they ought to be decided by the court of final appeal. As the survey indicates, this is particularly true of

200 [2006] IESC 31.
201 [2001] 1 I.R. 584 .

cases where the judicial branch is called upon to define the limits of the power of other branches of government. Perhaps the best example from the sample year surveyed is **Curtin v. Dáil Éireann**.[202] That case, which concerned the impeachment of a member of the judiciary, is a good illustration of the type of case in which a "leapfrog" procedure referred to earlier might be appropriate to ensure the prompt and definitive resolution of an important constitutional question.

Similarly, cases involving questions of the jurisdiction of the courts themselves ought to be addressed in the most authoritative court. The survey refers to such an example in the case of **Short v. Ireland**.[203] That case arose out of a claim by the plaintiffs that BNFL, by operating a Thermal Oxide Reprocessing Plant at Sellafield, had caused discharges into the Irish Sea, resulting in pollution of the environment and damage or potential damage to the health of the plaintiffs. The issue before the Supreme Court concerned the important question whether the courts of Ireland have jurisdiction to determine the lawfulness or validity of certain decisions taken abroad authorising or permitting the operations of which the plaintiffs complained.

One significant point which emerges from the survey is that it is not only cases involving constitutional issues that merit a Supreme Court ruling. Cases which raise important questions of private law and/or cases of commercial significance are also of public importance and should be recognised as such in any test for leave to appeal.

Taking the first example, the synthesis and restatement of common law jurisprudence is something which ought properly to be dealt with in the Supreme Court. The survey refers to the case of **Wildgust v. The Governor and Company of the Bank of Ireland,**[204] which concerned the tort of negligent misstatement. The case raised the important and unsettled question of the requirement of proximity for this relatively modern cause of action. As indicated in the survey, this was a case which was appropriate for listing before the Supreme Court.

The survey also refers to cases of commercial significance. For example, **Albatros Feeds v. Minister for Agriculture and Food**[205] was an appeal from the Commercial Court. The case arose out of judicial review proceedings in which the applicants challenged certain decisions by the Minister for Agriculture which required the seizure and detention of a consignment of corn gluten imported by the applicants as animal feed from the United States. The importance of dealing with commercial cases quickly has already been recognised in the court system by the establishment of the Commercial Court. The desirability of an authoritative and prompt ruling by the Supreme Court in such cases is something which should also impact on any leave requirement adopted.

2. Examples from the survey of cases in which leave to appeal to the Supreme Court would not be appropriate

The examples extracted from the survey are indicative of how a leave requirement might operate in practice to allocate certain types of cases to the Supreme Court. As discussed above, the primary function of the Supreme Court ought to be the development of the law in the cases coming before it. While some very limited discretion to correct errors might be

202 [2006] IESC 14.
203 [2006] IESC 46.
204 [2006] IESC 16.
205 [2006] IESC 52.

reserved to the Court, error correction should not be a significant part of its workload. Cases which require some review of the evidence before the lower court and/or a review of the way in which established principles were applied to a set of facts are more suited to a Court of Appeal rather than the Supreme Court. An analysis of some of the cases allocated to the Court of Appeal in the survey helps to illustrate the distinction.

First, taking cases which involve challenges to factual findings, **Guilfoyle v. Farm Development Co-operative Limited**[206] is a helpful example of a case more appropriate for resolution in an intermediate appellate court. The appellant in the case appealed a decision of the High Court in which specific performance of a putative oral contract was refused on the basis that there was insufficient evidence of agreement. It was pointed out that:—

> **"This is the type of case where an appellate court treads very carefully, because at issue are questions of fact and credibility. These are quintessentially matters for the trial court. In this case the findings of the learned trial judge as to which witness he believed were findings of primary fact."**

This is a classic example of a case which would more appropriately be dealt with by an intermediate appellate court than a court of final appeal.

Similarly, some cases raise, at an interlocutory stage, points of procedure which may not require extensive argument before the Supreme Court. For example, the survey refers to **McGrath, Michael v. Irish Ispat Ltd (In vol. liq.) formerly Irish Steel Ltd**.[207] That case concerned two motions which arose in the context of a personal injuries action. The plaintiff sought to admit further evidence pursuant to O. 58, r. 8 of the Rules of the Superior Courts, 1986 and the defendant sought to have the appeal dismissed for want of prosecution. These are the types of issues which could be promptly dealt with by an intermediate court of appeal.

West Donegal Land League Ltd v. Udaras Na Gaeltachta & ors[208] was an appeal against an order of the High Court requiring the appellant to provide security for costs pursuant to s. 390 of the Companies Act, 1963. Again, this was a case which arguably, ought not to have required a ruling by the Supreme Court.

Another good example from the survey of a case in which leave might not be appropriate is **Salthill Properties Limited v. Porterridge Trading Limited**.[209] That case concerned s. 316(1) of the Companies Act, 1963 (as amended by s. 171 of the Companies Act , 1990) which provides that a receiver may apply to the High Court for directions. One issue which arose in the case was the procedural question of whether the receiver had properly sought such directions to ascertain whether certain lease agreements with one party contravened earlier negative pledge clauses entered into with another party. The Court found that the procedure was correct as the case fell within the established principles that s. 316(1) could be relied upon by receivers attempting to resolve issues of priority among creditors. The other question the Court addressed was whether there had been sufficient evidence before the High Court to find that the onus of proof in the case had not been discharged by the notice party. The case can thus be categorised as one which concerned the application of

206 [2006] IESC 18.
207 [2006] IESC 43
208 [2006] IESC 29.
209 [2006] IESC 35.

established legal principles to facts and one which required a review of evidence already considered by the lower court. Both features of the case suggest that it would have been more appropriate to a court of appeal.

The survey also points out that where the Supreme Court has established a principle of law in an earlier case, the application of that principle in later cases ought generally to be left to the court of appeal. **Dunphy (a minor) v. DPP**[210] is an instructive example of this. The applicant in the case sought discovery of the material upon which the Director of Public Prosecutions made a decision to proceed with a criminal prosecution against her for drugs offences, while another minor arrested in connection with the same offence was dealt with under the Juvenile Diversion Scheme. The Supreme Court had already set out the relevant principles of law relating to the review of the DPP's prosecutorial discretion in **State (McCormack) v. Curran**,[211] **H v. D.P.P.**[212] and **Eviston v. Director of Public Prosecutions**.[213] The **Dunphy** case thus raised the question of the application of established principles to a distinct factual scenario rather than requiring any exposition of general principles of law.

E. Summary and Conclusions

The workload of the Supreme Court is currently such that it is difficult to focus on its role of developing the law in a principled and authoritative manner in the cases coming before it. Allocating cases involving error correction to a court of appeal with civil jurisdiction is one solution to this problem. That solution would require the adoption of an appropriate filter mechanism in the form of a leave requirement. The general criterion would be that a case must be of public importance to attract leave for an appeal to the Supreme Court.

Mr. Justice Geoghegan's survey suggests that the test of public importance might include:

- Cases which raise a legal issue (whether a private or constitutional law issue) which the Supreme Court has not previously ruled upon
- Cases involving the application of established principles to changing social/scientific circumstances
- Cases concerning the review of the power of branches of government, where justiciable
- Cases which require a ruling on the jurisdiction of another court
- Cases of major commercial significance.

F. Overview of Work of Court of Appeal

The civil work of a Court of Appeal has been considered above. In addition, such a Court of Appeal would incorporate the work of the current Court of Criminal Appeal. This is a significant jurisdiction, as considered in Chapter 6.

The relative workload of the High Court and Supreme Court in recent years provides some indication of how a three-tier appellate system might operate in Ireland. Leaving aside the

210 [2005] IESC 75.
211 [1987] ILRM 225.
212 [1994] 2 ILRM 285.
213 [2002] 3 I.R. 260.

small number of cases which might proceed directly from the High Court to the Supreme Court under the exceptional ''leapfrog'' jurisdiction, any new Court of Appeal would deal with all of the appeals currently dealt with by the Supreme Court and the Court of Criminal Appeal. The table below **(Fig 9.1)** illustrates the number of appeals over the last number of years.

Figure 9.1

Year	Appeals received by Supreme Court	Appeals received by Court of Criminal Appeal	Total Superior Court Appeals
2003	440	257	697
2004	531	257	788
2005	446	257	703
2006	484	244	728
2007	373	267	640
2008	443	306	749

The workload of the Supreme Court in a three-tier appellate system would depend upon the way in which its leave criteria are defined, as well as on the number of appeal cases brought in a given year which raise issues of public interest or concern. Obviously, the numbers of this sort of appeal may vary from year to year. However, Mr. Justice Geoghegan's analysis of the workload of the Supreme Court over a given period provides some indication of the possible workload which the Supreme Court could have in a three-tier system. Mr. Justice Geoghegan's analysis suggests that 35% of the matters disposed of by the Supreme Court in the course of his review raised issues appropriate for consideration by a court of last resort. As **Fig. 9.2** shows, applying this percentage to the number of cases disposed of by the Supreme Court in recent years produces a projected workload which is broadly comparable to that of other courts of last resort in common law countries.

Figure 9.2

Year	Number of Supreme Court cases actually disposed of	Projected number of cases disposed of by Supreme Court in a three-tier system
2003	304	106
2004	290	102
2005	206	74
2006	196	71
2007	229	80
2008	229	80

This exercise raises the question of how many additional cases could have been disposed of by the Supreme Court if a Court of Appeal were already in place. It is reasonable to suggest that the Supreme Court might have decided an additional number of cases in each year if it had a lower number of matters coming before it. As the Court currently receives

more appeals than it can dispose of in an individual year, there may be appeals which raise public interest issues but which — because of the backlog in the Court — are not addressed in the same year in which they are received. In a three-tier system, the Supreme Court would have the capacity to consider these cases at an earlier point. This could lead to a further increase in the number of cases being dealt with by the Supreme Court in an individual year. However, such figures cannot be estimated with any degree of accuracy. As Mr. Justice Geoghegan's percentage was based on an analysis of cases disposed of, it can only — for reasons of statistical integrity — be applied to the same category of cases.

For illustrative purposes the workload of the Court of Criminal Appeal for the same period as that surveyed by Mr. Justice Geoghegan has been set out in Appendix D. This provides some indication of the criminal workload a Court of Appeal would have had during that time.

CHAPTER 10

Conclusions on the Case for a General Court of Appeal for the Purpose of Processing Certain Categories of Appeals from the High Court

The absence of a Court of Appeal in civil matters means that the Supreme Court is the only appellate court from the High Court. This has created a backlog and an increasing delay in hearing cases on appeal.

As the Supreme Court currently hears appeals from all High Court decisions, a large number of cases concerning interlocutory matters and routine issues are being dealt with by the highest court in the State. This means that the Supreme Court is spending considerable time correcting errors in the High Court rather than developing the law. A Court of Appeal could deal with error correction, leaving the Supreme Court the time to focus on developing legal principles.

There has been a general growth of litigation in the High Court since 1961. In that time the number of sitting High Court judges has been increased from seven to 36 to cope with this. The number of Supreme Court judges has been increased only from five to eight. The fact that there is only one court to which an appeal may lie has led to a backlog of cases which are taking considerable time to get to the Supreme Court. This means that the gains of time at the High Court stage are, in the admittedly small percentage of cases which go to appeal, being lost at the appeal stage.

As well as the increase in High Court litigation generally, there has also been an increase in specialised areas of the law. This in turn has led to an increasing complexity in High Court litigation, which has an impact on the workload of the Supreme Court which hears appeals in such cases.

Ireland has a number of international obligations which are affected by the problem of the backlog. The lapse of time between a High Court and Supreme Court determination is a matter for concern. A breach of international Conventions may mean that the State may be found liable. This can have cost implications.

The Court of Criminal Appeal has acted as an effective filter in reducing the number of criminal cases before the Supreme Court. It thus demonstrates the potential for a Court of Appeal with civil jurisdiction to significantly reduce the burden on the Supreme Court.

The Court of Criminal Appeal, does, however, have two significant flaws. The first is that it is not comprised of a permanent panel of judges. Ideally, an appellate court of its importance should have a permanent panel of judges. Secondly, the Court does not have jurisdiction to hear constitutional issues. These issues should be addressed in the context of establishing an overall Court of Appeal.

The appointment of additional Supreme Court judges so that the Supreme Court could sit in, say, five divisions would address the backlog problem but could lead to inconsistency and uncertainty in the law.

The Supreme Court, as the highest court in the land, should sit *en banc* rather than in divisions. This is the approach in most other common law jurisdictions and should be the approach taken in this jurisdiction.

The Working Group has recommended the establishment of a Court of Appeal in order to remedy the systemic backlog that will otherwise continue to build in the Irish court system. Remedying this problem will be of benefit to the economy as well as to individual litigants and the community at large. It will also have the effect of clarifying the role of the Supreme Court.

The primary role of the Supreme Court is not to engage in error correction. It is not to engage in running a type of production line; it is primarily to engage in explaining the Constitution to the People.

This happens, in the adversarial system, by allowing an open, transparent and reasoned dialogue between advocates and judges and then publishing the reasons for the decision. We need to ensure that the process of dialogue which occurs in the Supreme Court is brought to as many of the people as possible and explained as thoroughly as possible.

If we really believe in a Constitution where the People gave the law to themselves then we must allow the Court where the Constitution is interpreted to function as well as it possibly can. We need to ensure that the Constitution remains vital, engaged, and understood.

It is for this reason, as well as the gains in efficiency described in the Report, that the Working Group is in favour of the establishment of a Court of Appeal.

CHAPTER 11

Introduction to the Issue of Constitutional Reform

> ***"(b) To address and consider such legal changes as are necessary for the purposes of establishing a Court of Appeal."***

The Working Group has considered the constitutional and technical requirements for establishing a Court of Appeal. Several possible options for a constitutional amendment have been considered. The advantages and disadvantages of either a **permissive** or a **self-executing** or a **consolidating amendment** are addressed. The possible changes to the Constitution of Ireland are also addressed.

CHAPTER 12

The Case for (i) a Permissive or (ii) a Self-Executing Amendment

A. Introduction

Establishing a Court of Appeal would be a major reform of Ireland's court system. It would be the most significant development of the legal system since the establishment of the current court system. It is appropriate that the People, as the repository of constitutional authority in the State, have the opportunity to consider this change.

This chapter will consider initially the case for a permissive amendment to the Constitution. This option would involve the insertion into the constitutional text of a provision which would secure the constitutionality of the new Court. The amendment could provide, for example, that:

> **"No provision of this Constitution will prevent the Oireachtas from establishing a Court of Intermediate Appeal, to be known as the Court of Appeal, with appellate jurisdiction from all decisions of the High Court, subject to such exceptions and regulations as may be prescribed by law."**

Alternatively, the amendment could be expressed in positive terms to permit the Oireachtas to legislate to establish a Court of Appeal.

The second part of this Chapter will consider the case for a non-permissive or self-executing amendment. This sort of amendment would directly establish a Court of Appeal. The Court would be a creation of constitutional law rather than of statute. It would also share some of the advantages and disadvantages of the permissive amendment approach. It is therefore logical to consider it in this Chapter of the Report.

1. Permissive Amendment

(i) Advantages

(a) Simplicity

A permissive amendment would have a number of possible advantages. The most obvious of these would be the brevity and relative simplicity of the proposed amendment.

(b) Flexibility

A second advantage of a permissive amendment would be that it would provide a degree of flexibility for the Oireachtas in terms of the establishment of a Court of Appeal and in terms of its ongoing regulation. The Court would be based on statutes which could be amended by the Oireachtas as it thought fit. Unlike the High and Supreme Courts, changes to the competence or character of the Court of Appeal would not require a constitutional amendment. A statutory amendment process provides a simpler mechanism for addressing any operational difficulties that might arise, or for introducing strategic or efficiency-oriented reforms where they were deemed appropriate. However, this type of amendment could also raise significant questions in relation to the independence and permanence of the Court of Appeal, which could substantially undermine it. These issues are considered in greater detail below.

(c) Minimal change

A single permissive amendment would have the advantage that it would involve a minimal alteration to the text of the Constitution. However, as discussed further below, the insertion of a single provision which did not accord with the remainder of Article 34 could create constitutional inconsistency. This could cause significant difficulties. A single permissive amendment may be simple in appearances but, as the following section explains, it would be liable to prove very complex in practice.

(ii) Disadvantages

A permissive amendment would effectively preserve the existing constitutional description of the court system. The Constitution presumes the existence of a particular Superior Court structure. This presumption is evident in a number of Articles. A single permissive amendment might allow for the existence of a Court of Appeal but it would leave the presumption of a two-tier superior court system in place. This could generate a number of potential problems.

(a) Status of the Court

Concerns about the status of a Court of Appeal established by way of permissive amendment would not be confined to considerations of public perception. The basic powers of the High Court and Supreme Court are set out in the Constitution. The character and competence of a Court of Appeal based on a single permissive amendment would, in contrast, be primarily dictated by statute. As such, the Court would be more susceptible to regulation by the Oireachtas than the other constitutional courts. This would be likely to raise concerns about the independence and permanence of the Court. This could make it more difficult to attract the calibre of judges necessary to operate what will, in the event of its establishment, be an institution of major national and constitutional significance.

These concerns would be exacerbated by the fact that a single permissive amendment would not extend the full protection of Article 35 to the judges of the Court of Appeal. Article 35.4.1° provides that:

> **"A judge of the Supreme Court or the High Court shall not be removed from office except for stated misbehaviour or incapacity, and then only upon resolutions passed by Dáil Éireann and by Seanad Éireann calling for his removal."**

The protection provided by Article 35.4.1° reflects the fundamental constitutional principles of judicial independence and the separation of powers. Failing to provide equivalent protection to the members of the Court of Appeal would be likely to undermine its perception and status amongst the public and the legal profession.

(b) Public perception

A possible disadvantage to a permissive amendment is the adverse impact which it could have on the public's understanding and perception of the court system. This would be likely to confuse or mislead the public. The possibility of public confusion calls the appropriateness of a permissive amendment into question.

In particular, problems could potentially arise in relation to the public's perception of the new Court of Appeal. In the event of its establishment, the Court of Appeal would play a critically important role in the Irish court system. It would function as the court of last resort for the majority of cases. It would direct and guide lower courts in their approach to a range of issues. It is critically important, therefore, that the Court be regarded by the public as a forum of national significance. A risk exists that a single permissive amendment would encourage some to see the Court as a forum which lacked a direct constitutional foundation and which was, accordingly, less important.

This fear would be particularly pertinent if the amendment were formulated in negative terms. In that case, the Court of Appeal would be established by statute. Its existence would be acknowledged by the Constitution but not directly attributable to it. This suggests that a positive amendment, directly establishing the Court of Appeal in the Constitution, may be preferable. This option would describe in much greater detail the way in which the Court would fit into the existing constitutional structure. As outlined below, this is a complex and difficult matter which may not be capable of being fully addressed by a single amendment.

(c) Constitutional competence of the Court of Appeal

A further consideration which could adversely affect the status of the Court is the fact that a permissive amendment would leave in place those provisions of the Constitution which require particular categories of case to be dealt with by the High and Supreme Courts only. Article 40.4.3° requires that a *habeas corpus* application, where the High Court feels that the law under which a person is being detained is invalid under the Constitution, to be referred directly to the Supreme Court by way of case stated. Similarly, Article 34.3.2° provides that:

> **"... no [question of the validity of any law] shall be raised (whether by pleading, argument or otherwise) in any Court established under this or any other Article of this Constitution other than the High Court or the Supreme Court."**

This requires a particular category of cases to be dealt with by the High and Supreme Courts and thus, effectively, to bypass a Court of Appeal. The public and professional perception of the Court could be adversely affected by the existence of such "leapfrog" jurisdictions, especially where they relate to such important matters as questions of constitutional law.

(d) Implications for the Supreme Court

These "leapfrog" jurisdictions also raise serious questions about the powers and workload of the Supreme Court. Under the Constitution the Court of Appeal would not be able to

consider points pertaining to the constitutionality, or otherwise, of a statute.[214] Even on the most expansive interpretation of Article 34.3.2°,[215] the Court of Appeal would not be able to examine the constitutionality of a post-1937 statute. Assuming this situation could not be changed without the insertion of a more complex multi-part amendment, this would mean that all cases concerning the constitutionality of post-1937 statutes would have to proceed directly from the High Court to the Supreme Court. This is likely to be a significant number of cases in any given year. The Working Group has consistently underlined the importance of the Supreme Court being in a position to manage its own caseload. Comparable courts of final appeal in the common law world retain this power. A permissive amendment would deny this power to the Supreme Court by requiring it to deal with a large number of matters which the Court of Appeal would be constitutionally precluded from considering. This would imperil the efficiency gains involved in creating a Court of Appeal.

(e) Practical problems

In addition, it would raise the question of what would happen in proceedings which relate only in part to constitutional issues. Significant practical problems would arise where the main appellate court was constitutionally prohibited from dealing with a particular aspect of an individual case. Cases typically involve a number of legal issues, only some of which raise any questions of Irish constitutional law. Introducing a permissive amendment would lead to a situation in which an appeal in one particular case would have to be divided up between different courts.

This would create a number of problems. First of all, it would deprive the Supreme Court of the critical ability to manage its own caseload by requiring it to hear all appeals in which a question of constitutional law is raised. This would increase its caseload, which would be liable to create continued delays in the future. It would therefore undermine the whole purpose of establishing a Court of Appeal.

Secondly, it would cause enormous case management difficulties. Dividing a single litigant's claim between different courts would be a complex and confusing system which could generate huge problems of practice and principle. How would the matters be separated out? Who would decide? Would the sub-divided claims proceed as normal in each court, or would one have to be stayed pending the determination of the other? If so, which one would be dealt with first? What would happen to the remainder of the issues in the interim? Would the whole case be allowed to by-pass the Court of Appeal once constitutional grounds were pleaded, or would litigants be required to wait to have other — possibly central — aspects of their claim heard? What if the courts came to different conclusions on common issues?

These are only some of the issues which would have to be addressed if a permissive amendment were used. It is clear that a Superior Court system with differing levels of constitutional competence would be an unwieldy and impractical structure which would inevitably lead to confusion, delays and increased cost.

(f) Constitutional incoherence

A final overall concern with a permissive amendment is that it could increase the risk of constitutional challenges being taken to court on the basis of the incoherence of the constitutional text. As noted at the outset of this section, relying on a single permissive

214 *People (D.P.P.) v. Tuite* (1983) 2 Frewen 175.
215 Some support for this can be gleaned from the *dicta* of Keane C.J. in *People (D.P.P.) v. M.S* [2003] 1 I.R. 606.

amendment would lead to the establishment of a court structure which, in practice, would not reflect the prevailing constitutional conception of the Irish courts. Careful drafting could avoid many of these potential problems. However, a residual risk would exist of challenges being taken to the gaps between the reality of the court structure and that described in the Constitution.

2. Self-Executing Amendment

A non-permissive or self-executing amendment would be one which would directly establish a Court of Appeal. This could be done in one of two ways.

The first option would be to insert a single provision into Article 34 which would provide for a Court of Appeal as part of the Constitution's Superior Court structure. The advantages of this approach include brevity and apparent simplicity. It would not provide the Oireachtas with the same level of flexibility but, depending on how it was drafted, any such provision would be likely to leave many practical matters for the Oireachtas to decide. It would also have the advantage of providing the Court with a firm constitutional basis. This would go some way towards addressing the concerns about the status and permanence of the Court which were discussed in the previous section. This approach would provide constitutional security for the Court as an institution and, if drafted correctly, for its members also.

However, the insertion of a self-executing amendment into Article 34 would encounter the same critical problem of constitutional incoherence. The text of the Constitution would create a three-tier Superior Court structure but be organised on the basis of a two-tier system. This would be likely to cause the same complications considered above in relation to the permissive approach. In particular, it would not resolve the issue about the constitutional jurisdiction of the Court of Appeal, thereby exposing the system to the problems identified in points (c) to (f) (pages 103 and 104).

The second possible approach would be to replace Article 34 with a single self-executing amendment establishing a High Court, Court of Appeal and Supreme Court. This would deal with the issue of constitutional incoherence, at least in terms of Article 34. This would, however, represent the most radical option for reforming Ireland's court structure. Replacing Article 34 with a self-executing provision would go far beyond what would be required to create a Court of Appeal. It could have very significant effects on the Superior Courts, far beyond that necessary to deal with the establishment of a new court.

B. Conclusion

Taking these considerations into account, the Working Group does not favour establishing the Court of Appeal either by way of a single permissive amendment or by way of a self-executing amendment. The disadvantages of such single amendments are considerable and significantly outweigh their potential advantages. In particular, the Working Group considers:

- The Court of Appeal would lack the protection of Article 35.4.1°, the permanence of a comprehensive constitutional basis and a jurisdiction to hear all constitutional issues.
- A permissive amendment could lead to a perception amongst the public, the legal profession and the judiciary that the Court of Appeal is not a court of co-equal constitutional status with the High Court and Supreme Court.

- A permissive amendment would deny the Supreme Court the crucial ability to manage its own caseload. This would undermine the whole purpose of establishing a Court of Appeal.
- A permissive amendment would lead to incoherence in the constitutional text, by creating a court structure which does not match that described in the remainder of Article 34.
- A single self-executing amendment would similarly create constitutional incoherence and problems with regard to the constitutional caseload of the Court of Appeal and the Supreme Court.

CHAPTER 13

The Case for a Consolidating Amendment

A. Introduction

Having concluded in Chapter 12 that a single permissive amendment would not be an appropriate or effective way of establishing a Court of Appeal, the Group then considered the case for creating a Court of Appeal by means of a consolidating amendment. In light of the limitations of a single-Article amendment, as described in Chapter 12, this represents the obvious alternative approach.

1. Advantages

The chief advantage of a consolidating amendment is that it would secure constitutional coherence by re-drafting the relevant parts of text of the Constitution so that it reflects accurately the position of the new court structure which was created. This would address many of the concerns raised in Chapter 12. A consolidating amendment could remove inconsistencies and avoid potential problems.

(i) Constitutional coherence

A consolidating amendment would ensure consistency and coherence in the Constitution's description of the Court of Appeal and the other constitutional courts. It would provide for both the status of the new Court and its relationship with the other constitutional courts. It would ensure, for example, that the appellate jurisdiction of the Supreme Court from decisions of the Court of Appeal and/or the High Court could be accurately and clearly explained rather than simply referring, as Article 34.4.3° currently does, to decisions of the High Court and ''other'' courts. This would reduce the potential for doubts or inconsistencies to arise over the status or powers of the respective courts or over the relationship between them.

(ii) Constitutional competence of the Court of Appeal

The option of a consolidating amendment would also have the advantage of allowing problematic aspects of the current text to be altered. Article 34.3.2° could, for example, be amended to allow full constitutional competence to be conferred on the Court of Appeal.

Chapter 12 described how a failure to amend this Article could undermine the status and public perception of the Court of Appeal and deprive the Supreme Court of the ability to manage its own caseload. This would risk a continuation of the current situation in which the Supreme Court is overburdened by a disproportionately heavy caseload.

(iii) Public perception

Similarly, a consolidating amendment would reduce the risk, identified in Chapter 12, of the Court of Appeal being seen as a less important institution when compared with the High and Supreme Courts. It would establish the new Court as a constitutional forum by setting out its status, character and competences in the text of the Constitution. Similarly, those Articles of the Constitution which confer ancillary or ceremonial responsibilities on members of the judiciary could be amended to refer expressly to the members of the new Court of Appeal. Both of these factors would support the public impression of the Court as one of national and constitutional significance.

(iv) Independence and status of the Court of Appeal

A consolidating amendment could also secure the confidence of the public and the legal profession in the independence and permanence of the new Court by extending the privileges and protections which the Constitution currently provides for the High and Supreme Courts to the Court of Appeal. Article 35, for example, could be amended to provide an equivalent level of protection against removal to judges of the Court of Appeal. This would be important not only to the public's perception of the Court, but also to the ability to attract judicial candidates of the necessary quality.

2. Disadvantages

(i) Complexity

The only disadvantage of a consolidating amendment is that it will be longer and more complex than a single permissive amendment.

However, the essence of the proposal — to establish a Court of Appeal — is the same single issue in any option.

B. Conclusion

Taking all of these considerations into account, it is the view of the Working Group that:

- A consolidated amendment would enable the text of the Constitution to be re-drafted to reflect the new court structure.
- It would secure the constitutional status of the new Court of Appeal and avoid the dangers involved in creating inconsistencies or incoherence in the constitutional text.
- In particular, it would allow full constitutional competence to be vested in the Court of Appeal, thereby underlining its importance and ensuring that the new system is efficient and effective in both the appellate courts.
- For these reasons, a consolidated amendment is a more sophisticated and effective option for establishing a Court of Appeal than a single permissive amendment, and is recommended by the Working Group.

CHAPTER 14

The Establishment of Courts of Appeal in Other Jurisdictions

A. Introduction

As the Group pointed out, many common law legal systems have an intermediate appellate court at the Superior Court level. This chapter explains briefly the appeal court structure in Australia, Canada, New Zealand and the United States of America. It also explores some of the procedural rules that apply in final appeals in those jurisdictions, including requirements as to leave, time limits, limitations on the length of written and oral submissions and the extent to which interventions by non-parties known as *amicus curiae* (''friends of the court'') are permitted.

1. Australia

The Court of Final Appeal in Australia, known as the High Court, was established by s. 71 of the Commonwealth of Australia Constitution of 1901. This provides in relevant part that:

> **''The judicial power of the Commonwealth shall be vested in a Federal Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. . .''**

The workload of the Court increased and the Federal Court of Australia Act 1976 was passed, bringing into being the Federal Court of Australia to take over some of the appellate burden borne by the High Court.

As well as hearing appeals from federal courts, s. 73(ii) of the Commonwealth of Australia Constitutional Act[216] confers an appellate jurisdiction on the High Court in relation to decisions ''of the Supreme Court of any State.'' Such appeals must relate to matters pertaining to federal law.

The High Court determines whether to grant leave to appeal to it under the terms of s. 35A of the Judiciary Act 1903. In so doing, it ''may have regard to any matters that it considers relevant but shall have regard to:

216 Hereinafter referred to as the Constitution Act.

"(a) whether the proceedings in which the judgment to which the application relates was pronounced involve a question of law:

(i) that is of public importance, whether because of its general application or otherwise; or

(ii) in respect of which a decision of the High Court, as the final appellate court, is required to resolve differences of opinion between different courts, or within the one court, as to the state of the law; and

(b) whether the interests of the administration of justice, either generally or in the particular case, require consideration by the High Court of the judgment to which the application relates."'"

Details of the practice and procedure of the appellate courts of this jurisdiction will be considered in more detail in Part III.

2. Canada

The Constitution Act 1867 divides authority for the judicial system in Canada between the federal government and the ten provincial governments.

The provincial governments are given jurisdiction over the administration of justice in the provinces, which includes the constitution, organisation and maintenance of the courts, both civil and criminal, in the province, as well as civil procedure in those courts.

The federal government is also given the authority under s. 101 of the Constitution Act 1867 to establish a General Court of Appeal for Canada and *"any additional courts for the better administration of the laws of Canada"*. It has used this authority to create the Supreme Court of Canada as well as the Federal Court of Appeal, the Federal Court and the Tax Court of Canada.

The Federal Court of Appeal was established under the Federal Courts Act 1971. It inherited the jurisdiction of the Exchequer Court and gained the jurisdiction to hear judicial reviews from federal agencies and tribunals. The Federal Court of Canada had two divisions, the Federal Court (Trial Division) and the Federal Court (Appeal Division). The Courts Administration Service Act 2002 came into force on 2 July 2003. This legislation amended the Federal Court Act 1971, which became the "Federal Courts Act", to create two separate courts, the Federal Court of Appeal and the Federal Court, from the existing two divisions of the Federal Court of Canada. Leave to appeal from these courts is usually granted by the Supreme Court itself.

While provincial courts of appeal are entitled to grant leave to appeal to the Supreme Court under s. 37 of the Supreme Court of Canada Act, this power has fallen into disuse as it is considered preferable for the Supreme Court to manage its own list.[217]

217 Sopinka and Gelowitz, *The Conduct of an Appeal* (Butterworths, 2nd ed., 2000). See *Dolbec v. U.S. Fire Insurance Co.* [1963] Que. Q.B. 170, *Cohnstaedt v. University of Regina* [1987] 2 W.W.R. 1 (Sask. C.A.), *Lowe v. Canadian Pacific Ltd.* (1999) 178 D.L.R. (4th) 764 (N.S.C.A.).

The Supreme Court Act 1985 provides in s. 40(1) that an appeal will proceed to that Court:

> **"[w]here the Supreme Court is of the opinion that any question involved [in the appeal] . . . is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it."**

Details of the practice and procedure of the appellate courts of this jurisdiction will be considered in more detail in Part III.

3. New Zealand

New Zealand, like the United Kingdom, does not have a single written text which operates as a constitution.[218] The three-tier court system is comprised of the High Court (so named in 1980), the Court of Appeal (created as a separate court by the Judicature Amendment Act 1957) and the Supreme Court (established by the Supreme Court Act of 2003, which abolished the right of appeal to the Privy Council).

The Supreme Court determines leave applications under s. 13 of the Supreme Court Act 2003 which provides as follows:

> 13. (1) The Supreme Court must not give leave to appeal to it unless it is satisfied that it is necessary in the interests of justice for the Court to hear and determine the proposed appeal.
>
> (2) It is necessary in the interests of justice for the Supreme Court to hear and determine a proposed appeal if—
>
> (a) the appeal involves a matter of general or public importance; or
>
> (b) a substantial miscarriage of justice may have occurred, or may occur unless the appeal is heard; or
>
> (c) the appeal involves a matter of general commercial significance.

The practice and procedure of the appellate courts of New Zealand will be considered further in Part III.

4. United States

Article III of the United States Constitution establishes the Supreme Court of the United States and refers to the power of Congress to create other "inferior courts".[219]

(i) The Federal Court System

Congress established federal district and circuit courts with the Judiciary Act of 1789. A major reform of the system occurred in 1891 with the Circuit Court Act, which established a permanent appellate court for each circuit. There are 94 judicial districts, which are in

218 See the Constitution Act 1986, which codified some of the preexisting legislation.

219 Article III, Section 1 of the United States Constitution:

> "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."

turn organised into 12 regional circuits. Each of these regional circuits has a court of appeals which hears appeals from the district courts located within its circuit, as well as appeals from decisions of federal administrative agencies.[220]

(ii) The State Court System

As well as the federal courts, each state has its own court system. Within the majority of state court systems there is a three-tier structure. For example, in Connecticut, there is a Superior Court with general jurisdiction, an Appellate Court and a Supreme Court. Decisions from the state Supreme Court may be appealed to the Supreme Court of the United States where they present substantial federal questions. This arises usually where it is argued that a constitutional right has been denied in the state courts.

(iii) Writs of Certiorari

The Supreme Court of the United States enjoys original jurisdiction in some very limited cases, such as those dealing with diplomatic personnel. It is also required to hear some appeals from lower federal courts. Apart from these cases, all appeals to the Supreme Court are brought by way of a writ of *certiorari*.[221] Essentially this is a petition to the Court asking it to hear an appeal. The grant or refusal of such writs is at the discretion of the Supreme Court. To have an appeal heard, at least four Justices of the nine must be in favour of granting the writ. Instead of seeking to correct erroneous decisions, the Court is looking for cases ''involving unsettled questions of federal constitutional or statutory law of general interest.''[222]

The rules governing *certiorari* are found in Title 28 of the Supreme Court Rules. These rules deal with matters such as time limits, and other procedural requirements, as well containing a list of factors to which the Court may have regard in considering writs of *certiorari*. These are factors, that, while ''neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers.'' They are as follows:

(1) the decision below conflicts with decisions of one or more federal courts of appeals or state courts of last resort on an important issue of federal law;

(2) the court below decided an important federal question in a way that conflicts with rulings of the Supreme Court;

(3) the court below decided a question of federal law that is so important that the Supreme Court should pass upon it even absent a conflict;

(4) (a category into which very few grants fall) the court below ''so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.''

The practice and procedure of this appellate structure will be considered in detail later.

220 As well as these circuit courts of appeal, there is the Court of Appeals for the Federal Circuit which has nationwide jurisdiction in a variety of specific subject areas, including international trade, government contracts, patents, trademarks, certain money claims against the United States government, federal personnel, and veterans' benefits.

221 See Baker, ''A Practical Guide to Certiorari,'' (1984) 33 Cath. U.L. Rev. 611 (1984) and Prettyman, ''Opposing Certiorari in the United States Supreme Court'' (1975) 61 Va. L. Rev. 197.

222 Rehnquist, *The Supreme Court: How it Was, How it Is* (1987) 269.

B. Conclusion

One of the striking features of this brief account of other common law jurisdictions is that they refer in their constitutional machinery to the court of last resort alone, leaving the establishment of other courts to the legislature.

This is in marked contrast to the provisions of Article 34 of the Irish Constitution which refer specifically to the Supreme Court and the High Court. This reference to these two courts renders the amendment of Article 34 and a number of other provisions (considered in Chapter 6) necessary for the sake of consistency. It renders it more difficult to make a single permissive amendment of the type used in other common law jurisdictions.

Furthermore, the lack of a constitutional basis could cast some doubt on the validity of the court as a whole. The constitutional validity of the established Court of Criminal Appeal was upheld in **People (A.G.) v. Conmey**.[223] The Constitution Review Group observed in 1996 that it would be more prudent to amend Article 34 to avoid the possibility of any potential future problems. The Working Group shares this opinion.

Strict procedural requirements apply in the jurisdictions discussed above and are designed to assist in the efficient disposal of appeals. These are an important aspect of an efficient and effective appeals system and they will be considered later in this report.

223 [1975] 1 I.R. 341.

CHAPTER 15

Amending Article 34 of the Constitution

A. Introduction

Earlier chapters have discussed the options for constitutional reform — a single permissive amendment, a self-executing amendment and a consolidating amendment. Exploring these further, this chapter considers what form an amendment to Article 34 might take. Consideration of this Article is one of the most important aspects of the constitutional amendments required to set up a Court of Appeal. Article 34 sets out the fundamental structure of the courts and how they relate to one another.

Section 1 of this Chapter sets out some of the important issues that arise in considering amending this Article. Section 2 sets out a number of alternative drafts of a consolidating amendment which would alter the current text of Article 34 to incorporate references to the Court of Appeal. Section 3 sets out drafts of Article 34 in terms of a single permissive amendment which the court has ruled out but which is given for information.

1. Issues to be considered in amending Article 34

A number of important issues arise in the context of drafting possible versions of a new Article 34. Crucial questions which arise in respect of a Court of Appeal are:

- the cases which may be appealed to it
- the cases which may be appealed from it and
- the mechanics for appeals to and from the new Court.

At the outset it is important to note that the adoption of a single permissive amendment would not allow for the resolution of these issues in the constitutional text. The issues considered would have to be resolved in legislation. The adoption of a consolidating amendment would, thus, give a more complete picture within the text of Article 34 itself of the role of the Court of Appeal.

(i) Cases appealable to the Court of Appeal

The identification of those cases appealable to the Court of Appeal could be best achieved by simply substituting the existing right to appeal from the High Court to the Supreme Court with a right of appeal from the High Court to the Court of Appeal. This would require an amendment to Article 34.4.3°, as contained in the draft in Section 2 below.

If a single permissive amendment were selected it would not be clear from the text that cases are no longer to proceed directly from the High Court to the Supreme Court on appeal. The new court structure could only be understood by consulting the statute book.

(ii) Cases appealable from the Court of Appeal

The second major issue which arises when amending Article 34 is the relationship between the Court of Appeal and the Supreme Court. The Group noted that only cases of significant importance should be subject to a further appeal from the Court of Appeal to the Supreme Court. One of the main purposes of establishing a Court of Appeal is to streamline the flow of cases through the Superior Courts and render litigation less lengthy and costly. Thus any amendment to Article 34 will need to narrow down the categories of cases appealable from the Court of Appeal.

The most straightforward way to achieve this is to introduce a requirement of leave to appeal to the Supreme Court into Article 34.6.3°. The formulation of a leave requirement would impact on the number of cases which the Supreme Court will hear. The threshold for leave is accordingly a matter of critical importance. Correctly calibrating the threshold test for a grant of leave is essential if the establishment of a Court of Appeal is to achieve the intended efficiency gains. A narrow formulation will significantly reduce the caseload of the Supreme Court while a broader one will reduce it less significantly. The leave criteria could also affect the types of cases heard by the Supreme Court.

It is important, therefore, to bear in mind the form of Supreme Court envisaged by the Group when determining the appropriate threshold for a grant of leave to appeal. The purpose of introducing a Court of Appeal is to ensure the creation of a more effective and efficient appellate court structure. As explained previously, the workload of the Supreme Court is such that it is simply incapable of promptly processing the appeals which it receives each year.

Establishing a Court of Appeal would allow the bulk of this appellate workload to be transferred to the new Court, which would have the capacity necessary to ensure that all appeals are dealt with in a prompt and efficient fashion. The result would be that the Court of Appeal would deal with many of the civil appeals that currently proceed directly to the Supreme Court, as well as the criminal appeals that are dealt with by the Court of Criminal Appeal.

This in turn would permit the Supreme Court to hear only those cases which raise legal questions of general social or public importance. There should be no general flow of appeals from the Court of Appeal to the Supreme Court. International experience suggests, rather, that the Supreme Court should hear approximately 80-90 cases per year. In the event that a Court of Appeal is established, the Supreme Court would hear cases which involve matters of wider public importance. As previously explained, such cases could involve:

- Cases which raise a legal issue (whether a private or constitutional law issue) which the Supreme Court has not previously ruled upon

- Cases involving the application of established principles to changing social/scientific circumstances
- Cases concerning the powers of other branches of government, where justiciable
- Cases which require a ruling on the jurisdiction of another court
- Cases of major commercial significance.

It is important that the thresholds for leave be designed in such a way as to ensure the emergence of this sort of system. It is the view of the Working Group, therefore, that regard should be had to the current criteria for leave to appeal from the Court of Criminal Appeal to the Supreme Court. The criteria should ensure that only appeals raising significant issues be allowed to proceed to the Supreme Court. The Supreme Court receives only those appeals which involve ''a point of law of exceptional public importance'' and in which it is ''desirable in the public interest'' for the appeal to be heard from the Court of Criminal Appeal.[224] The statistics indicate that these criteria perform this task effectively. The Supreme Court received two appeals from the Court of Criminal Appeal in 2008 and four in 2007 and in 2006. When it is considered that the Court of Criminal Appeal disposed of 232 matters in 2007 and 329 matters in 2006, it is obvious that the threshold is one which relatively few appeals can meet. It is sensible, therefore, to consider whether it can be adapted for the purposes of the Court of Appeal proposal under discussion here.

The criteria discussed above arguably restrict the number of appeals to too great an extent. Based on the experience of appeals from the Court of Criminal Appeal, the application of this threshold to the workload of a new Court of Appeal would probably result in between seven and ten appeals being heard by the Supreme Court. This would not make sufficient use of the Supreme Court and would be out of step with international best practice. It would also be contrary to the analysis made by Mr. Justice Geoghegan described in this Report.

One option would be to stipulate that a case must concern a ''matter of exceptional public importance'' to be heard by the Supreme Court but to omit the additional requirement that the hearing of an appeal be ''desirable in the public interest''.

The above formulation differs from the existing leave requirement to appeal from the Court of Criminal Appeal by referring to ''a matter of exceptional public importance'' as opposed to the narrower formulation, ''a point of law of exceptional public importance''. This broader approach, allowing for appeals other than those which raise a point of law to go to the court of final appeal, is taken in Australia, Canada and New Zealand.[225] The Working Group has taken the view that this approach has the advantage of permitting a broader range of cases to be considered as suitable for a Supreme Court appeal. This would secure the Supreme Court's capacity to manage its own caseload. Not all cases of public importance necessarily raise points of law. It would be unfortunate if the Supreme Court were precluded from hearing potentially important appeals due to too narrow a leave requirement. The Working Group therefore prefers the formulation reflected in Model A below to a formulation limiting appeals to those which raise a point of law.

The draft below contains a proposed amended version of Article 34.6.3° which reflects the leave requirement favoured by the Working Group.

224 Section 29 of the Courts of Justice Act, 1924, as substituted by section 22 of the Criminal Justice Act, 2006.
225 See Chapter 14.

Draft 1

6.3° ***The Supreme Court shall have appellate jurisdiction from such decisions of the Court of Appeal, as the Supreme Court may, by the grant of leave, decide to hear and determine. Such leave shall not be granted unless the Supreme Court is satisfied that the appeal concerns a matter of exceptional public importance.***

(iii) Mechanics of Appeals to the Court of Appeal

The Court of Appeal would take over the majority of the current caseload of the Supreme Court. Appeals to it from the High Court should thus be as of right — as is the current position of appeals from the High Court to the Supreme Court. This is reflected in the draft of Article 34.5.2° set out later in this chapter.

(iv) Mechanics of Appeals from the Court of Appeal

The introduction of a leave requirement for cases appealable from the Court of Appeal to the Supreme Court raises the issue of the forum in which leave is determined. In line with other common law jurisdictions, as discussed previously, the Supreme Court should decide this. Where it is sought to appeal a case from the Court of Appeal to the Supreme Court, the latter should have jurisdiction to determine whether or not to grant leave. This is reflected in the terms of Article 34.6.3° as redrafted below.

One other matter which arises in considering amendments to Article 34 is whether provision ought to be made for a ''leapfrog jurisdiction'' whereby certain cases could bypass the Court of Appeal and proceed directly to the Supreme Court.

One issue which arises in this context is the question of which Court ought to determine leave.

A number of options have been considered by the Working Group. One option would be to allow the Court of Appeal to certify whether a case was suitable for a Supreme Court hearing rather than a Court of Appeal hearing. The Working Group has noted that it is a common feature of most common law jurisdictions that the court of final appeal manages its own caseload and that this principle should be reflected in any leave arrangements. For this reason, that option was rejected.

A modified version of that option would be to allow the Court of Appeal to certify that a case is one which would more appropriately be dealt with by the Supreme Court. That decision — whether the Court of Appeal granted or refused certification — would then be itself appealable to the Supreme Court, which would make the final decision whether to hear the appeal or not. The disadvantage of this Model is that it introduces an additional procedural step — the application in the Court of Appeal, together with a potential additional appeal to the Supreme Court on the issue of leave.

The preferred option of the Working Group is to simply allow the Supreme Court to determine whether a case should ''leapfrog'' up to it. The illustrative draft of Article 34.6.4° is reproduced below.

Draft 2

6.4° In exceptional cases where having regard to the exigencies of such cases and where the public interest so requires, the Supreme Court may, subject to its own leave to appeal requirements, hear appeals from the High Court.

(v) Cases of statutory invalidity

This section addresses the question of what ought to be done in relation to appeals involving claims of statutory invalidity. As these cases can generate considerable uncertainty over the validity or otherwise of legislative measures, there is a strong argument that they ought to be determined as promptly as possible. Uncertainty and confusion are inimical to the rule of law.

The Group has considered a number of ways of dealing with cases which involve challenges to legislation. One concern which the Working Group has addressed is the potential for these cases to progress through two appeals, i.e., three court hearings before a definitive ruling is reached.

One possibility would be to deprive the Court of Appeal of the capacity to review the constitutionality of legislation altogether. The High Court and Supreme Court alone would retain this jurisdiction. If this were the arrangement then all cases challenging legislation would be appealed directly from the High Court to the Supreme Court. This would have the advantage of removing the possibility of two appeals in this type of case, which would ensure a more expeditious resolution. One disadvantage of this approach would be that the Supreme Court would have to hear all cases involving an issue of statutory invalidity. This would run the risk of negating some of the benefits of any new Court of Appeal.

One variation of this model would be to separate the issues out so that the Court of Appeal would retain *seisin* of those aspects of the appeal other than the legislative challenge. This procedure is used in a number of jurisdictions which have a dedicated Constitutional Court. It would have the advantage that the Supreme Court would need to deal only with the constitutional issues, which would reduce the amount of Supreme Court time dedicated to such direct appeals from the High Court.

The Working Group, however, was not in favour of this option. It would generate unnecessary procedural complexity. Furthermore, it would not address one of the biggest disadvantages of this type of arrangement, which is that it would deprive the Court of Appeal of an important jurisdiction. The Working Group is of the view that the new Court of Appeal should have the same constitutional jurisdiction as the other Superior Courts. It would be anomalous if the intermediate appellate court had a narrower jurisdiction than the High Court. It would also create the impression that the new Court was somehow less important than the other Courts.

For these reasons the Working Group does not favour an arrangement whereby all challenges to the constitutionality of statutes would be dealt with only by the High Court and the Supreme Court.

Another option considered by the Group was to allow those cases in which a statute has been struck down by the High Court or Court of Appeal to come before the Supreme Court

as a matter of course. When a statute is declared unconstitutional, this gives rise to a particularly problematic degree of uncertainty. This can be compounded by a lengthy appeal process. With these issues in mind, the Working Group has considered the approach taken in the South African court system. Under this system, where a statute is struck down, the case immediately proceeds to the court of final appeal. The ruling striking down the statute does not take effect unless it is confirmed by the Constitutional Court.[226] Where a statute is challenged but upheld, the normal appellate route is followed.

To apply this in the context of the Irish Superior Courts, there would be three possible routes a challenge to legislation might take.

Example A: A challenge is taken to a statute in the High Court. The challenge is unsuccessful. The case then goes to the Court of Appeal, which rejects the appeal. At this stage, any further appeal to the Supreme Court would have to get past the leave stage. In other words, the Supreme Court would have to determine that the appeal concerned a matter of exceptional public importance before it would hear any appeal.

Example B: A challenge to a statute was successful in the High Court. The appeal would bypass the Court of Appeal and proceed directly to the Supreme Court. As the Supreme Court would have a lower caseload under the proposed new court structure, the matter could be dealt with quickly and a definitive position reached in a short period of time. In the meantime the order of the High Court would not take effect.

Example C: A challenge to a statute is unsuccessful in the High Court but succeeds on appeal to the Court of Appeal. The appeal would proceed automatically to the Supreme Court. In the meantime the order of the Court of Appeal would not take effect.

If this system was adopted, the Supreme Court would have a discretion to refuse leave for appeals in situations such as Example A.

On the other hand, in those cases where a statute was struck down by the High Court, or the Court of Appeal, the matter would be dealt with definitively in a very short period of time, thus reducing the uncertainty and expense which can arise when a statute is found to be unconstitutional by the High Court. Furthermore, the ruling of the High Court or Court of Appeal would not take effect pending the determination by the Supreme Court.

The Working Group took the view that although the South African approach has a number of advantages, these could be realised by treating cases concerning statutory invalidity under the mechanism set out in Draft 2. Draft 2, it will be recalled, creates a ''leapfrog'' jurisdiction, which would enable the Supreme Court to decide to consider appeals directly from the High Court ''in exceptional cases'' where this is required ''by the public interest''. Cases where a statute is struck down could thus be directly appealed under Draft 2 where they met this test. This has the advantage of being more straightforward than the South African model. It involves the least amendment to the text and is a flexible arrangement which has the potential to resolve the concerns regarding this important type of case discussed above. It aims to strikes a balance between the need for speed and certainty in dealing with the validity of a statutory provision and the need to ensure the status of the intermediate appellate court is not undermined.

226 The Constitutional Court of South Africa is the court of final appeal for constitutional issues.

2. Draft Amendments of Article 34

The draft below incorporates the Court of Appeal into the Superior Court structure set out in the existing Article 34 of the Constitution. Text that has been added to reflect the role of the Court of Appeal is presented in bold italics. Draft Articles 1 and 2 are reproduced to illustrate how an amended Article 34 might look if altered to accommodate a Court of Appeal in the manner proposed above.

(i) Draft consolidating amendment of Article 34

Article 34:

1. Justice shall be administered in courts established by law by judges appointed in the manner prescribed by this Constitution, and save in such special and limited cases as may be prescribed by law, shall be administered in public.

2. The Courts shall comprise Courts of First Instance, ***a Court of Intermediate Appeal*** and a Court of Final Appeal.

3.1° The Courts of First Instance shall include a High Court invested with full original jurisdiction in and power to determine all matters and questions of law or fact, civil or criminal.

3.2° Save as otherwise provided by this Article, the jurisdiction of the High Court shall extend to the question of the validity of any law having regard to the provisions of the Constitution, and no such question shall be raised (whether by pleading, argument or otherwise) in any court established under this or any other Article of this Constitution other than the High Court, ***the Court of Appeal*** or the Supreme Court.

3.3° No Court whatever shall have jurisdiction to question the validity of a law, or any provision of a law, the Bill for which shall have been referred to the Supreme Court by the President under Article 26 of this Constitution, or to question the validity of a provision of a law where the corresponding provision in the Bill for such law shall have been referred to the Supreme Court by the President under the said Article.

4.1° The Courts of First Instance shall also include courts of local and limited jurisdiction with a right of appeal as determined by law.

5.1° The Court of Intermediate Appeal shall be called the Court of Appeal.

5.2° The Court of Appeal shall, with such exceptions and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court, and shall have appellate jurisdiction from such decisions of other courts as may be prescribed by law.

6.1° The Court of Final Appeal shall be called the Supreme Court.

6.2° The president of the Supreme Court shall be called the Chief Justice.

6.3° The Supreme Court shall have appellate jurisdiction from such decisions of the Court of Appeal, as the Supreme Court may, by the grant of leave, decide to hear and determine. Such leave shall not be granted unless the Supreme

Court is satisfied that the appeal concerns a matter of exceptional public importance.

6.4° ***In exceptional cases where having regard to the exigencies of such cases and where the public interest so requires, the Supreme Court may, subject to its own leave to appeal requirements, hear appeals from the High Court.***

6.5° No law shall be enacted excepting from the appellate jurisdiction of the Supreme Court ***or the Court of Appeal***, cases which involve questions as to the validity of any law having regard to the provisions of this Constitution.

6.6° The decision of the Supreme Court ***or of the Court of Appeal*** as to the validity of a law having regard to the provisions of this constitution shall be pronounced by such one of the judges of those Courts as each such Court shall direct, and no other opinion on such question, whether assenting or dissenting shall be pronounced, nor shall the existence of any such other opinion be disclosed.

6.7° The decision of the Supreme Court shall be final and conclusive in cases in which an appeal is heard by the Supreme Court. ***In all other cases the decision of the Court of Appeal shall be final and conclusive.***

7.1° Every person appointed a judge under this constitution shall make and subscribe the following declaration:.....

7.2° This declaration shall be made and subscribed by the Chief Justice in the presence of the President, and by each of the other judges of the Supreme Court, ***the judges of the Court of Appeal***, the judges of the High Court and the judges of every other Court in the presence of the Chief Justice or the senior available judge of the Supreme Court in open court.

7.3° The declaration shall be made and subscribed by every judge before entering upon his duties as such judge, and in any case not later than ten days after the date of his appointment or such later date as may be determined by the President.

7.4° Any judge who declines or neglects to make such declaration as aforesaid shall be deemed to have vacated his office

(ii) Single Permissive Amendment

There are a number of ways in which a single permissive amendment might be drafted. The main choice is between a negative formulation (Model X) and a positive one (Model Y).

Model X
No provision of this Constitution will prevent the Oireachtas from establishing a Court of Intermediate Appeal, to be known as the Court of Appeal, with appellate jurisdiction from all decisions of the High Court, subject to such exceptions and regulations as may be prescribed by law.

Model Y
The Oireachtas may establish a Court of Intermediate Appeal, to be known as the Court of Appeal, with appellate jurisdiction from all decisions of the High Court, subject to such exceptions and regulations as may be prescribed by law

The chief disadvantage of this approach is that it does not make clear the precise relationship between the three levels of Superior Courts. It fails also to clarify the extent to which the right of appeal from the High Court to the Supreme Court is intended to be abrogated. A self executing amendment would suffer similar problems.

The introduction of a single permissive amendment without more also creates inconsistencies and a lack of clarity in other constitutional provisions. These are discussed in the next chapter.

B. Conclusions

- The amendment of Article 34 is an essential constitutional reform to create a Court of Appeal
- The use of a single permissive amendment would not make clear the role of the Court of Appeal
- A more detailed amendment of Article 34 would make the role of the Court of Appeal clear
- A more detailed amendment would address some of the key issues considered.

CHAPTER 16

Consequential Amendments to the Constitution

A. Introduction

In the previous chapter the Working Group recommended that an overall amendment be made to Article 34, so as to establish the Court of Appeal coherently and clearly as an intermediate appellate court and to maintain consistency throughout the text of the Constitution.

This chapter takes this view further by setting out consequential amendments which would follow from the creation of a Court of Appeal. These may be divided into two categories:- those concerning the tenure and appointment of judges of the Superior Courts and those concerning certain functions of the most senior judges of the Superior Courts. A list with reference to these amendments may be seen in Appendix F.

1. Appointment and Tenure of Superior Court Judges

(i) Article 35

Article 35 deals with the appointment and removal of judges. It provides that judges of the High Court and Supreme Court can be removed from office only by resolution of the Dáil and Seanad for stated reasons of misbehaviour or incapacity. This is an important safeguard of judicial independence. In the event of the creation of a Court of Appeal, this independence should be extended to the judges of that Court.

An amended Article 35.4.1° could read as follows:

> A judge of the Supreme Court ***or the Court of Appeal*** or the High Court shall not be removed from office except for stated misbehaviour or incapacity, and then only upon resolutions passed by Dáil Éireann and by Seanad Éireann calling for his removal.

(ii) Article 36

Article 36 provides that the number of judges, and the way in which they are appointed and organised, will be regulated by law. It specifically mentions judges of the High and

Supreme Courts. It would be necessary to amend this Article to include a specific reference to judges of the Court of Appeal.

An amended Article 36.i could read as follows:

> Subject to the foregoing provisions of this Constitution relating to the Courts, the following matters shall be regulated in accordance with law, that is to say:
>
> i. the number of judges of the Supreme Court, ***the Court of Appeal*** and the High Court, the remuneration, age of retirement and pensions of such judges,

2. Functions of Superior Court Judges

In addition to the amendments described above, it would be consistent with the role and status of the Court of Appeal to alter other provisions of the Constitution to reflect the status of the most senior judge of that Court.

(i) Article 12

Article 12 of the Constitution provides for the qualifications, selection and removal of the President. It expressly commits certain tasks to the judges of the High and Supreme Courts.

Article 12.8 provides that an incoming President must swear a declaration in the presence of the members of the Oireachtas, ''Judges of the Supreme Court and of the High Court'' and ''other public personages''.

It is necessary to amend this Article to provide clearly for the attendance of members of the Court of Appeal. A failure to do so would be unlikely to impact upon the workings of government but it would give the impression that the Court of Appeal is less important than the original constitutional courts. It is important that the Court of Appeal be seen as a court of national significance if it is to attract the respect of the public and the calibre of judges necessary for it to successfully fulfil its important functions.

An amended Article 12.8 could read as follows:

> The President shall enter upon his office by taking and subscribing publicly, in the presence of members of both houses of the Oireachtas, of Judges of the Supreme Court, ***the Court of Appeal*** and of the High Court, and other public personages, the following declaration. . .

(ii) Article 14

Article 14 creates a Presidential Commission to exercise the powers of President where the President is absent, incapacitated, or otherwise unable to carry on the functions of office. The Commission comprises the Chief Justice, the Chairman of the Dáil and the Chairman of the Seanad.

Article 14.2.2° requires the President of the High Court to act in the place of the Chief Justice where that is necessary. This reflects the President of the High Court's position as the second most senior judicial officer in the State.

The creation of a Court of Appeal would establish a new court as the second highest in the State. Logically, the President of the Court of Appeal would be the State's second most

senior judge. Therefore the President of the Court of Appeal could act in place of the Chief Justice where that is necessary.

An amendment of the Constitution would accordingly be required.

An amended Article 14.2.2° would read as follows:

> The ~~President of the High Court~~ ***President of the Court of Appeal*** shall act as a member of the Commission in the place of the Chief Justice on any occasion on which the office of Chief Justice is vacant or on which the Chief Justice is unable to act.

(iii) Article 31

Another provision that would require amendment is Article 31. This Article creates the Council of State, its functions and composition. Article 31.2(i) provides that the *ex-officio* members of the Council will be ''the Taoiseach, the Tánaiste, the Chief Justice, the President of the High Court, the Chairman of Dáil Éireann, the Chairman of Seanad Éireann, and the Attorney General''.

It would be appropriate to recognise the importance of a new Court of Appeal by formally including its President as an *ex-officio* member of the Council, in lieu of the President of the High Court. An amendment would be required to achieve this.

An amended Article 31.2.(i) could read as follows:

> The Council of State shall consist of the following members:
>
> i. As ex-officio members: the Taoiseach, the Tánaiste, the Chief Justice, ***the President of the Court of Appeal***, the Chairman of Dáil Éireann, the Chairman of Seanad Éireann, and the Attorney General.

3. *Habeas Corpus* Procedure

Article 40.4 of the Constitution makes provision for detained persons to challenge the lawfulness of their detention before the High Court. Article 40.4.3° provides as follows:

> Where the body of a person alleged to be unlawfully detained is produced before the High Court in pursuance of an order in that behalf made under this section and that Court is satisfied that such person is being detained in accordance with a law but that such law is invalid having regard to the provisions of this Constitution, the High Court shall refer the question of the validity of such law to the Supreme Court by way of case stated and may, at the time of such reference or at any time thereafter, allow the said person to be at liberty on such bail and subject to such conditions as the High Court shall fix until the Supreme Court has determined the question so referred to it.

It is the view of the Working Group that this type of appeal by way of case stated should be referred to the Court of Appeal. A redrafted Article 40.4.3° would read as follows:

> Where the body of a person alleged to be unlawfully detained is produced before the High Court in pursuance of an order in that behalf made under this section and that Court is satisfied that such person is being detained in accordance with a law but that such law is invalid having regard to the provisions of this

Constitution, the High Court shall refer the question of the validity of such law to the ***Court of Appeal*** ~~Supreme Court~~ by way of case stated and may, at the time of such reference or at any time thereafter, allow the said person to be at liberty on such bail and subject to such conditions as the High Court shall fix until the ***Court of Appeal*** ~~Supreme Court~~ has determined the question so referred to it.

The law enabling an appeal to the Supreme Court would apply also.

B. Conclusions

The drafters of the Irish Constitution incorporated references to both of the Superior Courts into the text of the Constitution. This enables the citizen to understand, simply by reference to the Constitution, the superior court structure in the State. The references to the High Court and the President thereof throughout the text of the Constitution require careful amending to maintain this clarity and to retain consistency throughout the text.

CHAPTER 17

Recommendations as to Constitutonal Reform

The Working Group is committed to the principle that any constitutional change should entail the minimal amendment to the text possible.

The Working Group recommends that the Article 34 of the Constitution be amended by a consolidating amendment as described in Chapter 15 so as to make provision for a Court of Appeal.

The Working Group recommends a number of consequential amendments to the Constitution in Chapter 16.

CHAPTER 18

Statutory Reform

As well as constitutional amendment, the introduction of a new Court of Appeal would require significant statutory reform and changes to the Rules of the Superior Courts. A number of areas are identified where statutory amendments or enactments might be required to facilitate the establishment of a Court of Appeal. This chapter is a brief overview of the sort of issues which have to be addressed in the event that a Court of Appeal is created in Ireland.

Chapter 19 sets out the current statutory regime underlying the structure of the Supreme Court and identifies provisions that would require amendment to accommodate the new Court of Appeal. It also explains the rules of procedure that apply in the Supreme Court and identifies aspects of these to be reformed in the light of the new Court of Appeal.

Chapter 20 sets out the statutory provisions that apply to the Court of Criminal Appeal. The Working Group has already recommended that the new Court of Appeal should have jurisdiction in both civil and criminal matters. This would require the disestablishment of the existing Court of Criminal Appeal. The relevant statutes would also have to be amended to reflect the new court structure. Chapter 20 explains how the existing Court of Criminal Appeal functions and identifies statutory provisions and rules of procedure that may require amendment in the event of a new Court of Appeal being established.

Chapter 21 sets out the existing statutory regime governing the High Court and assesses whether any alterations to legislation or to the rules of procedure might be required to accommodate the new Court of Appeal. It also considers a number of statutory provisions which apply to a number of courts that might require amendment if the new Court of Appeal was established.

Chapter 22 contains a comparative analysis of Courts of Appeal in other jurisdictions. It focuses in particular on practice and procedure in the superior appellate court structures of a number of common law jurisdictions. This chapter is primarily of illustrative value, to indicate the range of options open to the Oireachtas as part of a process of statutory reform.

CHAPTER 19

The Supreme Court

A. Introduction

This chapter explains the statutory provisions which currently govern the establishment and composition of the Supreme Court. It identifies those provisions which might have to be altered in order to facilitate the establishment of a Court of Appeal. It also considers the rules of practice and procedure that presently apply to Supreme Court appeals and identifies areas that could require alteration in the event that a Court of Appeal is established.

As discussed earlier,[227] the legal basis of the current Superior Court structure is found in Article 34 of the Constitution together with the Courts (Establishment and Constitution) Act, 1961. This Act, together with the Courts (Supplemental Provisions) Act, 1961, sets out in more detail the arrangements set out in Articles 34 to 37 of the Constitution.

These two Acts replaced in substantial part their legislative predecessor, the Courts of Justice Act, 1924. Prior to the promulgation of the 1937 Constitution, the Constitution of the Irish Free State of 1922 set out a basic court structure in Articles 64 to 73. The Courts of Justice Act, 1924 made detailed provision for the establishment of the Supreme Court, the Court of Criminal Appeal, the High Court, the Circuit Court and the District Court.

While the 1961 legislation repealed and replaced many of the provisions of the Courts of Justice Act, 1924, the provisions governing the Court of Criminal Appeal and a number of other provisions still apply. These may also require amendment.

The legislation referred to above is supplemented by the Rules of the Superior Courts.[228] The Rules, which have been amended from time to time, set out the detailed provisions regarding practice and procedure before the Superior Courts. The introduction of a Court of Appeal will require the revision of some of these rules.

227 See Chapter Two.
228 S.I. 15 of 1986.

As well as the legislation and Rules of the Superior Courts, there also exist a number of practice directions. These too may require reasonably significant revision or extension to cover the Court of Appeal.

The Working Group has expressed the view that a new Court of Appeal should be established by amendment to the Constitution, that it should have both civil and criminal jurisdiction. Such a development would require the abolition of the existing Court of Criminal Appeal. The implications of this for the revision of legislation, rules and practice directions are also considered below.

B. The Supreme Court

1. Establishment and Constitution

The Courts (Establishment and Constitution) Act, 1961 makes provision in s. 1, for a Court of Final Appeal to be called the Supreme Court. The president of the Court is to be called the Chief Justice. The ordinary judges are each to be styled ''Judge of the Supreme Court''. The Act provides that there shall be at least four ordinary judges and that the Oireachtas may from time to time fix a greater number. Section 1(3) provides that the President of the High Court is to be an *ex officio* member of the Supreme Court. Under Section 1(4) it is provided that, at the request of the Chief Justice, judges of the High Court may sit as Supreme Court judges where there is an insufficient number of Supreme Court judges available to hear a matter.

Section 7 of the Courts and Courts Officers Act, 1995 provides that the Supreme Court ''may sit in two or more divisions and they may sit at the same time.''[229] That Act increased the number of ordinary judges of the Supreme Court to seven, thus bringing the total number of judges of the Supreme Court to eight. In cases where the validity of statutes is challenged the rule remains that such a case shall be heard and determined by not less than five judges of the Supreme Court.[230] The Court occasionally sits as a seven-judge court.[231] Appeals to and any other matters cognizable by the Supreme Court are to be heard by five judges including any judges who are deemed members by the provisions discussed above.[232] The Chief Justice (or in his absence the most senior ordinary judge) may determine that an appeal is to be dealt with by three judges — again this includes judges who are deemed to be Supreme Court judges. Such a determination cannot be made in respect of matters arising under Article 12 or Article 26 of the Constitution or matters concerning the validity of any law having regard to the provisions of the Constitution.[233]

Implications of a Court of Appeal

Any statute enacted after a referendum providing for the establishment of a Court of Appeal would have to include provisions — like those in the Courts (Establishment and Constitution) Act 1961 — to regulate the establishment, title and composition of the Court.

229 Section 7(3) of the Courts (Supplemental Provisions), Act as inserted by s.7 of the Courts and Court Officers Act, 1995.
230 Section 7(5) of the Courts (Supplemental Provisions) Act 1961, as inserted by s. 7 of the Courts and Court Officers Act, 1995.
231 For example, a 7 judge Court presided in *Curtin v. Dáil Éireann* [2006] 2 I.R. 556.
232 Section 7(3) of the Courts (Supplemental Provisions) Act, 1961.
233 Section 7(4) of the Courts (Supplemental Provisions) Act,1961.

As discussed earlier, the Working Group is of the view that it is not appropriate for the court of last resort to sit in panels. In common law countries a court of final appeal typically sits *en banc*. This helps to ensure that the decisions of the highest court in the land are consistent and predictable, thereby providing legal certainty. The Irish Supreme Court has been obliged to sit in panels in order to cope with the high volume of appeals from the High Court.

It would be consistent with the scheme of courts to make provision for the President of the Court of Appeal to be an *ex officio* member of the Supreme Court as is the case with the President of the High Court. Similarly, consideration might be given to permitting ordinary judges of the Court of Appeal to sit on the Supreme Court at the request of the Chief Justice.

2. Jurisdiction of the Supreme Court

The jurisdiction of the Supreme Court is set out in s. 7 of the Courts (Supplemental Provisions) Act, 1961. It establishes the Supreme Court as a "superior court of record with such appellate and other jurisdiction as is set out by the Constitution."[234] As discussed, that provides for a very broad appellate jurisdiction. Article 34.4.3° provides that the Supreme Court shall, with such exceptions and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court and from those of other courts as may be provided by law. A generous interpretation has generally been given to the term "decisions" in this context.

As well as its appellate jurisdiction, the Supreme Court has limited original jurisdiction under Articles 12 and 26 of the Constitution. Under Article 12.3.1° the Court has a role in the removal of the President for permanent incapacity. Article 26 makes provision for the referral by the President of a bill (or part of a bill) to the Supreme Court to assess its constitutionality prior to its passing into law.

Implications of a Court of Appeal

The introduction of a Court of Appeal should have no bearing on the original jurisdiction of the Supreme Court.

With regard to the appellate jurisdiction of the Supreme Court, the Working Group's view is that the Court's jurisdiction should be confined to a more limited category of cases than it is at present. Such an amendment would mean that there would be no need to alter the provisions of s. 7 of the Courts (Supplemental Provisions) Act, 1961 as it simply refers to the arrangements in the Constitution.

There would, however, be a need for legislation to provide for the taking of appeals from the Court of Appeal to the Supreme Court. This could, for example, set out the grounds upon which leave may be granted to appeal to the Supreme Court as well as the means for so doing.

Provision would also need to be made for any "leapfrog" jurisdiction that might be established. A "leapfrog" jurisdiction would allow for the possibility of appealing directly to the Supreme Court in particular circumstances, thereby by-passing the Court of Appeal.

234 Section 7(1) of the Courts (Supplemental Provisions) Act, 1961.

Procedural rules for applications for leave to appeal would also be required. The Rules of the Superior Courts would thus need to be amended to include procedural rules governing applications for leave to appeal to the Supreme Court. These rules would have to cover matters such as the appropriate notice periods, service and other similar matters.

3. Conduct of Appeals in the Supreme Court

Appeals to the Supreme Court are currently governed by Order 58 R.S.C. 1986 as amended by S.I. No. 248 of 2005: Rules of the Superior Courts (Personal Injuries), 2005 and S.I. No. 294 of 2005: Rules of the Superior Courts (Elections), 2005.

Order 58(1) of the Rules of the Superior Courts provides that appeals to the Supreme Court ought to be ''by way of rehearing''. Delany & McGrath comment that this has been ''quite restrictively interpreted''.[235] Henchy J. referred to ''rehearing'' in this context as a ''term of art'' which did not require the Court to conduct a full re-run of the lower court case.[236]

The Supreme Court has all the powers and duties as to amendment that the High Court enjoys. It also has full discretionary power to receive further evidence upon questions of fact. That evidence may be taken by oral examination in court, by affidavit or by deposition before an examiner or commissioner. Where matters have occurred after the date of the decision being appealed or where there is an appeal from an interlocutory judgment or order, no special leave is needed to admit such evidence.[237]

Where there is an appeal from a final judgment or order such further evidence (apart from matters subsequent) will be admitted only on special grounds. An application for leave to admit such evidence must be made to the Supreme Court. Such an application must set out the special grounds upon which the application is made.[238]

Implications of a Court of Appeal

The Working Group has taken the view that the jurisdiction of the Supreme Court to hear appeals should be narrower than is currently the case. In particular, it has recommended that a leave requirement be introduced such that leave is granted only in those cases where a matter of exceptional public importance arises.

Under the current system, where the Supreme Court provides the only appeal in many civil cases, the provision for a ''rehearing'' is entirely appropriate. It is envisaged, however, that the Court of Appeal would take over much of the workload of the Supreme Court. In such circumstances, it would be more accurate to describe the role of the Supreme Court on appeal in a different way. As previously observed, the role of courts of last resort in other common law jurisdictions is not one of error correction but is instead one of ensuring that the law is clear, coherent and applied consistently. Consideration might therefore be given to deleting the description in Order 58 rule 1 RSC of appeals to the Supreme Court as involving a ''rehearing'' and replacing that word with a more appropriate term such as ''review''.

Given the more limited category of case that would be likely to come before the Supreme Court, it might be questioned whether the provisions allowing for the adducing of evidence

235 Delany and McGrath, *Civil Procedure in the Superior Courts* (Thomson Round Hall, 2nd ed., 2005), at 525.
236 *Northern Bank Finance v. Charlton* [1979] I.R. 149, at 188.
237 Order 58 rule 8 R.S.C. 1986.
238 Order 58 rule 8 R.S.C. 1986.

described above are likely to be necessary. On the other hand, it should be noted that the current rules provide flexibility and the relevant powers are at the discretion of the Court. It might be thought preferable to equip the Court with sufficient powers to deal with any situation that might arise.

Some consideration will need to be given to these issues in the context of any overall review of Order 58.

4. Orders the Supreme Court may make on an Appeal

The Supreme Court is described in the current rules as having the power to draw such inferences of fact and to give any judgment or make any order which ought to have been made. It may also make such further or other order as the case may require.

The exercise of those powers is not dependent on the framing of the notice of appeal. The Supreme Court may use those powers even where the notice of appeal asks that only part of a decision be varied or reversed and the powers may be exercised in favour of all or any of the respondents or parties even though some of them may not have appealed from or complained of the decision.

The Supreme Court has the power to set aside the judgment or order being appealed and to order a new trial.[239] As well as these powers, the Supreme Court also has the power to make such order as to the whole or part of the costs as may be just.[240]

Rule 17 deals with security for costs. It provides that the Supreme Court may in special circumstances direct that a deposit or security for costs of an appeal be given.[241]

Rule 16 provides that no interlocutory order or rule from which there has been no appeal shall operate so as to bar or prejudice the Supreme Court from giving such decision upon an appeal as may be just.[242]

Implications of a Court of Appeal

There may not be any need to alter these aspects of Order 58 in the light of the establishment of a new Court of Appeal. These rules provide flexibility and leave matters to the Supreme Court's discretion; they are compatible with its altered role following the establishment of a Court of Appeal. There would, however, be a need to consider analogous rules for the Court of Appeal.

5. *Ex parte* applications to the Supreme Court

Order 58 rule 13 deals with appeals from *ex parte* applications in the High Court, that is, where one party applies to the High Court for an order, usually without notice to any other party. Where an *ex parte* application has been refused in the High Court, an application for a similar purpose may be made to the Supreme Court *ex parte* within four days from the refusal. Consideration may also be given to enlarging the time for such an application.[243]

239 Order 58 rule 9 R.S.C. 1986.
240 Order 58 rule 8 R.S.C. 1986.
241 Order 58 rule 17 R.S.C. 1986.
242 Order 58 rule 16 R.S.C. 1986.
243 Order 58 rule 13 R.S.C. 1986.

Implications of a Court of Appeal

The Court of Appeal would be likely to deal with appeals from the High Court in *ex parte* matters with the result that Rule 13 may no longer play any role. In that situation, it would seem logical to remove this provision from the existing Rules.

6. Rules regarding notice of appeals to the Supreme Court

All appeals to the Supreme Court must be entered in the Office of the Registrar of the Supreme Court within seven days of service of the notice of appeal. If there has been more than one notice of appeal then the deadline is within seven days of the service of the last notice served. The appellant must lodge with the Registrar an attested copy of the judgment or order appealed from and must leave him a copy of the notice of appeal indorsed with sufficient particulars of service to be filed. As soon as the necessary papers are in order and ready, the appeal will be set down by entering it in the proper list of appeals. The appeal shall then come on to be heard according to its place in that list unless otherwise directed by the Supreme Court.[244]

A person served with a notice of appeal to the Supreme Court need not serve a notice of cross appeal. If such a person wishes to contend at the hearing of the appeal that the judgment or order appealed should be varied, he must give notice to every party that might be affected by that contention. This must be done within four days of service of the original notice of appeal. The Supreme Court may extend that time period. Such a notice will be a four day notice and the appeal shall not proceed until the expiration of that period. An omission to give notice does not diminish the statutory powers or the powers under the rules of the Supreme Court. Such omission may be grounds for an adjournment or special order as to costs at the discretion of the Supreme Court.[245]

The appellant must "without delay" lodge five books of appeal in the Office of the Registrar of the Supreme Court. Each book must contain copies of the pleadings and all other documents required for the appeal. It must also contain a sufficient index and a true copy of the index must have been furnished to every other party affected by the appeal in advance. Where the appeal is one under rule 2, three books are required initially and the Supreme Court may order that more be lodged later.[246]

Rule 22 makes special provision for cases where a defendant wishes to contest as a respondent an appeal brought by a co-defendant under s. 32(3) of the Civil Liability Act 1961. This is the provision dealing with the issue of concurrent wrongdoers. Such a defendant must serve notice of his intention to do so in the Form No. 30 in Appendix C to the Rule on the co-defendant, the plaintiff and any other party directly affected. He has seven days from the date on which the notice of appeal was served on him. This time period may be extended by the Supreme Court. He must lodge a copy of the notice of intention to contest the appeal with the Registrar of the Supreme Court at the latest on the day after the last day for service of such notice.[247]

A notice of appeal must be served within 21 days of the passing and perfection of the order or judgment being appealed. The notice is a ten day notice.[248] The Supreme Court has the

244 Order 58 rule 11 R.S.C. 1986.
245 Order 58 rule 10 R.S.C. 1986.
246 Order 58 rule 12 R.S.C. 1986.
247 Order 58 rule 22 R.S.C. 1986.
248 Order 58 rule 3(1) R.S.C. 1986.

power to abridge the time for notice of an appeal.[249] It also has the power to enlarge the time for serving notice of an appeal even where the application for same is made outside of the time for such service.[250]

A notice of appeal for an appeal to the Supreme Court must state the grounds of appeal and the relief sought or the order (if any) *in lieu* of the judgment or order appealed from sought by the appellant. Where there has been a trial with a jury it must be made clear whether all or part of the verdict or findings is being appealed.[251] A notice of appeal may be amended at any time and on such terms as the Supreme Court may see fit.[252]

A notice of appeal must only be served on every person directly affected by the appeal. The Supreme Court may, however, direct notice of the appeal to be served on all or any of the parties to the action or other proceeding, or upon any person not a party, and in the meantime may postpone or adjourn the hearing of the appeal upon such terms as may be just, and may give such judgment and make such order as might have been given or made if the persons served with such notice had originally been parties.[253]

Implications of a Court of Appeal

The introduction of a leave stage prior to the lodging of an appeal means that these aspects of Order 58 will require revision and substantial amendment. Order 58 rules 10, 11, 12 and 22 would become obsolete if the new Court were established. New rules governing notice of an application for leave to appeal would be required.

7. Appeals involving questions of fact

Rule 14 concerns the situation where a question of fact is involved in an appeal. It provides that the evidence taken by the High Court on the question of fact shall be brought before the Supreme Court. Where this takes the form of affidavit evidence this is done by the production of printed copies of those that are printed and, where they are not, of copies. Where oral evidence has been taken, this will be received by the Supreme Court *via* the production of a copy of the Judge's notes or such other materials as the Supreme Court may deem expedient. The Supreme Court may by special order receive evidence in other ways.[254]

If during the hearing of an appeal, a question arises in respect of a direction given by the trial judge to a jury or to assessors, rule 15 provides that the Supreme Court shall have regard to verified notes or other evidence and to such other materials as the Supreme Court may deem expedient.[255]

Implications of a Court of Appeal

The introduction of a Court of Appeal would significantly reduce the number of cases coming before the Supreme Court from the High Court. Apart from the rare and exceptional cases which may be permitted to ''leapfrog'' the Court of Appeal, nearly all of the cases before the Supreme Court would be second appeals from the Court of Appeal. Furthermore,

249 Order 58 rule 3(3) R.S.C. 1986.
250 Order 58 rule 3(4) R.S.C. 1986.
251 Order 58 rule 4 R.S.C. 1986.
252 Order 58 rule 6 R.S.C. 1986.
253 Order 58 rule 5 R.S.C. 1986.
254 Order 58 rule 14 R.S.C. 1986.
255 Order 58 rule 15 R.S.C. 1986.

such cases would primarily involve questions of law alone. This means that the provisions of rule 14 would be of little practical significance except perhaps in cases where there has been a ''leapfrogging''.

As far as rule 15 is concerned, this is likely to retain more vitality if the new Court of Appeal is established since it relates to matters that are germane to appeals on a point of law. Again, however, the majority of appeals would have passed through the Court of Appeal before reaching the Supreme Court. A rule such as rule 15 is therefore more appropriate for application to a Court of Appeal than to the Supreme Court.

Again, the retention of a ''leapfrog'' jurisdiction suggests that the rules set out in rules 14 and 15 may still be of some utility in those rare cases that bypass the Court of Appeal. Rules 14 and 15 or rules with a similar effect might usefully be retained in the context of any ''leapfrog'' jurisdiction but may not be suitable for application in the context of the general body of appeals before the Supreme Court.

8. Effect of a notice of appeal on existing proceedings

Rule 18 provides that an appeal to the Supreme Court shall not operate as a stay of execution or a stay of proceedings under the decision appealed from unless the High Court or Supreme Court make such an order. It goes on to provide that no intermediate act or proceeding shall be invalidated by an appeal to the Supreme Court unless the High Court or Supreme Court order otherwise.[256]

Implications of a Court of Appeal

As most appeals would be processed by the new Court of Appeal, some provision regarding stays would need to be made in respect of appeals to that Court. The existing rule could be extended to cover appeals under the new regime.

If Rule 18 or a rule with similar effect were retained and extended to cover appeals to the Court of Appeal, two provisions may be required to accommodate the new Court. One provision could, for example, provide that appeals to the Court of Appeal shall not operate as a stay unless the High Court or Court of Appeal make such an order.

A second provision could deal with ''leapfrog'' appeals. Such a provision could stipulate that appeals to the Supreme Court under the ''leapfrog'' procedure shall not act as a stay on proceedings unless the Supreme Court or the Court from which the appeal originated so order.

9. Applications under the rules to be made to the High Court

Rule 19 provides that wherever an application under the rules may be made to either the High Court or Supreme Court, it must be made in the first place to the High Court.[257]

Implications of a Court of Appeal

The introduction of the Court of Appeal will need to be recognised in any new rules. One option would be to amend rule 19 such that any application which is made under the rules should be made first of all to the High Court or Court of Appeal as appropriate.

256 Order 58 rule 18 R.S.C. 1986.
257 Order 58 rule 19 R.S.C. 1986.

10. Interest

Rule 20 provides that on an appeal from the High Court, unless the Supreme Court orders otherwise, interest for such time as execution has been delayed by the appeal shall be allowed. The Taxing Master or other proper officer may compute interest for that time period and does not need an order for that purpose.[258]

Implications of a Court of Appeal

Rule 20 would have to be amended to reflect the introduction of the Court of Appeal. Two rules would be required — one relating to appeals to the Court of Appeal and the other to appeals to the Supreme Court.

11. Appeals to the Supreme Court from special tribunals or bodies

Rule 21 provides that Order 58 applies so far as applicable to all appeals to the Supreme Court from any special tribunal or body.[259]

Implications of a Court of Appeal

If appeals from such bodies were to be transferred to the Court of Appeal then this rule would no longer be required.

12. Appeals on a point of law under the electoral acts

Rule 23 was amended by substitution by S.I. No. 294 of 2005: Rules of the Superior Courts (Elections), 2005. It provides for special procedural rules where there is an appeal on a point of law to the Supreme Court under certain Electoral Acts.[260]

Implications of a Court of Appeal

The retention or otherwise of this rule will depend on whether the new Court of Appeal is charged with the responsibility of hearing such matters or whether the Supreme Court is to retain appellate jurisdiction on a first appeal.

13. Appeals from jury trials

Rule 2 provides that in any case where there has been a jury trial, a notice of appeal shall include an application for a new trial and such other relief to be sought, e.g., setting aside the verdict.

Rule 7 contains special provisions relating to appeals from jury trials. It provides that the Registrar of the Supreme Court must apply to the trial judge for a report of the trial for the information of the Supreme Court. Rule 7(2) explains the circumstances in which a new trial is ordered. It provides that a new trial shall not be ordered on the ground that there has been a misdirection, improper admission or rejection of evidence, or because the decision of the jury was not taken upon a question which the trial judge was not asked to leave to them, unless the Supreme Court is of the opinion that some substantial wrong or miscarriage has been thereby occasioned in the trial. Where the Court finds that the wrong or miscarriage affects only part of the matter or only some or one of the parties, the Supreme

258 Order 58 rule 20 R.S.C. 1986.
259 Order 58 rule 21 R.S.C. 1986.
260 Order 58 rule 23 R.S.C. 1986.

Court can give final judgment as to part of the matter or as to the affected parties only and may direct a new trial as to part of the matter or the affected parties only. Under rule 7(3) a new trial may be ordered without interfering with the finding or decision on any other question.

Implications of a Court of Appeal

This rule might be revised depending on whether it is envisaged that the Supreme Court will hear any appeals from criminal trials in the future.

14. Order 87 — Appeals from the Central Criminal Court

Order 87 makes provision for appeals from the Central Criminal Court to the Supreme Court.

Implications of a Court of Appeal

The establishment of a Court of Appeal to which all High Court cases must be appealed would mean this provision would be redundant. It could, however, retain some vitality in the context of the "leapfrog" jurisdiction of the Supreme Court. This provision may need to be revised.

15. Cases stated to the Supreme Court

Under s. 16 of the Courts of Justice Act, 1947, a judge of the Circuit Court may state a case to the Supreme Court on a point of law. Similarly, s. 38(3) of the Courts of Justice Act, 1936 provides that the High Court, on hearing an appeal to it from the Circuit Court, may state a case on a point of law to the Supreme Court. The procedural rules relating to both types of case stated are set out in Order 59. Once the case stated has been drafted and agreed, the relevant judge will sign it and it must then be lodged with the Registrar or County Registrar, as appropriate, who then endorses on it the date of lodgment, the name of any party or parties who applied for the case stated, the name of the party to have carriage of it and the names and addresses of the parties' solicitors. The Registrar must, within seven days of lodgment, serve notice thereof by registered post on every party that appeared in the matter. The original case stated must be transmitted to the Registrar of the Supreme Court, who then sets it down for hearing. The party who has carriage of the case stated must within 21 days after the serving of notice just described, lodge a certificate of readiness and five copies of the case stated and any documents referred to therein with the Registrar of the Supreme Court. These rules are the residual rules to apply where statute provides for the stating of a case to the Supreme Court but does not include any procedures.

Implications of a Court of Appeal

The continued utility of the rule will depend on whether cases stated from the Circuit Court are to remain in the Supreme Court or be transferred to the Court of Appeal.

16. *Habeas Corpus* applications

Order 59, rule 4 concerns the procedure for a case stated to the Supreme Court under the *habeas corpus* procedure in Article 40 of the Constitution.

Implications of a Court of Appeal

It was recommended that cases stated under the *habeas corpus* procedure should be appealed to the Court of Appeal. If that is the case then this rule will be obsolete as any further appeal in such matters would be subject to the leave requirements discussed in this Report.

17. Remittal of cases to the Circuit Court

Under s. 26 of the Courts of Justice Act, 1924, an appeal lies to the Supreme Court from a decision by the High Court to grant or refuse an application to remit a case to the Circuit Court under s. 25 of the same Act.

Implications of a Court of Appeal

The Working Group has recommended that the new Court of Appeal should substantially take over the existing workload of the Supreme Court. An appeal from a grant or refusal of the High Court to remit a case to the Circuit Court would logically, therefore, be taken to the Court of Appeal. Section 26 of the Courts of Justice Act, 1924 could be amended accordingly.

18. Supreme Court Practice Directions

A number of Supreme Court Practice Directions are currently in force. Some of these may no longer be of relevance if the Court of Appeal takes over certain matters.

Implications of a Court of Appeal

Some of the Practice Directions refer to specific matters which are currently appealable to the Supreme Court. For examples, SC04 concerns appeals relating to the Hague Convention, SC10 refers to appeals in cases concerning European Arrest Warrants and SC13 concerns cases stated as well as the general category of appeals. If the new Court of Appeal were to take over these appeals, these aspects of the existing practice directions would no longer be required.

A specific issue arises concerning SC14, which refers to Appeals under s. 29(2) of the Courts of Justice Act, 1924 (as amended by the Criminal Justice Act, 2006 and by the Criminal Justice Act, 2007). The Practice Direction refers to the current system whereby a certificate is required that a case is of point of law of exceptional public importance. The Working Group has recommended that a requirement of leave be introduced so that cases which concern a matter of exceptional public importance may be appealed to the Supreme Court from the Court of Appeal. The existing practice direction is inconsistent with the proposed new constitutional criterion and would accordingly require amendment.

CHAPTER 20

The Court of Criminal Appeal

A. Introduction

This chapter sets out the way in which the existing Court of Criminal Appeal operates. As the only existing appellate Superior Court, the way in which appeals are processed in this court is of relevance to any reform in this area. The new Court of Appeal, as proposed by the Working Group, would have both criminal and civil jurisdiction. It would thus deal with a much larger volume of litigation than the existing Court, which deals only with certain criminal matters. Thus some new rules would be required in order for it to function effectively, along with some new statutory provisions.

1. The Court of Criminal Appeal — Establishment and Constitution

Section 3 of the Courts (Establishment and Constitution) Act, 1961 established the Court of Criminal Appeal. The composition of the Court is set in s. 3(2). It provides that the Court shall be summoned in accordance with directions from the Chief Justice and shall comprise not less than three judges. One judge must be either the Chief Justice or an ordinary judge of the Supreme Court nominated by him. The other two are to be ordinary judges of the High Court.

Implications of a new Court of Appeal

As the Working Group has noted previously, one of the main disadvantages of the existing arrangements in the Court of Criminal Appeal is the fact that it is not a permanent court. The Working Group recommends that a permanent Court of Appeal be established with jurisdiction in both criminal and civil matters. Section 3 of the Courts (Establishment and Constitution) Act, 1961 would need to be repealed and a new section substituted establishing the new Court of Appeal. Any new statutory provisions would need to specify the number of judges appointed to the Court of Appeal and the various permissible configurations of the Court. Statutory provisions would also need to address the extent, if any, to which judges of other courts might sit on the Court of Appeal, including the question of *ex officio* members of the new Court.

2. Jurisdiction of the Court of Criminal Appeal in General

The jurisdiction of the Court of Criminal Appeal is set out in s. 12(1) of the Courts (Supplemental Provisions) Act, 1961. It provides that the Court of Criminal Appeal shall be a superior court of record and shall ''have full power to determine any question necessary to be determined for the purpose of doing justice in the case before it.'' Under s. 12(2) the Court enjoys all the jurisdiction the previous Court of Criminal Appeal enjoyed as transferred over by s. 48 of the Courts (Supplemental Provisions) Act, 1961.

Implications of a new Court of Appeal

The Working Group recommends that a new Court of Appeal with criminal and civil jurisdiction be established and that it be given jurisdiction within the Constitution. Any new statutory provision replacing s. 12 of the Courts (Supplemental Provisions) Act, 1961 would need to reflect this. This could be done by making reference to the Constitution in the provision. For example, s. 7 of the Courts (Supplemental Provisions) Act, 1961, which establishes the Supreme Court describes it as ''a superior court of record with such appellate and other jurisdiction as is set out by the Constitution.''

3. Jurisdiction of the Court of Criminal Appeal

The provisions concerning appeals to the Court of Criminal Appeal are contained in s. 31 of the Courts of Justice Act, 1924, which was re-enacted and applied to the new Court of Criminal Appeal under s. 48 of the Courts (Supplemental Provisions) Act, 1961. It provides for appeals to the Court of Criminal Appeal from the Central Criminal Court or the Court of the High Court Circuit. Appeals lie from the Circuit Court in all cases tried on indictment by virtue of s. 63.

The appellant must obtain a certificate from the judge who tried him that the case is a fit case for an appeal. If such a certificate is refused, an appeal may be brought to the Court of Criminal Appeal against such refusal and it may grant leave to appeal.

Section 32 of the Courts of Justice Act, 1924 was also re-enacted and applied to the new Court of Criminal Appeal under s. 48 of the Courts (Supplemental Provisions) Act, 1961. It provides that the Court of Criminal Appeal shall grant leave to appeal in cases where the court is of the opinion that a question of law is involved or where the trial appears to the court to have been unsatisfactory or there appears to the court to be any other sufficient ground of appeal.

The Court of Criminal Appeal also has the power to make all consequential orders including orders admitting the appellant to bail pending the determination of his appeal. Section 3(6) of the Criminal Procedure Act, 1993 amended s. 32 of the Courts of Justice Act, 1924 so that the power to make consequential orders now also applies in respect of applications for leave to appeal.

Implications of a new Court of Appeal

The introduction of a new Court of Appeal would require that these provisions be revisited. One option would be to retain the substantive content of these provisions by statutorily transferring them to the new Court of Appeal in respect of criminal matters. It is likely that consideration would also have to be given to the procedures by which civil matters from lower courts would reach any new Court of Appeal.

4. Determinations by the Court of Criminal Appeal

Section 34 of the Courts of Justice Act 1924 and s. 5(1)(a) of the Courts of Justice Act, 1928 formerly regulated the jurisdiction of the Court of Criminal Appeal on hearing an appeal. Those provisions no longer apply and the current law is contained in s. 3(1) of the Criminal Procedure Act, 1993. This provides that on hearing an appeal, the Court of Criminal Appeal may make a number of determinations. It may:

- Affirm the conviction. It may do this even where it is of the opinion that a point raised by an appellant could be decided in his favour if it considers that no miscarriage of justice has actually occurred
- Quash the conviction and make no further order
- Quash the conviction and order a retrial
- Quash the conviction and substitute a verdict that the appellant is guilty of a different offence and impose a sentence in respect of that other offence. This can be done where the Court is of the view that the jury must have been satisfied of facts which proved the appellant guilty of another offence and that the appellant could have been found guilty of that offence. The sentence imposed must not be more severe than that already imposed on conviction[261]
- On hearing appeals against sentence, the Court may quash the sentence and impose such sentence or make such order as it considers appropriate. Such a sentence or order must be one which could have been imposed at trial[262]
- Under s. 2 of the Criminal Procedure Act, 1993, the Court of Criminal Appeal may quash a conviction or review a sentence in cases of a miscarriage of justice. This applies to any person who has been convicted on indictment or, having signed a plea of guilty, who stands convicted after an application for leave to appeal or an appeal to the Court of Criminal Appeal. The power may be exercised where the appellant alleges that a new or newly discovered fact shows that there has been a miscarriage of justice in relation to the conviction or that the sentence is excessive

The Court of Criminal Appeal also has jurisdiction to make a number of determinations in respect of appeals relating to unfitness to plead and insanity verdicts. These are currently governed by ss. 7-9 of the Criminal Law (Insanity) Act, 2006 which repealed s. 35 of the Courts of Justice Act, 1924.

Implications of a new Court of Appeal

The rules set out in s. 3 of the Criminal Procedure Act, 1993, which allow the Court of Criminal Appeal to make certain orders, should be extended to cover a new Court of Appeal in the exercise of its criminal jurisdiction. This could be done, for example, by substituting a new provision into that Act or into the Courts of Justice Act, 1924.

The same applies to the provisions regarding the way in which the current Court of Criminal Appeal deals with miscarriages of justice in s. 2 of the Criminal Procedure Act, 1993 and the provisions of the Criminal Law (Insanity) Act, 2006.

Statutory provisions setting out the determinations which the new court may make in civil matters would also be required.

261 Section 3(1) of the Criminal Procedure Act, 1993.
262 Section 3(2) of the Criminal Procedure Act ,1993.

5. The conduct of appeals in the Court of Criminal Appeal

Section 33 of the Courts of Justice Act, 1924 concerns the hearing of appeals. A new section was substituted by s. 7 of the Criminal Justice (Miscellaneous Provisions) Act, 1997. The substituted s. 33 provides that the hearing of an appeal shall be based on a record of the proceedings at the trial and a transcript thereof verified by the trial judge. Where the trial judge is of the opinion that the record or transcript does not reflect what took place during the trial, a report by him explaining the defects is also to be before the Court. A broad definition of record is set out in s. 33(3) as including a written record, shorthand notes on a disc, tape or soundtrack etc., a film tape and photographs. The Court of Criminal Appeal has the power to hear new or additional evidence and to refer any matter for report by the trial judge.[263]

Where the Court is of the opinion that the record or transcript is defective in any material particular it may determine the appeal in such manner as it considers appropriate.[264]

Section 3 of the Criminal Procedure Act, 1993 makes provision for the adducing of evidence before the Court of Criminal Appeal on hearing an application for leave to appeal or an appeal against either conviction or sentence. Where such an appeal is based on new evidence, the Court may direct the Commissioner of the Garda Síochána to carry out inquiries as to whether such evidence should be adduced.

The Court may order the production of any document, exhibit or thing connected with the proceedings.

The Court may order any person who would have been compellable at trial to attend for examination before the Court. This applies even where that person was not called to give evidence at the trial.

The Court may receive the evidence of any witness. It may also take depositions.[265]

It may "generally make such order as may be necessary for the purpose of doing justice in the case before the Court".[266]

Implications of a Court of Appeal

The new Court of Appeal would take over the functions of the existing Court of Criminal Appeal. One option would be to continue to apply the rules discussed above in the context of appeals in criminal matters. Additional provisions would need to be enacted concerning the adducing of evidence in civil appeals.

6. Appeals from the Court of Criminal Appeal to the Supreme Court

Section 29 of the Courts of Justice Act, 1924 originally governed appeals from the Court of Criminal Appeal to the Supreme Court. This provision was amended by the substitution of a new provision by s. 22 of the Criminal Justice Act, 2006. This now provides that a person who is the subject of an appeal or other matter before the Court of Criminal Appeal may appeal the decision of that Court to the Supreme Court if that Court or the Attorney General

263 Section 33(1) of the Courts of Justice Act as substituted by s. 7 of the Criminal Justice (Miscellaneous Provisions) Act, 1997.
264 Section 33(2) of the Courts of Justice Act as substituted by s. 7 of the Criminal Justice (Miscellaneous Provisions) Act, 1997.
265 Section 3(4) of the Criminal Procedure Act, 1993.
266 Section 3(2) of the Criminal Procedure Act, 1993.

or the Director of Public Prosecutions certifies that the decision involves a point of law of exceptional public importance and that it is desirable in the public interest that the person should take an appeal to the Supreme Court.[267]

The Attorney General or Director of Public Prosecutions may appeal a decision of the Court of Criminal Appeal to the Supreme Court without prejudice to the decision in favour of an accused person. Again, this requires the Court, the Attorney General or the Director of Public Prosecutions to certify that the decision involves a point of law of exceptional public importance and that it is desirable in the public interest that the Attorney General or Director of Public Prosecutions should take an appeal to the Supreme Court.[268]

Appeals may not be taken to the Supreme Court in any other circumstances.[269]

Implications of a Court of Appeal

The Working Group has recommended that the Constitution specify the leave criteria for the taking of appeals from the Court of Appeal to the Supreme Court. The Group favours a requirement that an appeal concern a "matter of exceptional public importance". That being the recommended constitutional standard, it should also obviously be reflected in any statutory description of leave.

Section 29 of the Courts of Justice Act, 1924 (as amended by s. 22 of the Criminal Justice Act, 2006) currently embodies a different standard and would require amendment if it were to be applied to the new court of Appeal exercising its criminal jurisdiction.

If an overarching statute governing the new Court of Appeal in both civil and criminal matters was introduced, specific statutory provisions in respect of leave should be required to accommodate the roles of the Attorney General and the Director of Public Prosecutions in the context of criminal appeals.

7. Section 28 of the Courts of Justice Act, 1924

Section 28 of the Courts of Justice Act, 1924 provides that the Court of Criminal Appeal shall sit in Dublin unless the Chief Justice directs that it sit elsewhere. The President of the Court is to be such member present as is entitled to take precedence over the other members. The decision of the Court is to be by majority judgment. One opinion is to be given and this is to be given by the President unless he directs that another judge is to deliver it. Section 48 of the Courts (Supplemental Provisions) Act, 1961 re-enacted s. 28 so that it applies to the Court of Criminal Appeal established by s. 3 of the Courts (Establishment and Constitution) Act, 1961.

Section 3(2) of Part II of the First Schedule of the Courts and Court Officers Act, 1995 provides that s. 28 will be repealed when an order is made bringing s. 3(2) into operation. Section 4 of the Courts and Court Officers Act, 1995 vests the powers of the Court of Criminal Appeal in the Supreme Court. It requires an order under s. 1(2) of the Courts and Court Officers Act, 1995 to bring it into force. This has not yet occurred.

267 Section 29(2) of the Courts of Justice Act 1924 as substituted by s. 22 of the Criminal Justice Act, 2006.
268 Section 29(3) of the Courts of Justice Act, 1924 as substituted by s. 22 of the Criminal Justice Act, 2006.
269 Section 29(1) of the Courts of Justice Act, 1924 as substituted by s. 22 of the Criminal Justice Act, 2006.

Implications of a Court of Appeal

Some aspects of the above provisions are likely to require amendment in order to facilitate any new appellate structure. The provisions identifying the President of the Court of Criminal Appeal, for example, reflect the way in which the court is currently composed. It would seem logical to amend this to reflect any changes that might be made. The content of the other aspects of s. 28 would not necessarily be inconsistent with the proposed new Court of Appeal but they may need to be reproduced in a new statutory form to apply to the new Court.

8. Rules governing the Court of Criminal Appeal

The rules concerning the Court of Criminal Appeal are set out in Order 86 R.S.C. as amended by S.I. No.265 of 1993 Rules of the Superior Courts (No.2) of 1993 and S.I. No. 325 of 2008 Rules of the Superior Courts (Recording of Proceedings), 2008.

Order 86 sets out notice periods for appeals and applications for leave to appeal to the Court of Criminal Appeal in rule 5. The current notice period for both is 21 days as per the amendment introduced in S.I. No. 265 of 1993 Rules of the Superior Courts (No.2) of 1993.

Order 86 also sets out various rules regarding matters such as bail, the suspension of orders made by the trial judge, examination of witnesses, abandonment of appeals, documents and exhibits, report of the trial judge and the listing of cases before the Court.

Amendments to those aspects of the rules concerning records of proceedings were made by S.I. No. 325 of 2008 Rules of the Superior Courts (Recording of Proceedings), 2008.

Implications of a Court of Appeal

These rules could simply be applied to the new Court of Appeal exercising its jurisdiction in criminal matters. Rules would also have to be enacted to regulate the taking of civil appeals to any new Court of Appeal.

CHAPTER 21

High Court and General Superior Court Provisions

A. Introduction

This chapter sets out the main statutory provisions and rules governing the High Court. A new Court of Appeal will not alter the way in which the High Court operates. The only significant change would be that cases would go from that Court to the new Court of Appeal rather than to the Supreme Court.

B. Provisions Relating to the High Court

1. Establishment and jurisdiction

The High Court is a Superior Court of record. The Constitution provides in Article 34.3.3° that the High Court has "full original jurisdiction in and power to determine all matters and questions of law and fact whether civil or criminal." The relevant statutory provisions which concern the High Court's jurisdiction state that it includes "such original and other jurisdiction as is prescribed by the Constitution".[270] The High Court's jurisdiction includes all powers, duties and authorities incident to any and every part of the jurisdictions so vested.[271] Section 9 of the Courts (Supplemental Provisions) Act, 1961 makes provision for the jurisdiction of the High Court in lunacy and minor matters. The criminal jurisdiction of the High Court is set out in s. 11 which also provides that the High Court when exercising such jurisdiction is to be known as the Central Criminal Court.

Implications of a Court of Appeal

The Working Group has not recommended any change to the original jurisdiction of the High Court so the content of these statutory provisions would not have to be altered in the event that a new Court of Appeal is established.

270 Section 8(1) of the Courts (Supplemental Provisions) Act, 1961.
271 Section 8(3) of the Courts (Supplemental Provisions) Act, 1961.

2. The President of the High Court

The jurisdiction of the Chief Justice of the Supreme Court and the President of the High Court is dealt with in s. 10 of the Courts (Supplemental Provisions) Act, 1961. It provides that whenever the Chief Justice is unable to transact the business of his office, whether due to illness or some other reason, all jurisdictions, powers, authorities and functions for the time being vested in him in virtue of his office shall be exercised or performed by the President of the High Court. If the President is similarly unable to carry out such business, the most senior ordinary judge of the Supreme Court may do so.[272]

The President has the function of arranging and distributing the business of the High Court. Where the President is unavailable this is carried out by the most senior ordinary High Court judge.[273]

As well as these functions, the President of the High Court is also charged with the hearing of a number of categories of statutory appeal, for example, disciplinary proceedings under the Solicitors' Acts 1954-2002, and appeals from decisions of the Financial Services Ombudsman under the Central Bank and Financial Services Authority of Ireland Act, 2003.

Implications of a Court of Appeal

If a new Court of Appeal is established it will have a President. Logically that judicial office should be considered the second most senior in the State. The current provisions regarding the relationship between the Chief Justice and the President of the High Court may thus need some revision.

The functions of the President of the High Court in arranging and distributing the business of the High Court need not be altered in the wake of the creation of a Court of Appeal.

As mentioned above, one large portion of the workload of the President of the High Court relates to certain statutory appeals. The growth in regulatory legislation referred to in this Report has greatly increased this workload. The new President of the Court of Appeal could take over some of this work. If that was to be done, a comprehensive review of all of the legislation generating appeals to the President would be required to identify those statutory appeals that might be transferred to the President of the Court of Appeal.

3. Cases stated

Section 52 of the Courts (Supplemental Provisions) Act, 1961 sets out the procedure whereby a case may be stated from the District Court to the High Court. Under s. 52(2) the ruling of the High Court may be appealed to the Supreme Court.

Implications of a Court of Appeal

The jurisdiction to determine cases stated under this provision could be transferred to the Court of Appeal. If this was to happen, s. 52 would require amendment, as would Order 62 of the Rules of the Superior Courts.

272 Section 10(2) of the Courts (Supplemental Provisions) Act, 1961.
273 Section 10(3) of the Courts (Supplemental Provisions) Act, 1961.

C. Miscellaneous Provisions

There are a number of statutory provisions which apply to a variety of courts. Some of these may need to be extended to apply to the Court of Appeal also.

1. Jurisdiction to bind over

Section 54 gives to judges of the District, Circuit, High and Supreme Courts the jurisdiction to bind a person over to the peace or to good behaviour.

Implications of a Court of Appeal

This jurisdiction would probably be extended to the new Court. This would require a statutory amendment.

2. Courts and court officers

Various legislative provisions exist concerning the number of judges and other officers appointed to the existing courts.

Implications of a Court of Appeal

Provision would need to be made for the appointment of court officers and the machinery of the new Court of Appeal. This could be done by way of amendment to Courts (Supplemental Provisions) Act, 1961-2007 and the Courts and Court Officers Act, 1995.

3. General provision regarding rules of court

Section 14 of the Courts (Supplemental Provisions) Act, 1961 provides that the jurisdiction vested in the courts by the Act is to be exercised ''so far as regards pleading, practice and procedure, generally, including liability to costs, in the manner provided by rules of court''. The pre-existing rules under s. 36 of the Act of 1924, as applied by s. 48 of the 1961 Act, are applicable by virtue of s. 14(1).

Implications of a Court of Appeal

Some provision will need to be made to give legal force to rules of Court for the new Court of Appeal.

4. Judges of the Superior Courts — Qualification, Pensions and Renumeration

The Courts (Supplemental Provisions) Act, 1961 sets out the provisions regarding the qualification of judges in s. 5. To be a judge of the Supreme Court or the High Court a person must be a practicing barrister of not less than twelve years' standing.[274] Service as a judge of the Circuit Court shall be deemed practice at the Bar.[275]

An ordinary judge of the Supreme Court is qualified for appointment as President of the High Court or as Chief Justice.[276] Both the President[277] of the High Court and any ordinary

274 Section 5 (2)(a) of the Courts (Supplemental Provisions) Act, 1961.
275 Section 5 (2)(b) of the Courts (Supplemental Provisions) Act, 1961.
276 Section 5(3) of the Courts (Supplemental Provisions) Act, 1961
277 Section 5(4) of the Courts (Supplemental Provisions) Act, 1961

judge[278] of the High Court are qualified for appointment as an ordinary judge of the Supreme Court or as Chief Justice.

Section 6 of the Courts (Supplemental Provisions) Act, 1961 concerns pensions for judges of the High and Supreme Courts. Part I of the Schedule to the Act provides that every judge of the High Court, Supreme Court or Circuit Court following fifteen years or more of service is entitled to a pension for life of two-thirds of his remuneration at the time of such vacation of office.[279] Where a judge vacates his office after more than five but fewer than fifteen years of service owing to age or permanent infirmity, he is entitled to a pension for life of one-sixth of his remuneration at the time of such vacation of office with the addition of one-twentieth of such remuneration for every completed year of service in excess of five.[280]

For the purposes of their pension entitlements, judges of either court who are removed for incapacity are deemed to have vacated their office by reason of permanent infirmity.[281]

The remuneration payable to High and Supreme Court judges is set out in s. 46(1).

Implications of a Court of Appeal

The introduction of a Court of Appeal would not appear to require any change in this area save for the extension of these provisions to cover the qualifications, pensions and remuneration of judges appointed to the new Court of Appeal also.

4. Judges — mode of address

Section 10 of the Courts of Justice Act, 1924 provides for the mode of address for High and Supreme Court judges. This is to be addressed in rules of court. Section 10 stipulates a general principle that all judges shall have ''equal power, authority, and jurisdiction with one another''.

The correct mode of address for Supreme Court and High Court judges is governed by Order 119, rule 1 RSC, as amended by S.I. No. 196/2006, Rules of the Superior Courts (Mode of Address of Judges), 2006. This requires that the Chief Justice and the President of the High Court be referred to by their titles in English or Irish. All ordinary judges are to be referred to individually as ''Judge'' or ''A Breitheamh''. The phrases ''An Chúirt'' and ''The Court'' are also acceptable.

Practice Direction SC09 refers to these rules and directs that, in relation to Supreme Court judges, the rule does not affect the use otherwise of the title of Mr. Justice / Mrs. Justice or more formally The Hon. Mr. Justice / The Hon. Mrs. Justice. Members of the Supreme Court must be referred to, in the third person, as Mr. Justice or Mrs. Justice as appropriate.

Implications of a Court of Appeal

The introduction of the new Court of Appeal will require the extension of the existing rules governing modes of address to cover judges appointed to the Court of Appeal. Section 10 of the Courts of Justice Act, 1924 and Order 119 rule 1 as amended could be altered to include reference to the mode of address for judges of the new Court of Appeal.

278 Section 5(5) of the Courts (Supplemental Provisions) Act, 1961
279 Paragraph 3(2) Second Schedule, First Part of the Courts (Supplemental Provisions) Act, 1961
280 Paragraph 3(3) Second Schedule, First Part of the Courts (Supplemental Provisions) Act, 1961
281 Section 6(2) of the Courts (Supplemental Provisions) Act, 1961.

5. Robe of Bench and Bar

Order 119 rules 2 and 3 provide for the modes of dress for judges and for counsel appearing in the Superior Courts. The requirement for Superior Court judges is that they must wear a ''black coat and vest of uniform make and material of the kind worn by Senior Counsel, a black Irish poplin gown of uniform make and material, white bands, and a wig of the kind known as the small or bobbed wig''. Counsel appearing in the Superior Courts are to appear ''habited in a dark colour, and in such robes and bands and with such wigs as have heretofore been worn by Senior and Junior Counsel respectively''. Section 49 of the Courts and Court Officers Act, 1995 provides that a barrister or a solicitor when appearing in any court shall not be required to wear a wig of the kind heretofore worn or any other wig of a ceremonial type.

Implications of a Court of Appeal

The same rules regarding the attire of judges and counsel would apply to the Court of Appeal as currently and from time to time may apply in the High Court and the Supreme Court. The provisions of rules 2 and 3 of Order 119 RSC could be extended to cover the attire of judges and counsel in the new Court of Appeal.

6. Jurisdiction of the Superior Courts Generally

Section 24 of the Courts of Justice Act, 1924 provides that judges of the High and Supreme Courts have jurisdiction to hear and determine ''any case whether civil or criminal, in equity, or at common law; or under statute'' but that ''no judge shall sit upon the hearing of an appeal in an action tried before him whether with or without a jury, or upon an appeal from a judgment or order made by him or to which he was a party whether concurring or dissenting''.

Implications of a Court of Appeal

The reference to the different types of case the Supreme and High Courts can hear would need to be extended to cover the jurisdiction of the new Court of Appeal. The principle that no judge should sit on appeal in respect of a decision in which he participated is of significance in the context of the creation of a Court of Appeal. It is possible that the new Court of Appeal may have judges of the High Court sitting on it from time to time. If that were to happen, the chances of the situation referred to in s. 24 might increase. It would be prudent, therefore, to extend the prohibition to cover the new Court of Appeal.

CHAPTER 22

A Comparative Review of Appellate Structures and Procedures

This chapter provides a comparative overview of the way in which appellate systems are organised and operated in other leading common law countries. The chapter discusses the appellate systems of Australia, Canada, New Zealand, the United Kingdom and the United States of America. It describes the judicial structures in each jurisdiction, and outlines how appeals are processed within each system. This demonstrates how other jurisdictions have dealt with the sort of questions that could arise in relation to the establishment of a three-tier appellate system in Ireland.

A. New Zealand

1. Introduction

The Supreme Court Act 2003 abolished the right of appeal to the Privy Council from the decisions of domestic courts, and established in its place a Supreme Court of New Zealand. This Supreme Court came into existence on 1 January 2004, and has been entitled to hear appeals as of 1 July 2004. The Supreme Court is at the apex of a system which also includes a Court of Appeal, a High Court and a number of more localised district courts. The New Zealand Superior Court system is therefore similar to the model proposed for Ireland.

2. Overall Court Structure

Invested with inherent common law jurisdiction, the High Court is the only court in New Zealand with a non-statutory substantive jurisdiction. It also acts as a court of appeal from decisions of the District Court. This is a court of local and limited jurisdiction, which deals with minor criminal offences, and civil claims below $200,000. The competence of the High Court of New Zealand is thus roughly equivalent to that of the Irish High Court.

The Court of Appeal occupies a position between the High Court and the Supreme Court. It deals with appeals from decisions of the High Court in both civil and criminal cases, as well as providing the opportunity, upon the grant of leave, for a second appeal in respect of decisions of the District Court and other inferior statutory tribunals.

The new Supreme Court serves as New Zealand's final court of appeal. Appeals can be taken to the Supreme Court only with the leave of the Court. It is envisaged that leave will not be granted on a general basis, but will instead be available only in limited circumstances.

3. Court of Appeal

(i) Jurisdiction

The jurisdiction of the Court of Appeal in New Zealand is primarily governed by the provisions of Part II of the Judicature Act 1908, as amended.

Section 66 of the 1908 Act confers a general appellate jurisdiction on the Court of Appeal from "any judgment, decree or order" of the High Court.[282] This obviously encompasses appeals in both civil and criminal proceedings.

This general jurisdiction is curtailed in circumstances where the decision of the High Court was itself on appeal from a lower court or tribunal. As in Australia, this provision is designed to prevent the delay and costs associated with the possibility of third or fourth appeals and to preserve the principle of one appeal as of right and one with leave.

Section 67 of the 1908 Act declares that an appellate decision of the High Court "is final, unless a party, on application, obtains leave to appeal against that decision". This application is made initially to the High Court, or, in the event of a refusal, to the Court of Appeal.

Leave is also required in relation to appeals against pre-trial rulings in criminal cases, and appeals on questions of law from the Employment Court.

The 1908 Act further allows for the removal of a civil case from the High Court directly to the Court of Appeal in so-called "exceptional" circumstances. Section 64(2) enumerates a number of non-exhaustive situations in which such exceptional circumstances could be found. These include cases where one party intends to argue that a previous Court of Appeal decision should be overruled,[283] proceedings raising one or more points of considerable and urgent public importance,[284] or proceedings raising a significant point of law which has been the subject of conflicting High Court decisions.[285]

(ii) Nature of appeal

As the Court of Appeal enjoys a generally unlimited appellate jurisdiction in relation to decisions of the High Court, appeals are regarded as rehearings of the case at hand.[286]

(iii) Conduct of appeal

The conduct of a Court of Appeal hearing is governed by the Court of Appeal (Civil) Rules 2005, or the Court of Appeal (Criminal) Rules 2001, as appropriate.

282 The section provides that:

> The Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment, decree, or order save as hereinafter mentioned, of the High Court, subject to the provisions of this Act and to such rules and orders for regulating the terms and conditions on which such appeals shall be allowed as may be made pursuant to this Act.

283 Section 64 (2) (a).
284 Section 64 (2) (b).
285 Section 64 (2) (c).
286 Rule 47 of the 2005 Rules states, without more, that: "All appeals are to be by way of rehearing".

In cases where an application for leave to appeal is required, it must be made within 20 working days of the decision in question. Applications must state the specific grounds of appeal, and the reasons why leave should be granted. In an application for leave, the written submissions must not exceed ten pages.[287] If an oral hearing is held, counsel are allowed ten minutes to make their submissions to the court. The party applying for leave is also entitled to a further five minutes reply.[288]

The Court is not required to give reasons for granting leave, but is obliged by rule 27(3) to give reasons where it has refused the application. These reasons may, however, ''be stated briefly and in general terms only''.

In the case of civil appeals as of right, a similar 20 working day time limit applies. Any cross-appeals must be filed within ten days of the service of the notice of appeal.

At the pre-hearing stage, a party must apply to the Registrar for the allocation of a date. As part of this application, the party is required to supply a copy of the decision under appeal, a written estimate of the time which the hearing will take,[289] and a request for the sitting of a Full Court, where appropriate.

Written submissions may be no more than 30 pages, and must include a factual narrative, a summary of the arguments, the submissions in detail, and a list of the authorities to be cited.[290] The appellant's submissions must be filed 20 working days in advance of the hearing, while the respondent's must be filed ten working days in advance. Bundles of authorities must also be supplied with the submissions.

In terms of the pleadings and hearing, the Court of Appeal is conferred with all powers and duties of a court of first instance concerning procedure.[291]

(iv) Composition of the Court

As envisaged by the Judicature Act 1908, the Court of Appeal generally sits in divisional form with three members.[292] There is a Criminal Appeals Division and a Civil Appeals Division. There are nine judges currently appointed to the Court of Appeal.

The Criminal Appeals Division can be made up in a number of ways: by three members of the Court of Appeal; by two members of the Court of Appeal and one judge of the High Court; or by one member of the Court of Appeal and two High Court judges.[293] In practice, the latter approach is usually followed. The High Court judges are selected by the Chief Justice on a case by case basis, or for a period up to three months. In the way in which it involves judges from different levels, there are some parallels here with the current composition of the Irish Court of Criminal Appeal.

The Civil Appeals Division can be constituted along the same lines, by reference to s. 58B. In practice, again, it generally comprises one judge of the Court of Appeal, and two High Court judges.

287 Rule 23(2) of the 2005 Rules.
288 Rule 25(1) of the 2005 Rules.
289 Rule 38(3) (b) of the Court of Appeal (Civil Rules) 2005 requires that such estimates be either one hour or less, two hours or less, one day (defined as 4.5 hours), or more than one day (specifying the number of days expected).
290 Rule 41(1) of the 2005 Rules.
291 Rule 48 of the 2005 Rules.
292 Section 58.
293 Section 58A.

Under s. 58D(4), the Court is required to sit as a Full Court of five permanent members in respect of proceedings where a Divisional Court considers it desirable to do so, in relation to appeals from the Court Martials Appeal Court, and when dealing with cases of "sufficient significance to warrant the consideration of a Full Court". This last catch-all test is not defined in the 1908 Act, but is left for the Court to determine in accordance with its own procedures.

4. The Supreme Court

(i) Jurisdiction

Although it is intended to function as the highest court of appeal in New Zealand, the Supreme Court does not enjoy the same general appellate jurisdiction as the Court of Appeal. The primary restriction on its competence is that it can hear only appeals by way of leave.[294]

Section 13 provides that the Supreme Court may not grant leave unless "it is satisfied that it is necessary in the interests of justice for the Court to hear and determine the proposed appeal". Section 13(2) goes on to provide a non-exhaustive but illustrative list of circumstances in which, in the opinion of the legislature, the hearing of an appeal would be necessary in the interests of justice.

Appeals will satisfy this s. 13 standard where they involve:

- "a matter of general or public importance";[295] or
- a potential "substantial miscarriage of justice";[296] or
- a "matter of general commercial significance".[297]

In civil proceedings, s. 7 of the Supreme Court Act 2003, allows an appeal to be taken to the Supreme Court where it is not prohibited by statute. It cannot hear appeals against decisions to refuse to give leave for appeals to the Court of Appeal.

Similar restrictions apply in respect of so-called "leapfrog" appeals from decisions of the High Court. Decisions of other inferior courts or tribunals can only be taken to the Supreme Court where that is specifically provided for by statute and where, in addition to the general requirements of s.13, there are also "exceptional circumstances that justify taking the proposed appeal directly to the Supreme Court".[298]

Although the Supreme Court's jurisdiction covers issues of both fact and law, its early decisions have been at pains to reiterate the very constrained circumstances in which it will entertain applications for leave to appeal on factual grounds. The Supreme Court has sought to emphasise the fact that its appellate jurisdiction is primarily directed towards the rationalisation and development of the law, rather than more factual issues of error correction. In *Junior Farms Ltd v. Hampton Securities Ltd (in liquidation)* [2006] 3 NZLR 522, the Court refused to grant leave where the aspiring appellant had expressly admitted that no issues of general public importance were involved in its appeal. The Court rejected its arguments in favour of a broad construction of the "miscarriage of justice" ground for

294 Section 12(1) of the Supreme Court Act 2003.
295 Section 13(2) (a).
296 Section 13(2) (b).
297 Section 13(2) (c).
298 Section 14.

granting appeal. In explaining its decision to refuse leave,[299] the Court indicated (at para. 4) that appeals on questions of fact would rarely succeed in satisfying the threshold for the grant of leave.

> **"It cannot have been intended by the legislature that the Supreme Court, when hearing an appeal in a civil case which has already been the subject of a first, error-correction appeal . . . is to embark on a further exercise of error correction. That is simply not the role of an ultimate appellate Court, as can be seen from the practice and jurisprudence of comparable Courts in the common law world."**[300]

Reviews of questions of fact would be allowed only (at para. 5):

> **"[I]n the rare case of a sufficiently apparent error . . . of such a substantial character that it would be repugnant to justice to allow it to go uncorrected in the particular case."**[301]

This demonstrates quite clearly that, while retaining the power to do so in an appropriate case, the Supreme Court will rarely exercise its jurisdiction to hear appeals on questions of fact.

Appeals to the Supreme Court will, it would seem, generally be confined to cases involving questions of law, rather than fact. This confirms the Court of Appeal's role as the primary court for factual appeals aimed at the correction of errors.

In terms of criminal proceedings, the Supreme Court can hear only appeals under specific sections of the criminal code.[302] These sections include Part 13 of the Crimes Act 1961, which includes appeals on questions of law, appeals in respect of pre-trial proceedings, and appeals against conviction and sentence. Appeals from the Court of Appeal can also be heard in relation to proceedings under the Courts Martial Appeals Act, 1953.

The Supreme Court has also been reluctant to adopt an expansive approach to its jurisdiction to conduct criminal appeals. This has been particularly noticeable in relation to appeals on issues of sentencing. The application of settled sentencing criteria to an individual case was held not to satisfy the "general public importance" threshold in *Pue v. R.* [2005] NZSC 55. The Court similarly noted in *Mist v. R.* [2005] NZSC 29 that appeals against the length of a sentence will very rarely raise a question of general principle of the sort which is suitable for a second appeal.

(ii) Nature and scope of appeal

Section 24 of the 2003 Act declares that "Appeals to the Supreme Court proceed by way of rehearing".

One of the issues which has been considered in the new system is the extent to which new grounds or issues can be raised on appeal. This will generally not be tolerated. In *Al Baiiaty v. R.* [2005] NZSC 85, for example, the accused's attempts to rely for the first time on alleged failings on the part of his trial counsel were dismissed.

299 In a decision which, by reference to section 16, was very short.
300 [2006] 3 NZLR 522, at para. 4.
301 [2006] 3 NZLR 522, at para. 5.
302 Section 10.

The Supreme Court has not, however, absolutely prohibited the raising of such issues. In *Pavitt v. R.* [2005] NZSC 24, the Court dismissed the accused's attempt to advance grounds of challenge to his conviction which had not been canvassed before the Court of Appeal. It did, however, observe that this could be allowed in some circumstances. Noting that "it would be unusual to permit an appeal on grounds not raised in the Court of Appeal",[303] it nonetheless suggested that this could be permitted where there was a "real possibility that it could be demonstrated by reference to those grounds that there had been a miscarriage of justice . . . which went uncorrected . . . on the first appeal".[304]

The Court has also been reluctant to allow the raising of points which had been conceded in a lower court. In *Otago Station Estates Ltd. v. Parker* [2005] NZSC 16, the appellants (now represented by different counsel) attempted to argue, in direct contradiction of their concession in the Court of Appeal, that their cheques had not been in default at any point. The Court refused leave to raise this point (although leave was granted on other grounds), expressing the view that:

> **"It is only rarely and with extreme caution that a second level appellate court will allow a point to be raised which has been conceded below and it should not do so if there is any possibility that the outcome might have been affected if the point had been taken earlier."**[305]

(iii) Conduct of appeal

The conduct of appeals before the Supreme Court is governed by the Supreme Court Rules 2004.

Rule 5 confers a general power on the Court to "give any directions that seem necessary for the just and expeditious resolution of the matter".

Stringent restrictions apply to the conduct of an application for leave. These are considered more extensively below.

In terms of the substantive hearing of an appeal, the rules are similar to those which apply in the Court of Appeal. Written submissions must not exceed 30 pages, and must be filed 20 working days in advance of the hearing and the response within ten working days in advance of the hearing.[306]

The Court is entitled to request a report from the relevant court of first instance. It can similarly require the production of any document, exhibit or thing which was produced at first instance. It may also grant leave for the admission of further evidence by way of affidavit, deposition, or oral evidence.[307]

(iv) Composition of the Court

The Supreme Court can only sit as a panel of five members and there are five judges appointed to the Court. Where there is some difficulty with convening a full court, the 2003 Act permits the appointment of a retired judge of the Supreme Court or Court of Appeal.

303 [2005] NZSC 24, at para. 4.
304 *Ibid.*
305 [2005] NZSC 16, at para. 11.
306 Rule 41 of the 2004 Rules.
307 Rule 40 of the 2004 Rules.

(v) Leave requirements

The obligation to obtain leave in respect of an appeal to the Supreme Court is the crucial factor in determining the scope of the Court's jurisdiction. The 2003 Act evinces a clear intention that onerous restrictions will apply in relation to the grant of leave to appeal. In an effort to ensure that the objectives underpinning the establishment of the Supreme Court are not frustrated by lengthy application for leave, the 2003 Act provides for the operation of a curtailed application procedure. Section 15 expresses a clear preference for written rather than oral submissions in respect of such proceedings. Parties are specifically permitted to file written submissions, but are prohibited from appearing before the Court unless ''it thinks fit''.

The commitment to procedural brevity at the leave stage is also evident in the Supreme Court Rules 2004. Rule 20 dictates that the written submissions of either party at the leave stage may not exceed ten pages. Rule 21 meanwhile provides that oral submissions, if permitted, should not exceed 15 minutes for each side, with five further minutes for the appellant to reply to issues raised. These restrictions can, however, be waived by the Court in the circumstances of an individual case.

The Act further imposes only a limited obligation to give reasons in respect of decisions at the leave stage. In keeping with the practice in the Australian courts, the obligation extends only to the giving of reasons for refusals of leave. Furthermore, s. 16(2) specifically entitles the Court to provide only brief reasons that are ''stated in general terms only''.

B. England and Wales

1. Overall Court Structure

The court system in England and Wales is a five-tier system in civil cases and a four-tier system in criminal cases.

The lowest civil courts are the Magistrates' Courts. These have a limited jurisdiction and deal mainly with family law, local taxation and administrative functions. The next level up are the County Courts. These have jurisdiction to deal with cases up to the value of £50,000. The High Court sits in six divisions — Family, Chancery and Queen's Bench, and three Divisional High Courts, which hear appeals from the Magistrates' Court and County Courts as well as appeals from a variety of administrative tribunals. It also has a judicial review jurisdiction and hears appeals by way of the case stated procedure. The next division up is the Court of Appeal and the House of Lords is the court of last resort.

As far as criminal matters are concerned, the Magistrates' Courts deal with all summary offences and are basically analogous to District Courts in the Irish court system. More serious offences are dealt with on indictment with a jury in the Crown Court. This is the High Court exercising its jurisdiction in criminal matters. There are six circuits. The Crown Court hears appeals against sentence from the Magistrates' Courts. Points of law may be appealed from the Magistrates' Courts to the High Court — Queen's Bench Division. Appeals from the Crown Court are made to the Court of Appeal (Criminal Division), whose decisions are appealable to the House of Lords.

2. The Court of Appeal

(i) Jurisdiction

(a) Civil

The Court of Appeal has a civil appellate jurisdiction in respect of final decisions of the High Court,[308] county court or tribunals. By virtue of s. 15(3) of the Superior Court Act, 1981, the Court of Appeal has "all the authority and jurisdiction of the court or tribunal from which the appeal was brought" vested in it.

Appeals can also come before the Court of Appeal pursuant to rule 52.14 of the Civil Procedure Rules (CPR), in accordance with which a lower court faced with an appeal can decide to remove it directly to the Court of Appeal. This can be done when the lower court considers that an important issue of principle or practice is raised, or that there are compelling reasons to do so. The Court of Appeal can, however, remit the matter to the lower court at any time.

Section 57 of the Access to Justice Act, 1999 vests a similar removal power in the Master of the Rolls. This provision allows him to direct that an appeal before a county court or the High Court should be heard instead by the Court of Appeal.

The Court of Appeal cannot hear an appeal from the decision of the High Court on a case stated from a magistrates court.[309] The Court of Appeal heard a case in these circumstances in *Farley v Child Support Agency* [2005] EWCA Civ 869. It was subsequently found to have acted without jurisdiction.

(b) Criminal

The Court of Appeal hears appeals against sentences or convictions delivered in the Crown Court.

(c) Advisory

The Court of Appeal also has jurisdiction to deal with points of law under the Attorney General's reference procedure. By virtue of s. 36 of the Criminal Justice Act, 1972, the Attorney General is entitled to ask the Court for its opinion on a point of law arising from an acquittal.

The procedure has been used for net but significant points of law that require a prompt ruling of the Court of Appeal before a potentially incorrect decision of law has too wide a circulation in the Courts.[310]

The procedure will generally be used only in relation to rulings which:

- Are sufficiently clear and precise to be capable of being challenged,
- Address a point of law as opposed to the sufficiency of evidence in a particular case, and
- Involve a point of practical importance which is likely to be followed in other cases.

308 Section 16 (1) of the Supreme Court Act 1981, as amended.
309 Section 28A of the Supreme Court Act 1981.
310 See *Attorney General's Reference (No. 1 of 1975)* [1975] QB 773, *per* Widgery LCJ, at 778.

A case is more likely to generate a reference where it has been reported. Where a Court of Appeal decision has clearly been made in ignorance of binding inconsistent authority no reference will be made.

(d) Internal

The Court of Appeal can, in very limited circumstances, re-open a final determination of an appeal. Rule 52.17 allows this to occur where:

- It is necessary to do so in order to avoid real injustice.
- The circumstances are exceptional and make it appropriate to reopen the appeal.
- There is no alternative effective remedy.

This effectively operates as a second appeal against an earlier decision of the Court of Appeal. Rule 52.17 is based on the approach adopted in the case of *Taylor v. Lawrence* [2002] EWCA 90; [2002] 2 All E.R. 353, where the Court of Appeal agreed to re-open its earlier decision.

(ii) Nature and scope of appeal

(a) Civil

Rule 52.11 of the Civil Procedural Rules states that a civil appeal will proceed as a review rather than a rehearing, unless statute provides otherwise.

The rule also allows, however, for the possibility that an appeal court can hold a rehearing where it considers it to be in the interests of justice, based on the circumstances of the case.

(b) Criminal

The Lords emphasised in *Stafford v. D.P.P.* [1974] A.C. 878 that a criminal appeal in the Court of Appeal should not be regarded as a rehearing of the action. Lord Bridge observed in *Pendleton* that this meant that "the question for [the Court's] consideration is whether the conviction is safe and not whether the accused is guilty".[311]

(iii) Conduct of appeal

(a) Civil

Part 52 of the Civil Procedure Rules sets out the way in which a civil appeal hearing should proceed. Where leave under s. 55 of the Access to Justice Act, 1999 is not required, permission must be obtained from either the Court of Appeal, or the lower court. Practice Note 52.4.6 suggests that permission should usually be sought at the hearing at which the decision being challenged is delivered. Where permission is sought from the Court of Appeal, it must be entered as part of the appellant's appeal notice within 21 days of the decision under appeal, unless the Court provides otherwise.[312] Notices can be filed by e-mail in the Court of Appeal.

Permission can be granted or refused by the Court without a hearing. If permission is refused without a hearing, the parties will be notified of the reasons for the refusal. The applicant is entitled to have these reasons reconsidered at an oral hearing. This must be requested within seven days of the serving of notice of the decision.

311 [2001] UKHL 66; [2002] 1 All E.R. 524, at para. 19.
312 Rule 52.4.1 of the Civil Procedure Rules.

A skeleton argument should usually be included in the appeal notice. Where this is not practicable, it must be filed within 14 days of the service of the notice. The skeleton argument must define the areas of controversy at issue, list the points which the appellant wishes to make, and identify the relevant propositions of law which are set out in each authority cited. In the Court of Appeal, it should also specify how long the hearing is expected to last. The citation of multiple authorities in support of a single proposition must be justified to the Court.

A failure to comply with the Practice Note in the Court of Appeal will prevent the costs of the argument being assessed, unless the Court directs otherwise.

Where permission is obtained, an appeal bundle must be served on the other parties within seven days of receiving notice of the grant of permission. The appellant must also complete and return the Appeal Questionnaire which accompanies the grant of permission within 14 days. This confirms that the necessary documents have been served on the other parties, and will be supplied to the Court as required.

Where the appeal bundle exceeds 500 pages, a core bundle containing the documents which are central to the appeal must be filed. This can be no more than 150 pages.[313] Costs will again be disallowed where the appeal bundles do not conform to the relevant guidelines in Practice Note no. 52.

The parties are not allowed to vary time limits for the filing of material of their own accord. All applications to vary time must be made to the appeal court.[314]

Depending on its urgency and state of readiness, the matter is then listed in one of the Court of Appeal's lists for case management. When the matter is given a date for hearing, the parties must agree a bundle of authorities to be given to the Court. This bundle should be filed seven days in advance, and should include authorities relating only to points in dispute. It should not contain more than ten authorities unless the case is such as to justify greater citation. The relevant passages to be relied upon should also be marked.[315]

Supplementary skeleton arguments can be filed by the appellant up to 14 days in advance of the hearing, and up to seven days in advance by the respondent. The Court may disallow any arguments which were not supplied in skeleton form within these time limits.

In relation to the determination of the appeal, the Court of Appeal has all the powers of the lower court. It is empowered to affirm, set aside or vary any order or judgment made, refer any claim or issue for determination by the lower court, order a new trial or hearing. It is also entitled to make an order of damages or vary a jury award of damages when dealing with an appeal from a claim tried by a jury.[316]

(b) Criminal

Criminal appeals in the Court of Appeal are not conducted as a rehearing.

The Court is, however, empowered to admit new evidence where it is of the view that it is "necessary or expedient in the interests of justice" to do so.[317]

313 Rules 15.2 and 15.3 of Practice Note 52.
314 Rule 52.6.1 of CPR
315 Rule 15.11 of Practice Note 52
316 Rule 52.10. of the CPR
317 Section 23(1) of the Criminal Appeal Act 1968

The Criminal Appeal Act, 1995 also established a Criminal Cases Review Commission with the power to investigate criminal cases and report its findings to the Court. These reports can include new evidence. This new regime replaced the previous Ministerial power to refer a criminal conviction to the Court of Appeal as he saw fit.[318] The Commission is entitled, with or without an application being made to it, to investigate any conviction or sentence handed down by a criminal court. It can also be directed by the Court of Appeal to investigate and report on any matter which is relevant to the determination of the case before it.

(iii) Composition of the Court

The Court of Appeal has two divisions, a Civil Division and a Criminal Division. The distribution of matters between them, and the general practice and procedure of each, are set out in Part III of the Superior Court Act, 1981. Each Division has a President, who is charged with the organisation of its affairs. There are 37 Lord Justices currently appointed to the Court of Appeal as well as the Master of the Rolls and the Lord Chief Justice.

The Court generally sits as a three-judge Court, meaning that there are normally up to 12 Courts sitting at any one time.

Section 59(1) of the Access to Justice Act, 1999 made provision, however, for the Civil Division of the Court to be duly constituted when sitting as a single judge. This is subject to any directions from the Master of the Rolls, who may, with the concurrence of the Lord Chancellor, specify a minimum requirement of judges for the court to be properly constituted in relation to particular proceedings.

Section 55(2) of the 1981 Act specifies that the Criminal Division of the Court will be duly constituted where it consists of an uneven number of judges not less than three. A two-judge Court is entitled to hear matters which are not appeals against conviction, sentence, leave to appeal, or an insanity verdict.

(iv) Leave requirements

(a) Permission to appeal

Rule 52.3.1 of the CPR establishes a general obligation to obtain permission in respect of any first instance appeal. Permission may be granted by either the lower court, or the court to which the appeal will be taken. Permission can only be given where there is a real prospect of success, or, alternatively, other compelling reason why the appeal should be allowed.[319] Where relevant, these rules apply to proceedings before the Court of Appeal.

(b) Permission in respect of second appeals

The Access to Justice Act, 1999 adopted as a guiding principle the notion that there should be only a single appeal as of right from any decision of a court. As noted earlier, this is a principle which enjoys widespread support across common law appellate systems. Section 55 introduces a leave restriction in relation to appeals to the Court of Appeal from an appellate decision of a lower court. These restrictions are reproduced in rule 52.13 of the CPR.

318 Section 17(1)(a) of the Criminal Appeal Act 1968
319 Rule 52.3.6.

Where a county court or the High Court has heard and determined an appeal in relation to a matter decided in a lower court, that appeal decision can only be taken to the Court of Appeal where the Court considers that:

- The appeal would raise an important point of principle or practice
- There is another compelling reason to allow the appeal.

This reform aimed to ensure that second appeals:

> **"[W]ould in future become a rarity and that the judges of [the Court of Appeal] would be freed to devote more of their time and energy in hearing first appeals in more substantive matters which either their court or a lower court had assessed as having a realistic prospect of success."**[320]

These limitations do not apply to criminal cases.[321]

3. The House of Lords

(i) Jurisdiction

The House of Lords is the court of last resort for the entire United Kingdom in civil matters and for England, Wales and Northern Ireland for criminal matters. It is important to note at the outset that it is scheduled to be replaced in October 2008 by a new Supreme Court of the United Kingdom. The provisions governing the establishment of this new Court are contained in the Constitutional Reform Act, 2005.

The appellate jurisdiction of the House of Lords is currently governed by the Appellate Jurisdiction Act 1876. Section 3 provides that an appeal may lie to the House of Lords from "any order or judgment" of the English Court of Appeal, or any Scottish court from which an appeal could have been taken prior to the commencement of the Act. Section 40 of the Constitutional Reform Act, 2005 describes the appellate jurisdiction of the new Supreme Court in similar terms.

The House of Lords also has original jurisdiction in regard to matters of peerage under Standing Order 78.

(ii) Composition of the House of Lords

There are 12 law lords or "Lords of Appeal in Ordinary". They are also entitled to sit as members of the House in its parliamentary guise.[322]

Other members of the House who have held high judicial office may also sit as law lords provided that they meet the criteria set out in the 1876 Act. This means that the House of Lords can call upon retired law lords and senior judges who are members of the House.

It requires a panel of three to sit under s. 5 of the Appellate Jurisdiction Act, 1876 but in practice usually sits as a panel of five. It can sit in larger panels in important cases. For example, it sat as a panel of seven in *Pepper v. Hart* [1993] AC 593 (considering the use of parliamentary debates in statutory interpretation) and as a panel of nine in *A (F.C.) and*

320 *Tanfern Ltd v Cameron-MacDonald (Practice Note)* [2000] 1 WLR 1311, at 1320
321 Sections 54(2) and 55(2)
322 One of the changes that will be brought in under the Constitutional Reform Act 2005 is that law lords will be removed from parliament.

others (F.C.) v. Home Secretary [2005] 2 A.C. 68 (considering the legality of indefinite detention).

Under s. 42 of the 2005 Act, the new Supreme Court must sit with at least three judges for it to be duly constituted. More than half the sitting justices on a panel must be permanent (as opposed to acting) justices.

(iii) Conduct of appeal

Procedures in the House of Lords are determined by the House itself through the issuing of practice directions and standing orders. The procedures described in this section are taken from the 2007-2008 edition of these rules, which was approved by the House on 8 October 2007.

Where a party wishes to take a civil appeal to the House of Lords from the English or Northern Irish Courts of Appeal, an application for leave to appeal must be made first to the relevant Court of Appeal. Only after that Court refuses leave may application be made to the House of Lords itself. Application is made by presenting a petition for leave to appeal.

A petition for leave to appeal should be lodged within one month from the date of the order appealed from. The petition should set out briefly the facts and points of law and conclude with a summary of the reasons why leave should be granted. Supporting documents are not normally accepted and amendments or the lodging of supplementary petitions are allowed only in exceptional circumstances.

Petitions for leave to appeal to the House of Lords are considered by an Appeal Committee consisting of three Lords of Appeal. Petitions are generally decided on the papers alone, without a hearing. The petition may be referred to an oral hearing if the Committee considers it appropriate. A hearing is also automatically held if the Committee cannot come to a unanimous conclusion.

The petition procedure should take no more than eight weeks from the date of lodgment of the petition.

Where leave is granted, further documentation must be filed in advance of the hearing. The appellant is obliged to lodge a Statement of the facts and issues. The Statement should be a succinct account of the main facts of the case, including an account of judicial proceedings up to that point and an account of the issues raised by the appeal. The appellants are responsible for drawing up the Statement in draft and they must submit it to the respondents for discussion and agreement. The Statement must be a single document agreed between the parties. In the event of disagreement, disputed material should be removed from the draft Statement and included instead in each party's case. An Appendix of documents, containing only material ''necessary to support and understand the argument when the appeal is heard by the Appellate Committee'', must also be submitted. No document which was not used in evidence in the lower courts may be included. These must be lodged within six weeks of the presentation of the appeal, although an extension of time may be sought from the House.

The appeal is regarded as being set down once these documents are lodged. It may be called on for hearing at any point after this. Dates are provisionally agreed with each side

in advance but may be altered at short notice. Counsel are expected to be available in the week before and after the provisional date.

Within seven days of this setting down, each party must notify the Judicial Office of the number of hours that their counsel estimate to be necessary for each of them to address the Appellate Committee. Counsel are expected to confine their submissions to the time indicated in their estimates.

The Practice Directions also draw counsel's attention to the fact that the average length of appeals before the Appellate Committee is two days. Appeals are therefore listed for hearing on this basis. Estimates of more than two days must be explained in writing to the Head of the Judicial Office and may be referred to the Law Lords.

(iv) Procedure and requirements for leave

Leave is required in respect of all civil appeals from England, Wales and Northern Ireland. Leave may be granted from the court appealed from or the House of Lords itself. Leave is generally not required in respect of civil matters appealed from Scotland provided that two counsel have certified the reasonableness of the appeal.[323]

As outlined above, leave is sought from an Appeal Committee by way of petition. The requirements for leave are governed by Civil Practice Direction 4.5, which provides that leave will be granted where a petition "raises an arguable point of law of general public importance which ought to be considered by the House at that time, bearing in mind that the cause will already have been the subject of a judicial decision".

The former practice of the House of Lords was generally[324] to simply grant or refuse leave without giving reasons. In 2003, a practice direction was issued whereby the House of Lords altered this practice in respect of refusals of leave.[325] The impetus for this was to conform to the requirements of European Community Law insofar as they require reasons to be given for refusing leave to appeal in a case raising points of Community Law. In relation to petitions which include a contention that a such a point is raised, the House of Lords now gives reasons for refusing leave in a format which reflects the *acte clair* doctrine developed by the European Court of Justice.[326]

The House of Lords, as part of the same practice direction, altered the existing practice in all other cases where leave is refused by providing that it would give "brief reasons for refusing leave to appeal" but that otherwise no reasons would be given.[327]

(v) The "leapfrog" procedure

It is possible to bypass the Court of Appeal and appeal directly from the High Court to the House of Lords under the "leapfrog" procedure introduced in the Administration of Justice Act, 1969. In order to obtain leave to do so, all of the parties to the appeal must consent and the appeal must raise a point of law of public importance relating wholly or mainly to a

323 This was formerly the procedure for English and Northern Irish appeals also, prior to legislative reform in 1934 and 1962.
324 There were occasions where reasons were given. See Lord Diplock in *Ex p Indian Association of Alberta* [1982] QB 892.
325 Session 2002-03, *Thirty-Eighth Report from the Appeal Committee*, 3 April 2003.
326 See *Case C-283/81, CILFIT v. Ministry of Health*
327 These changes in general cases appear in Civil Direction 4.5 and Criminal Direction 5.5.

statute or statutory instrument.[328] The trial judge must certify the importance of the case and leave is determined by the House of Lords itself. This procedure is rarely used.

In respect of criminal appeals, there is no jurisdiction to entertain appeals from Scotland. (The Scottish Court of Criminal Appeals is the court of last resort for criminal matters in Scotland). Appeals from England, Wales and Northern Ireland require leave from either the trial court or an Appellate Committee of the House of Lords. There must also be a certificate from the court appealed from stating that a point of law of exceptional public importance is involved and explaining the point. The House of Lords hears appeals from the Court of Appeal (Criminal Division) and the Queen's Bench Division of the High Court under the case stated procedure.

C. AUSTRALIA

1. Introduction

The court structure in Australia is complicated by the federal nature of that jurisdiction. Unlike the unitary system employed in Ireland, the Australian system has distinct state and federal courts. This obviously impacts on the extent to which direct comparisons can be drawn between the Irish and Australian experiences. This section will focus primarily on the way in which federal law is dealt with by the Australian courts since the federal law court structure is closest to the Superior Courts model proposed in the earlier parts of this report.

2. Overall Court Structure

(i) State law

State law is dealt with primarily by the courts of the individual states. There is usually a State Supreme Court at the apex of each state system.

Section 73(ii) of the Commonwealth of Australia Constitutional Act[329] confers an appellate jurisdiction on the High Court in relation to decisions ''of the Supreme Court of any State''.

(ii) Federal law

Section 71 of the Constitution Act vests ultimate power in respect of federal law in the High Court, which it describes as ''a Federal Supreme Court''. For the purposes of this Chapter, this Court approximates most closely the role envisaged for the Irish Supreme Court after the establishment of a Court of Appeal.

This section also confers jurisdiction on ''such other federal courts as the Parliament creates''. This power has been used by Parliament to create a number of statutory courts. The main federal courts are the Family Court, the Federal Magistrates Court and the Federal Court of Australia. Unlike the more specialised Family and Magistrates Courts, the Federal Court of Australia exercises a more general federal law jurisdiction. It is therefore the appropriate forum to compare with the proposed new Irish Court of Appeal.

Although the Australian federal system appears at face value to be a two-court system, it operates in reality as a three-tier system. First instance decisions of the Federal Court can

328 The Australian procedure for referring constitutional issues to the High Court has broadly similar restrictions.
329 Hereinafter referred to as the Constitution Act.

usually be internally appealed to the Full Federal Court. A further appeal can subsequently lie from decisions of the Full Court to the High Court, where leave to appeal is granted.

3. The Federal Court

(i) Jurisdiction

As outlined above, s. 71 of the Constitution Act allows Parliament to make provision for federal courts. The Federal Court was established on the 1st February 1977, pursuant to the Federal Court of Australia Act, 1976.

(a) Original jurisdiction

As a creation of statute, the jurisdiction of the Federal Court can be easily extended or restricted by Parliament. The competence of the Court is therefore strikingly diverse. This reflects the fact that it is governed by over 150 statutes, ranging from the Spam Act, 2003 to the Disability Discrimination Act, 1992. Significant jurisdictions include those arising under the Corporations Act, 2001, Administrative Appeals (Judicial Review) Act, 1977 and Admiralty Act, 1988. The vast majority of these statutes vest original jurisdiction in the Court.

By virtue of s. 20 of the Federal Court of Australia Act, 1976, such first instance cases shall be heard by a single judge of the Court, unless statute provides otherwise. The Full Court may be called upon to hear first instance cases where the Chief Justice is of the view that the matter before the court is of "sufficient importance".[330] When acting as a first-instance court, the Federal Court performs a similar role to that of the Irish High Court.

(b) Appellate jurisdiction

As already noted, the appellate jurisdiction of the Federal Court is more pertinent to the purposes at hand. This aspect of the Court's competence is governed by s. 24 of the 1976 Act. This provides that the Court can entertain appeals from:

- Judgments of the Federal Court when constituted by a single Judge
- Judgments of the Supreme Court of a Territory
- Judgments of a State Supreme Court exercising federal jurisdiction
- Judgments of the Federal Magistrates Court in the exercise of that Court's original jurisdiction.[331]

Section 25(1) requires that the appellate jurisdiction of the Federal Court be exercised by the Full Court. This effectively establishes a two-tier system within the Court. Although it exists as a single legal entity, the Federal Court functions in its full form, in reality, as an intermediate Court of Appeal.

Exceptions exist in relation to appeals against summary decisions[332] or migration judgments of the Magistrates Court.[333] These may be heard by a single judge Court.

The general appellate jurisdiction of the Full Court is excluded in respect of decisions of a single judge Court on appeal from the Federal Magistrates Court.[334] Section 33(2) allows these decisions to be appealed directly to the High Court.

330 Section 20 (1A).
331 Section 24 specifically exempts a number of statutory schemes from the scope of this general appellate jurisdiction.
332 Section 25(6).
333 Section 25(1AA).
334 Section 24(1AAA).

Applications for leave to appeal, an extension of time, a stay or for the amendment of proceedings may be heard by a single judge Court, or by a Full Court.[335] Order 52, rule 2AA of the Federal Court Rules provides that these applications will usually be heard by a single judge.

(ii) Nature of appeal

The nature of any appeal depends upon the statute which creates the right of appeal. In general, however, an appeal to the Full Federal Court is by way of rehearing.

The Full Court originally held in *Duralla Pty Ltd v. Plant* (1984) 2 F.C.R. 342 that an appeal to it was a so-called "strict appeal", in which the question before the Full Court was whether the decision of the lower court was correct at the time it was given. The decisions of the High Court in *CJD v. VAJ* (1998) 197 C.L.R. 172 and *Allesch v. Maunz* (2000) 203 C.L.R. have been interpreted as dictating that the decision in *Duralla* "must, apparently, be discarded".[336] The High Court felt that the Full Court's power under the 1976 Act to admit further evidence at hearing demonstrated an intention on the part of Parliament that appeals would operate as a rehearing.

(iii) Conduct of appeal

The 1976 Act directs the Court to have regard in an appeal to the evidence given during the first instance hearing. The Court is expressly empowered to draw inferences of fact from that evidence. It is also entitled, in the exercise of its discretion, to hear new evidence by affidavit, videolink, or oral examination.[337]

The standard procedure for the conduct of an appeal is set out in Order 52 of the Federal Court Rules and in Practice Note No. 1 of 14 August 2003, as amended. The Court has discretion to deviate from the Practice Note guidelines, although the expectation is that they will apply to the majority of cases.

A notice of appeal must be filed within 21 days of the decision at issue.[338] After the filing of notice of appeal, the Full Court organises its schedule at a call-over hearing, the date of the holding of which is communicated to the relevant parties in advance. At this preliminary stage, the parties must be in a position to provide extensive details to the Court about their appeal. These details include the nature of the matter, the essential issues raised, the existence of any outstanding motions, the degree of urgency, and the parties' agreed estimate of the amount of time which the appeal will take.

The parties must also advise the Court whether any consideration has been given to the possibility of conducting the appeal electronically. This involves the filing or exchange of documents or submissions electronically. It may also include the use of data in electronic form during the hearing.[339]

A hearing date will subsequently be fixed by the Chief Justice, after all call-overs have been held. The parties are then obliged to prepare and furnish their written submissions. These must cover the issues raised and the outline arguments to be advanced. The relevant

335 Section 25(2).
336 Cairns, *Australian Civil Procedure* (5th ed., Thomson, 2002).
337 Section 27.
338 Order 52, rule 15(1).
339 See Practice Note No. 17 on *Guidelines for the use of information technology in litigation in any civil matter.*

Practice Note specifies that outline arguments must explain each step in the argument and identify all legislation, authorities or findings of fact upon which the argument will rely. Submissions must also specify any alleged errors of fact on the part of the trial judge upon which it is intended to rely.

Written submissions must "ordinarily" be no more than ten pages. Leave must be obtained at the call-over stage to provide more lengthy submissions.

The appellant must file his submissions five working days in advance of the hearing, while the respondent must supply his two working days before the hearing.

Additional materials may be supplied in the course of the hearing where the Court grants leave to do so.

If a party wishes to call evidence in an appeal which was not before the lower court, an application to do so, pursuant to Order 52, rule 36, must be made. This must be done at least 21 days before the date of the hearing.

In determining the appeal, the Full Court is entitled to:

- Affirm, vary or reverse the judgment under appeal.
- Give any judgment or order it sees fit.
- Set aside the judgment, in whole or in part, and remit the matter to the lower court.
- Set aside a civil jury verdict and enter judgment.
- Grant a new trial.
- Award execution, or remit the matter for execution of its order.[340]

(iv) Composition of the Court

The Full Federal Court can sit as three judges or more[341] to hear appeals from decisions of single judges of the Court. In practice, a Full Court is usually composed of three judges, but can sometimes sit as five. There are 46 judges currently appointed to the Federal Court.

(v) Leave requirements

Section 24(1A) requires that the Court grant leave to appeal in respect of any challenges to interlocutory decisions of a single judge court. Criteria for the grant of leave have been developed by the Court to the point that they are now "reasonably well settled" (*Gant v. Commissioner Australian Federal Appeals (no. 2)* [2006] FCA 1494, at para. 7). Leave will only be granted when it can be shown that the order in respect of which leave to appeal is sought is attended with sufficient doubt to warrant it being reconsidered, and that substantial injustice would result if leave to appeal were refused.[342]

340 Section 28 of the 1976 Act.
341 Section 14(2) of the 1976 Act.
342 *Federal Commissioner of Taxation v Hydrocarbon Products Pty Ltd* (1987) 72 ALR 391; *Telstra Corporation Ltd v AAPT Ltd* (1997) 38 IPR 539.

4. The High Court

(i) Jurisdiction

The High Court of Australia has both original and appellate jurisdiction. It draws its competence from both constitutional and statutory sources. This section will consider only the appellate jurisdiction of the Court as this is most pertinent to the purposes of this Chapter.

The appellate jurisdiction of the High Court is primarily governed by s. 73 of the Constitution. This provides that the High Court shall have jurisdiction to determine appeals from all ''judgments, decrees, orders, and sentences'' which were delivered:

- By the High Court, in the exercise of its original jurisdiction
- By any federal court, or court exercising federal jurisdiction
- By the Supreme Court of any State
- By the Inter-State Commission.[343]

The High Court thus exercises an array of appellate functions. Section 73 indicates that it is entitled to hear appeals from both State and Federal courts. In addition, the law also allows for an internal appeal mechanism from decisions of a single judge High Court to a Full Court, like that which operates in the Federal Court of Appeal. This section will consider these different avenues of appeal in turn.

The Court's s. 73 jurisdiction is, however, subject to ''such exceptions and ... regulations as the Parliament prescribes''. Appeals to the High Court are therefore governed by a number of separate statutes. The majority of appeals, however, fall within the scope of the general principles of Part V of the Judiciary Act, 1903.

The appellate jurisdiction of the High Court is defined in Section 73 of the Constitution Act in terms of appeals from ''judgments, decrees, orders and sentences'' from the specified courts. This was interpreted in *Mellifont v. A.G. of Queensland* (1991) 173 C.L.R. 289 to allow an appeal in respect of a decision on a preliminary matter. It will not, however, allow the Court to issue an advisory opinion.[344]

- *Appeals from the High Court:*

Section 34 of the 1903 Act confers competence on the High Court to hear ''appeals from all judgments whatsoever'' of any judge (or judges) acting in exercise of the High Court's original jurisdiction.

Leave must, however, be obtained where the appeal relates to an interlocutory judgment of the High Court.

- *Appeals from State courts:*

Section 35 provides for appeals from:

- Decisions of State Supreme Courts on any matters, federal or otherwise.

343 This last possibility ''has been a dead letter for most of the High Court's history''. See Blackshed & Williams, *loc. cit.*, at chapters 14 and 25.
344 *Saffron v. R.* (1953) 88 C.L.R. 523.

- Decisions of the courts of any State which were made in the exercise of their federal jurisdictions.[345]

Unless statute provides otherwise, s. 35(2) specifies that such appeals cannot be brought without the special leave of the High Court.

- *Appeals from the Federal Court*

This is the closest procedure to that which would typically occur under the proposed new Irish court structure. This is the equivalent of an appeal from a Court of Appeal decision which was itself an appeal from the first instance decision of the High Court. Section 33 of the Federal Court Act, 1976 provides that an appeal cannot be brought from the decision of the Full Court without the special leave of the High Court. Unless statute provides otherwise, appeals cannot be brought to the High Court from decisions of a single judge Federal Court.

An exception is made in relation to decisions of a single judge court on appeal from the Federal Magistrates Court. Obviously, this is a broadly similar situation where the decision under appeal is itself an appellate decision. These can only be taken where the High Court grants special leave to appeal. This conforms to the general principle that an individual is entitled to one appeal as of right, and one appeal by leave.

(ii) Nature of appeal

It was decided in *Victorian Stevedoring Pty Ltd v. Dignan* (1931) 46 C.L.R. 73 that an appeal to the High Court from the decision of a State court is a strict appeal, rather than a rehearing. The High Court could only conduct an appeal as a rehearing where that was provided for by statute.

The High Court refused in *Mickelberg v. R.* (1989) 167 C.L.R. 259 to permit new evidence to be entered on appeal. This is based upon its view that its original and appellate jurisdictions are completely and exhaustively proclaimed by the relevant provisions of the Constitution Act. If the Court was to allow the hearing of new evidence, it would, in effect, be dealing with that evidence on a first instance basis. This would therefore be an exercise of original jurisdiction on the part of the Court. As this would not be come within the parameters of ss. 75 and 76 of the Constitution Act, the reception of such evidence would be *ultra vires* the Court.

The Court has noted, however, that this is a rule which could be subject to future statutory amendment. Section 76, it will be remembered, permits Parliament to confer additional original jurisdiction on the High Court. In *Eastman v. R.* (2000) 172 A.L.R. 39, Gaudron J., for the majority, thus pointed out that "there is no constitutional inhibition on the parliament legislating to that effect". As this had not been done, however, the Court refused to receive any new evidence in relation to the applicant's fitness to plead at trial.

(iii) Conduct of appeal

Appeals to the High Court are conducted in accordance with the Rules of the High Court 2004, as amended.

345 As outlined above, Parliament has conferred federal law competences on State courts.

A notice of appeal must be issued within 21 days of the decision in question, or the grant of leave to appeal, whichever is the later. As applications for leave to appeal must be lodged within 28 days of the impugned decision,[346] this will normally be the relevant date.

At an early stage of the proceedings, the parties and the Registrar must agree to settle the index of the appeal book. This includes the pleadings, testimony, evidence and exhibits, as well as the decision of the court under appeal. In agreeing an index, the parties are obliged to endeavour to exclude irrelevant or unnecessary material.

The form and delivery of written submissions are governed by Practice Direction No. 1 of 2000. These require the appellant to deliver his submissions at least ten days in advance of the hearing. These will include a concise statement of the issue(s) before the court, a narrative recital of the relevant facts as agreed in the appeal book, a ''succinct argument'' encompassing the relevant legislation, principles, decisions and errors alleged, a chronology of events, and a statement of the form of the precise orders sought.

These written submissions cannot exceed 20 pages without the leave of the Court.

The respondent must provide his written submissions at least seven days in advance of the hearing. These are again limited to 20 pages in length, unless the Court grants leave to exceed this limit.

The appellant is entitled to enter a reply to these submissions. It must not, however, exceed five pages. No provision is made for the Court to grant leave to exceed this limit. This reply must be entered at least two days in advance of the hearing.

The powers of the High Court during the hearing of an appeal are extensive. Section 77G of the 1903 Act allows the Court to ''order the examination of a person upon oath orally, or on interrogatories before the Court'' in ''any cause pending'' before it. Section 77H similarly allows for evidence to be given, on affidavit or otherwise, in the ''hearing of any matter'' before the Court. It cannot, however, receive new evidence unless statute so specifies.[347]

In determining the matter before it, the High Court may affirm, reverse or modify the judgment under appeal. It may also give such judgment as should, in its view, have been given at first instance.[348] In circumstances (like a case stated) where the proceedings are not before the Court, it can award execution, or remit the matter to the lower court for the execution of its judgment.

(iv) Composition of the Court

The High Court is composed of a Chief Justice and six other judges. The Court can sit as a single judge in relation to, *inter alia*, applications for special leave, and exercises of the Court's original jurisdiction. Appeals under s. 20 of the 1903 Act must be heard by a Full Court. This covers appeals from decisions of a single High Court judge, a federal court, or a single judge State court exercising federal jurisdiction.

Section 19 of the 1903 Act provides that a Full Court may be constituted by two or more judges. This is, however, subject to a number of exceptions.

346 Part 41 of the 2004 Rules.
347 *Mickelberg v. R.* (1989) 167 C.L.R. 259.
348 Section 37 of the 1903 Act.

Where an appeal is taken against the decision of a State Court which itself was sitting as a Full Court, the High Court must sit as three or more judges.[349]

Appeals from the Federal Court of Appeal must also be heard by a Full Court of not less than three judges.[350]

(v) Leave requirements

Section 35A of the 1903 Act directs the Court, when considering an application for special leave to appeal under any Act, to have regard to ''any matters it considers relevant''. The section goes on, however, to oblige the Court to have regard to:

> **''(a) whether the proceedings in which the judgment to which the application relates was pronounced involve a question of law:**
>
> **(i) that is of public importance, whether because of its general application or otherwise; or**
>
> **(ii) in respect of which a decision of the High Court, as the final appellate court, is required to resolve differences of opinion between different courts, or within the one court, as to the state of the law; and**
>
> **(b) whether the interests of the administration of justice, either generally or in the particular case, require consideration by the High Court of the judgment to which the application relates.''**

Part 41 of the Rules of the High Court 2004 requires that an application for leave to appeal be lodged within 28 days of the pronouncement of the decision in question. The applicant then has a further 28 days to deliver and file a summary of his arguments. This summary must not exceed ten pages.

Any reply to the applicant's summary cannot exceed five pages.

The Court is not obliged to conduct an oral hearing in relation to an application for leave. A party who wishes to have an oral hearing must specify that in the course of his summary arguments.

By reference to Part 41.11.1, any two judges of the Court can determine an application without holding a hearing. If it is decided to hold a hearing, the Rules set strict time limits for argument. The applicant is entitled to 20 minutes to present his application. The respondent has 20 minutes to present his arguments, with a further five minutes allotted for the applicant's reply. The Court has discretion to extend these limits if it sees fit.

The High Court has developed a practice of giving reasons for its decisions only where an application for leave to appeal has been refused.[351]

The Registrar of the High Court has a general discretion to give directions on any matter where he is of the view that that would be convenient, at any time after the filing of the application.

349 Section 21(2) of the 1903 Act.
350 Section 33 of the 1976 Act.
351 This was followed in the New Zealand Supreme Court Act 2003.

D. CANADA

1. Overall Court Structure

The Constitution Act 1867 divides authority for the judicial system in Canada between the federal government and the ten provincial governments. As with Australia, this section will focus primarily on the federal legal system as it has the greatest comparative relevance for the project at hand.

The federal government is given the authority under s. 101 of the Constitution Act to establish a General Court of Appeal for Canada and "any additional courts for the better administration of the laws of Canada". It has used this power to create the Supreme Court of Canada as well as the Federal Court of Appeal, the Federal Court and the Tax Court of Canada.

The federal government also has, as part of its jurisdiction over criminal law, exclusive authority over the procedure in courts of criminal jurisdiction, both provincial and federal.

In effect the courts in Canada are organised in a four-tiered structure. The Supreme Court of Canada sits at the apex of the structure and hears appeals from both the federal court system, headed by the Federal Court of Appeal, and the provincial court systems, headed in each province by that province's Court of Appeal. In contrast to its counterpart in the United States, therefore, the Supreme Court of Canada functions as a national, and not merely federal, court of last resort.

As alluded to above, this section will concentrate on the federal court structure as it most closely approximates to the Irish Superior Court system proposed in Parts I and II. The federal system consists of the Supreme Court of Canada, the Federal Court of Appeal and the Federal Court. In addition, the Tax Court of Canada and Court Martial Appeal Court deal with specialist areas of federal law.

2. The Federal Court of Appeal

(i) Jurisdiction

The Courts Administration Service Act, 2002 created a separate Federal Court and Federal Court of Appeal from the existing divisions of the Federal Court of Canada.

The Court of Appeal has a dual judicial review and appellate jurisdiction. This section will chiefly consider the appellate element of the Court's competence. It has jurisdiction to hear and determine appeals from any final judgment, judgment on a question of law determined before trial, or interlocutory judgment, or determination on a reference, of the Federal Court or (with some exceptions) the Tax Court of Canada pursuant to s. 27 of the Federal Courts Act, 1985. There is no general leave requirement in respect of these appeals.

(ii) Nature and Scope of Appeals

By virtue of s. 53 of the Federal Courts Act, 1985, the Federal Court of Appeal enjoys the same power as the lower Federal Court to take evidence on oath from witnesses.

Under rule 351 of the Federal Court Rules, the Court may "in special circumstances" grant leave to a party to present evidence on a question of fact. New evidence should therefore not usually be admitted by the Federal Court of Appeal.

(iii) Conduct of Appeals

An appeal is commenced by the issuing and serving of a notice of appeal. This notice should be served within 30 days of the pronouncement of a final judgment or within ten days of the pronouncement of an interlocutory decision.[352] The Federal Court of Appeal may fix or allow further time for filing in an appropriate case. The notice of appeal must include, *inter alia*, a precise statement of the relief sought and a complete and concise statement of the grounds intended to be argued.[353]

Within 30 days after the filing of a notice of appeal, the parties are required to agree in writing as to the documents, exhibits and transcripts which are to be included in the appeal book. If the parties are unable to agree, this appellant must request the Court to determine the content of the appeal book in advance of the hearing.

The appellants must then file a memorandum of fact and law within 30 days. The respondent then has 30 days to file her memorandum of fact and law. Where a cross-appeal has been filed, the respondent must serve and file a memorandum of fact and law as appellant and the appellant must serve and file a memorandum of fact and law as respondent.

Once the memorandum has been served or the time for so doing has elapsed, the appellant has 20 days to file a requisition requesting that a date of the appeal be set. This requisition must state, *inter alia*, the maximum number of hours or days required for the hearing and list any dates within the following 90 days on which the parties are not available.[354]

The Attorney General of Canada and the attorney general of each province are entitled to notice of any appeal made in respect of a constitutional question.

At any stage, the Federal Court of Appeal may quash proceedings before it where it has no jurisdiction or where those proceedings are not taken in good faith.

The powers of the Federal Court of Appeal in the appellate context are set out in s. 52 of the Federal Courts Act 1985.

Where the appeal is from the Federal Court, the Court of Appeal may:

- Dismiss the appeal
- Give the judgment and award the process or other proceedings that the Federal Court should have given or awarded
- Order a new trial if it is in the ends of justice to do so
- Make a declaration as to the conclusions that the Federal Court should have reached on the issues decided by it and refer the matter back to the Federal Court on that basis.

(iv) Composition of the Court

There are twelve judges and a Chief Justice. The Court sits as a panel of three.

352 Section 27 of the Federal Courts Act 1985.
353 Rule 337.
354 Rule 347.

(v) Leave requirements

Leave to appeal is not normally required to take a case to the Federal Court of Appeal. Where leave is required by statute, a motion for leave to appeal must be brought in writing. The Court is entitled to dispose in writing of such a motion without the holding of an oral hearing.

3. The Supreme Court

(i) Appellate jurisdiction

The Supreme Court of Canada has a mixture of original and appellate jurisdictions. In terms of the appellate functions under examination here, the Supreme Court is entitled to hear appeals from both provincial and federal courts. This section will concentrate on the way in which it deals with appeals from the Federal Court of Appeal as this procedure is most pertinent to the issue of how appeals from a new Irish Court of Appeal might be dealt with by the Supreme Court.

(ii) Nature and scope of appeal

Section 62(1) of the Supreme Court Act, 1985 provides that "[a]n appeal shall be on a case to be stated by the parties or, in the event of difference, to be settled by the court appealed from or a judge thereof". This indicates that a Supreme Court appeal is regarded as a review rather than a rehearing. Appeals are intended to be confined to the issue of public importance which they raise. This is illustrated by s. 62(2) which confines the material produced on appeal to "the judgment objected to and so much of the pleadings, evidence, affidavits and documents as is necessary to raise the question for the decision of the Court".

The Supreme Court is, however, also entitled to receive further evidence relating to the appeal. This may be done by oral examination, deposition or affidavit. Section 62(3) makes clear, however, that this ought to be done only in exceptional cases. It provides that the Court may receive further evidence in its discretion only "on special grounds and by special leave".

(iii) Conduct of appeal

Where leave is granted, the parties must comply with a variety of rules on the submission of documents to the Court. Parties to an appeal must provide the Court and the other parties with a condensed book. This should contain the excerpts from the record and book of authorities that the party will refer to in oral argument. These should be marked with a tab. The condensed book may also contain an outline of the oral argument, which must be based on the contents of the condensed book and which should not exceed two pages.

At the full hearing of the appeal, each party is entitled to be represented by two counsel. Only one may appear for an intervener. The names of the counsel appearing must be given to the Court in writing at least two weeks before the hearing of the appeal. Those parties who do not meet the time limits for filing of documents in advance of the hearing are not entitled to appear in oral argument unless a judge orders otherwise.

Oral argument is usually limited to one hour in total on each side. Where there are multiple appellants or respondents, the hour must be divided between them. The Court may extend the time for argument or reply if it sees fit.

(iv) Composition of the Court

The Supreme Court is composed of a Chief Justice and eight ordinary judges of the Court. The Court must sit with at least five judges.

(v) Leave requirements

Leave is generally required to take an appeal to the Supreme Court of Canada. There are, however, a number of specific exceptions where appeals may be taken as of right. These include:

- A civil appeal from the decision of a provincial Court of Appeal on a reference by the provincial government
- A civil appeal from the Federal Court of Appeal in the case of controversy between Canada and a province or between two or more provinces
- A criminal appeal concerning any question of law where a judge of the provincial Court of Appeal has dissented
- A denial of *habeas corpus*
- A reversal of a verdict of acquittal.

In all other cases, leave must be obtained. Section 40(1) of the Supreme Court Act provides for the granting of leave where:

> **"[T]he Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it."**

An application for leave to appeal must be made in writing to the Supreme Court. The Court may grant or refuse the application for leave on the basis of the written submissions. It may also order the holding of an oral hearing to determine the application if it considers it appropriate. Three judges consider each application.

The application for leave must be served on the respondent(s) and filed with the Court within 60 days of the date of the judgment appealed from. Time is counted from the date that the judgment was pronounced orally in court, or, if reserved, the date of the written judgment. An application for leave to appeal must include all relevant documentation. It must include a memorandum of argument which should itself include a concise statement of facts, a concise statement of the questions in issue and a concise statement of argument. Responding parties must respond within 30 days of service of the application for leave. Their response must also include a memorandum of argument which should not exceed 20 pages. Any parties seeking to intervene in the proceedings may submit a memorandum or argument of no more than five pages.

Where a hearing is held in relation to an application for leave, oral argument is strictly confined. Rule 70 provides that only one counsel shall appear for each party, and that each side must limit their oral submissions to 15 minutes. Counsel for the applicant or applicants will also be allowed five minutes to reply. The Court has the discretion to depart from these restrictions if it sees fit.

The Supreme Court generally sets out the issues on appeal and baldly states whether the application for leave has been granted or denied. The Court has an established practice of declining to elaborate on the reasons for granting or denying leave to appeal.[355]

Decisions regarding the grant of refusal of leave are normally final. Rule 74 provides that there is no rehearing on a leave application and Rule 73 provides that there shall be no reconsideration of a leave application unless there are exceedingly rare circumstances in the case that warrant consideration.

One of the peculiarities of the Canadian appellate system is that the power to grant leave to appeal is vested in a number of different courts. Section 37 of the Supreme Court of Canada Act allows a provincial court of appeal to grant leave to appeal to the Supreme Court "where, in the opinion of that court, the question involved in the appeal is one that ought to be submitted to the Supreme Court for decision". This power has more or less fallen into disuse as it is generally considered preferable for the Supreme Court to manage its own list.[356]

In *Paulet v. Brandon University Faculty Assn.* (1991) 86 D.L.R. (3d.) 575 (Manitoba Court of Appeal), Huband J. stated, at page 576:

> *. . .in general the Supreme Court should control its own agenda and . . . leave should be granted by provincial courts of appeal only in special circumstances.*

See also *Marlay Construction Ltd. v. Mount Pearl (Town)* (1997) 147 Nfld. P.E.I.R. 249, where the Court of Appeal of Manitoba held that:

> **" . . . the Supreme Court of Canada should be entitled to control its own agenda and that leave should be granted by provincial courts only in special circumstances. . ."**[357]

Section 37.1 also allows the Federal Court of Appeal to grant leave to appeal from a final judgment of the Federal Court of Appeal where, in its opinion, the question involved in the appeal is one that ought to be submitted to the Supreme Court for decision. This again undermines the principle that the Supreme Court ought to retain management of its own caseload.

E. United States of America

1. Overall Court Structure

The U.S. judicial structure is a complex one which is made up of an extensive number of federal and state courts. The appellate systems often vary from state to state. This diversity of arrangements makes it difficult to produce an overarching analysis of state appellate systems.

There are also difficulties involved in conducting an assessment of the federal appellate courts. The federal court system has a number of appellate courts. The U.S. is divided into

355 See, for example, *Apotex Inc v Bayer Aktiengesellschaft* [1999] 3 SCR 857, at para. 8.

356 See Sopinka and Gelowitz, *The Conduct of an Appeal* (Butterworths, 2nd ed., 2000); *Dolbec v. U.S. Fire Insurance Co.* [1963] Que. Q.B. 170, *Cohnstaedt v. University of Regina* [1987] 2 W.W.R. 1 (Sask. C.A.), *Lowe v. Canadian Pacific Ltd.* (1999) 178 D.L.R. (4th) 764 (N.S.C.A.)

357 1997) 147 Nfld. P.E.I.R. 249, at 251.

12 regional circuits, each of which has a Court of Appeal. There is also a 13th court, the Court of Appeals for the Federal Circuit. This is a relatively specialist court which deals with a more restricted range of appellate matters.

These Courts of Appeal are often organised in different ways. This, again, undermines the usefulness of any overview of this system. Unlike the proposal for an Irish Court of Appeal, the jurisdiction of these appellate courts is restricted by reference to subject-matter and geography. This chapter will accordingly concentrate on the court with the most relevance to the proposed Irish appellate system, the United States Supreme Court. As a court of last resort which deals primarily with matters of particular public importance, it fulfils a role very similar to that envisaged for the Irish Supreme Court in any post-Court of Appeal system.

2. United States Supreme Court

(i) Jurisdiction

Article III of the United States Constitution deals with the structure and competence of the Supreme Court. The sections relevant to the appellate jurisdiction of the Court provide that:

> **"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . ..**
>
> **The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;**
>
> **— to all cases affecting ambassadors, other public ministers and consuls;**
>
> **— to all cases of admiralty and maritime jurisdiction;**
>
> **— to controversies to which the United States shall be a party;**
>
> **— to controversies between two or more states;**
>
> **— between a state and citizens of another state;**
>
> **— between citizens of different states;**
>
> **— between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.**
>
> **In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."**

Under the Eleventh Amendment to the Constitution it is provided that:

> **"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."**

The appellate jurisdiction of the United States Supreme Court has been conferred by various statutes under the authority given to Congress under the Constitution.[358] This jurisdiction includes some direct appeals from district courts — these do not require *certiorari* and are commenced by notice of appeal.[359]

The United States Court of Appeals may certify to the Supreme Court a question or proposition of law "on which it seeks instruction for the proper decision of a case".[360] There is no requirement of *certiorari*. There is instead a "preliminary examination" of the certificate, at which point the Court decides whether to entertain the certificate and invite briefs from the parties.

The Supreme Court may also hear appeals from cases which are pending in U.S. courts of appeal but not yet adjudicated on.[361]

(ii) Nature of appeal

Matters heard by the Supreme Court are almost always a review of a legal question of particular importance. Rehearings are rarely permitted. Rule 10 of the Supreme Court Rules states that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law".

(iii) Conduct of appeal

An appellant whose petition for a hearing has been granted must prepare a brief on the merits. This should specify, *inter alia*, the question or questions to be decided, a concise statement of the basis for the Court's jurisdiction, a concise statement of the case, a summary of the argument and a conclusion specifying the reliefs sought. The brief need not be expressed in identical terms to the petition but cannot raise any additional questions or change the substance of the questions originally stated.

40 copies of the brief on the merits must be filed within 45 days of the order granting of writ of *certiorari*. The respondent then has 30 days to file their brief on the merits. Applications to extend time may be made but are not encouraged.

Parties are also encouraged to agree a joint appendix for filing. This contains the relevant docket entries, pleadings, decision or orders and other aspects of the record of the matter in the courts below.

When a case is listed for hearing, the Clerk of the Court notifies each side and requests that they complete and return an argument form.

Unless the Court directs otherwise, each side is allowed 30 minutes for oral argument. Counsel are instructed that the purpose of oral argument is not to summarise the arguments set out in their brief but to stress the main points of the case that might persuade the Court to accept their position. The Court's guide for counsel emphasises that they are not required to use all 30 minutes. Time is kept by means of a lighting system which shows white when there are five minutes remaining and red when time is up. Counsel is required to terminate

358 See 28 U.S.C. 2071 *et seq.*
359 Rule 18 of the Supreme Court Rules.
360 Rule 19.
361 28 U.S.C. 2101(e).

their argument immediately upon the showing of the red light, except when they are in the process of answering a question from one of the Justices.

(iv) Composition of the Court

There are eight associate justices and one Chief Justice.

(v) Leave requirements

In order to appeal to the Supreme Court, a litigant must petition the court for *certiorari*. Review on a writ of *certiorari* is not a matter of right but is granted at the discretion of the Court. Instead of seeking merely to correct erroneous decisions, the Court is looking for cases ''involving unsettled questions of federal constitutional or statutory law of general interest''.[362]

Supreme Court rule 10 sets out factors that, while ''neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers''. These are as follows:

(2) The decision below conflicts with decisions of one or more federal courts of appeals or state courts of last resort on an important issue of federal law

(3) The court below decided an important federal question in a way that conflicts with rulings of the Supreme Court

(4) The court below decided a question of federal law that is so important that the Supreme Court should pass upon it even absent a conflict

(5) The court below ''so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power'' (a category into which very few grants fall).

In cases where an appeal is sought to the Supreme Court to review a case pending in a United States Court of Appeals prior to that court giving judgment, the case must be one ''of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination'' in the Supreme Court.[363]

A petition for *certiorari* must be filed within 90 days after the entry of judgment below (or denial of rehearing), absent an extension. The petition must be in the Clerk's Office on the 90th day. It is possible to get up to a 60 day extension in which to file a petition, if the petitioner moves for one at least ten days before the petition is due under Supreme Court rule 13.

The petition is filed in booklet form and must be no longer than 30 pages. 40 copies must be filed with the Court. An appendix setting out the decisions below must be bound at the back of the petition. The rules as to the proper format of the petition are set out in Supreme Court Rules 33 and 34.

The contents of a petition are set out in rule 14 of the Supreme Court Rules. There are three critical parts of a petition.

362 Rehnquist, *The Supreme Court: How it Was, How it Is* (Morrow, 1987), at 269.
363 Rule 11.

- The first page of the petition is devoted to the Question(s) Presented
- The next part is the Statement. This is a history of the case and any relevant background, including a description of the trial and appellate court rulings
- The third part of the petition is the section entitled ''Reasons for Granting the Petition.'' This describes the conflict among the lower courts and persuades the Court of the practical importance of questions presented. It will also put forward the case on the merits.

Rule 14.4 expressly provides that ''the failure of a petitioner to present with accuracy, brevity and clarity whatever is essential to read and adequately understand'' their petition constitutes sufficient reason to refuse it.

Once a petition is filed, the respondent has an opportunity to file a brief in opposition. This must be done within 30 days. This is also the time limit for any *amicus* briefs. The petitioner then has ten days in which to file a reply under Supreme Court Rule 15.5.

The formal requirements for the opposing brief are set out in Rules 15.3, 24.2.[364]

Once the time for filing these briefs has elapsed, the briefs received are circulated to the Justices and their law clerks. The role of the law clerk in the *certiorari* process is one of the idiosyncratic aspects of the U.S. Supreme Court. Some judges have their clerks read all the petitions. Others have formed a ''pool'' to review petitions. A single clerk from the pool is assigned to each case and writes a memorandum to guide the Justices who participate in the pool. That memo discusses the certworthiness of the petition and makes a recommendation as to its disposition.

The Chief Justice compiles a list of cases he believes should be set for a conference discussion (the ''discuss list'') and circulates it to other members of the Court. Any of them may add a case to the list. Any case not appearing on the discuss list is ''dead listed'' for denial without a conference vote. Only 15 percent to 30 percent of circulated petitions appear on the discuss list.[365]

To succeed in a petition for *certiorari*, four judges must agree to hear the case. The justices review 130 petitions for *certiorari* each week. Each Monday an order list is released — this includes information on the acceptance and rejection of petitions.

One of the criticisms that has been made of the *certiorari* system is that the Supreme Court may and frequently does deny *certiorari* even where there is a conflict in the lower courts. This led Justice White to complain that the Court was failing to maintain federal law in a ''satisfactory, uniform condition''.[366]

364 See Baker, ''A Practical Guide to Certiorari,'' (1984) 33 Cath. U.L. Rev. 611 (1984) and Prettyman, ''Opposing Certiorari in the United States Supreme Court'' (1975) 61 Va. L. Rev. 197.
365 Caldeira & Wright, *The Discuss List: Agenda Building in the Supreme Court*, 24 Law & Soc. Rev. 807, 808 (1990).
366 *Beaulieu v. United States* , (1990) 497 U.S. 1038, at 1039.

CHAPTER 23

Efficiencies in the Practices and Procedures of the Superior Courts

(d) "To make such other recommendations as are appropriate for the purposes of ensuring greater efficiencies in the practices and procedures of the Superior Courts."

A. Introduction

There have been significant developments in the management of the courts in the last decade, since the creation of the Courts Service in 1998. Fewer judges per head of population than in other common law and European Union states determine the cases before the courts.

1. Population

As discussed in Chapter 3, there has been a significant increase in population in Ireland. There has been a 50% increase in the population since the last structural reform of the court system. The increased population has contributed to the growth in the volume of litigation coming before the courts.

2. Developing Society — Volume of Litigation

Along with the growth in population there has been significant development in society in Ireland. Thus there has been legislation in areas which have resulted in new forms of litigation. Family law, an area where there were few cases 20 years ago, involves a significant amount of court time today, as do commercial cases. New lists have been established in the High Court as a consequence of modern statutes, e.g. the Extradition list, the Hague Convention list (child abduction cases).[367]

The volume of litigation is increasing. In 2007 there were 700,000 matters before the Courts.[368] In the High Court, compared to 2006, there was a 26% increase in new cases,

367 See list at Figure 3.9.
368 Courts Service Annual Report, 2007.

bringing it to 19,435.[369] This figure includes a 73% increase in the numbers of cases before the Commercial Court and a 30% increase in Solicitors' Act cases. The only route for these cases for ultimate appeal is the Supreme Court.

3. Complexity

The increasing complexity of cases has been considered earlier in this report.

4. Effectiveness

To meet this radically increased volume and complexity of cases, the courts are managing the implementation of change programmes.

5. Numbers of Judges

There are eight judges in the Supreme Court. This is the only superior appellate court in the State, which hears civil appeals from the High Court and criminal appeals from the Court of Criminal Appeal. This number of judges reflects the fact that the number of judges in Ireland is relatively fewer than in other states. In the recent European Commission for the Efficiency of Justice (CEPEJ) publication ''European Judicial Systems'', Edition 2008 (data 2006) on the efficiency and quality of justice, the number of judges in 2006 was considered. A table was published at p.108-109. It found that the number of professional judges presiding in a jurisdiction per 100,000 inhabitants varies considerably according to countries and judicial systems. Drawing from that information, the following is illustrated.

Figure 9.2

Country	Professional Judges	
	Number	Per 100,000 inhabitants
Armenia	179	5.6
Austria	1,674	20.2
Belgium	1,567	14.9
Cyprus	98	12.7
Denmark	359	6.6
Finland	901	17.1
France	7,532	11.9
Germany	20,138	24.5
Ireland	132	3.1
Italy	6,450	11.0
Luxembourg	174	36.8
Netherlands	2,072	12.7
Norway	512	10.9
Spain	4,437	10.1
Sweden	1,270	13.9
N. Ireland	371	21.3
Scotland	227	4.4
England & Wales	3,774	7.0

369 Courts Service Annual Report, 2007.

Ireland has the lowest number of judges per head of population. Further, Scotland and England, which are the other countries with relatively low ratios of judges, have significant numbers of non-professional (lay) judges. Thus there were 749 in Scotland and 28,865 lay magistrates in England and Wales. Ireland does not have the system of temporary judges or lay magistrates. It was pointed out in the recent CEPEJ publication that distinction could be made between legal systems where all judges are professional (Armenia, Austria, Cyprus, Denmark, Ireland and the Netherlands) and the systems of the United Kingdom where the role of lay judges/magistrates is essential in all legal fields.

Despite the fact that Ireland does not have lay judges (which may be a partial explanation for the relatively low number of judges in Scotland, and England and Wales where there are approximately 28,865 lay magistrates), Ireland is at the bottom of the table. Alternatively, one could view it as the top of the table, with the fewest judges per head of population. Irish judges hear more cases than judges of other countries. This is illustrated by the statistical figures given previously for comparative Supreme Courts where the Irish Supreme Court hears more cases than do other courts of final appeal.

6. Recent Developments

The judiciary and the courts staff have led significant developments in recent times, seeking to develop further efficiencies in the practice and procedure of the Superior Courts.

7. The Courts Service

The management of the courts had been unaltered since the courts were established in 1924 by the Courts of Justice Act 1924, until the establishment of the Courts Service in 1999.[370] It was found that there had been a great increase in litigation (both in volume and complexity) and that this had given rise to problems, including delays, in hearing cases. The management of the courts had not evolved sufficiently to meet the challenges.[371]

The Courts Service has proved to be a success, *inter alia* in assisting judges to modernise the practice and procedure of the courts. Keane C.J., on his retirement in 2004, in a packed Supreme Court, stated:

> **"As I look back on my 25 years as a judge I have no hesitation in singling out the establishment and development of the vibrant organisation which is the Courts Service as the most remarkable and successful development in the Irish legal system in that time. Many extraordinary efforts have made this young modern agency the success it is in just 5 years."**

8. Reform

The Courts Service has established a dedicated Reform and Development Directorate. It is tasked with modernising and improving court rules, procedures and practices.

This Directorate also gives administrative and research support to the three rules committees. This administrative support has enabled the committees to work more efficiently to develop the rules for the courts.

370 Courts Service Act, 1998.

371 Working Group on a Courts Commission. First Report. Management and Financing of the Courts, 1996. See this and other reports on www.courts.ie.

9. Information Technology

There was little or no information technology in the courts prior to the establishment of the Courts Service. The first step taken by the Courts Service was to lay cable — to establish the infrastructure. Within a year of its establishment all offices nationwide had been cabled for information technology. Local and wide area networks had been installed and made available to all staff and judges linking 50 sites nationwide into a single corporate network. Internal and internet email was established, together with website development.

New IT systems have been developed, with an interim system for the Supreme and High Court offices.

10. e-Courts

The potential for information technology to increase efficiencies in the court system is great and a number of steps have been taken to create ''e-courts''. These are essentially paperless courts where all pleadings are filed on line and the documents in court are also viewed on screens. The importance of these reforms was noted by the Committee on Court Practice and Procedure in its *27*th Interim Report.[372] The Commercial Court, the establishment of which was recommended by the Committee in that Report, is one example of the establishment of an e-court.

The development of e-courts involves the provision of facilities as well as an enhancement of the way in which practitioners work.

Some developments have already taken place. A courtroom at Bow Street has been fitted out to facilitate hearings that may require videolink evidence or other special facilities. Order 63A, r.6(1)(x) allows the Commercial Court Judge to make directions for:—

> **''The exchange of documents or information between the parties, or for the transmission by the parties to the Registrar of documents or information electronically on such terms and subject to such conditions and exceptions as a Judge may direct.''**

The case booklet — prepared for the case management conference — may also be maintained in electronic form.[373] The President of the High Court may also issue practice directions in relation to the electronic service, exchange and lodgment of documents.[374] These changes are designed to harness the advantages of information technology to improve the court system.

The Supreme Court as an e-court

The Supreme Court is moving towards operating as an e-court. Parties are currently required to lodge documentation with the Court in electronic form. A pilot system for the electronic display of evidence in the Supreme Court is being prepared. The research work in relation to appropriate software and tools that would be suitable for the electronic presentation of documents in the Supreme Court has been completed.

372 Committee on Court Practice and Procedure: *27*th Report: Commercial Court, 13 February 2002. Available from www.courts.ie.
373 Order 63A, r. 14(11).
374 Part VII of Order 63A. No such practice direction had been issued as of 27 January 2009.

11. e-Government Projects

e-Government projects have been completed. This includes putting judgments online. Judgments of the Supreme Court, Court of Criminal Appeal and High Court are available on the Courts Service website. The judgments are posted online as soon as they are approved by the judges. Court lists are available online — see the *Legal Diary* on the Courts website.[375]

12. Website

The Courts Service website has 14,000 web pages and provides 24/7 access to online information, e.g., the Legal Diary, judgments, practice directions, rules, fees, terms and sittings.

This website has won a number of awards, for example the e-Government award for *Best State Body* for 2005 and 2008. It is proposed to use this website to develop further efficiencies in the courts.

13. Video Conferencing

A major programme to roll out video conferencing facilities to a range of courtrooms is under way. The combination of an e-court and video conferencing will greatly assist the development of more efficient courts in the future. Thus, for example, a bail application may be heard by a judge sitting in Dublin, with evidence from a person in prison, obviating the need for transportation.

14. Example in Public Service

In 2008, at the opening of Blanchardstown Courthouse, the Minister for Finance, Mr. Brian Lenihan, T.D. stated:

> **"This type of reform and innovation is an example of what the Government is encouraging across the entire Public Service. My belief is that this reflects the position of the judiciary and the Courts Service as an organization, which is fully connected with the reality faced by the world in which it operates and the community it serves. Since its establishment the Courts Service has been extremely progressive in adapting to new methods and approaches."**

15. Staff of Courts Service

The staff of the Courts have led the way in developing a modern service. When the Working Group on a Courts Commission was exploring the possibilities for change (1995-1998), members of the Courts staff participated in discussions and made constructive submissions. During 1998-1999, after the Courts Service Act 1998 had been passed by the Oireachtas but before the Courts Service was established, the staff and the Trade Unions entered into full and frank discussions with P.J. Fitzpatrick, CEO, and facilitated the amalgamation of the staff from several different divisions into the single corporation of the Courts Service. This was an example of modernisation within the public service with commitment, leadership and courage from the staff. Since 1999, first under the leadership

375 www.courts.ie.

of P.J. Fitzpatrick, and currently with Brendan R. Ryan as CEO, the staff have worked to establish a world class model court service, with great success.

16. Visitors

Visitors from court administrations all over the world have travelled to Ireland to study the model of the Irish Courts Service. These include representatives of judges and court staff from Scotland, Bangladesh, Norway, Canada, Abu Dhabi, Finland, Lesotho, Bosnia and Herzegovina, Egypt, New Zealand, Vietnam and Latvia.

17. Case management

One of the most important areas for reform in the context of practice and procedure is the introduction of case management in the court system. By this system a judge actively manages the process of a case from an early stage. The international experience has been that case management is a key component of modern court reform.[376] Case management is already used in the Irish Superior Courts.

(i) Case management in the High Court

The use of case management and rules of court to assist in the efficient processing of litigation has been growing in Ireland. Perhaps the most striking example of reform in this area is the creation of the Commercial Court. As noted in Chapter 5, this is a special list in the High Court which hears commercial matters. The Commercial Court operates under special rules of procedure.[377] These rules allow the High Court judge to take control of the proceedings and case manage them so that they can be disposed of ''in a manner which is just, expeditious and likely to minimise the costs of the proceedings''.[378] This is done by means of initial direction hearings which essentially set out a timetable for pre-trial preparation by the parties and directions during the substantive proceedings also.

The key reform entailed in the rules applicable to the Commercial Court is that they involve the Commercial Court judge in proactive case management. Usually, the parties to an action bear the carriage of litigation. In the Commercial Court, control over the progress of a case rests with the Court rather than the parties. This reform of the rules is designed to reduce the length and cost of proceedings.

In the Commercial Court, the judge has the power to fix time limits to speed up the delivery of pleadings, discovery etc. The Commercial Court judge may make directions in respect of pleadings and give directions to fix certain issues to be dealt with as preliminary issues. He can also make a number of rulings in respect of evidential matters which are designed to cut down the time taken at trial. For example, he can control the admissibility and presentation of evidence pre-trial and at the trial he can limit examination-in-chief. He may also direct that documents be listed and agreed before trial. He can require that any expert witnesses meet and discuss the issues in contention before the trial. As well as making directions in respect of evidence, the Commercial Court Judge can also adjourn

376 Woolf, *Access to Justice: Interim Report on the Civil Justice System in England and Wales* (1995).
377 Order 63A R.S.C.
378 Rule 5 reads as follows:

> ''A Judge may, at any time and from time to time, of his own motion and having heard the parties, give such directions and make such orders, including the fixing of time limits, for the conduct of proceedings entered in the Commercial List, as appears convenient for the determination of the proceedings in a manner which is just, expeditious and likely to minimise the costs of those proceedings.''

proceedings to give the parties time to consider alternative dispute resolution. Such a direction may potentially lead to the settlement of a case without the need for a full trial.

To be successful, case management requires the co-operation of the parties both with the Court and with each other. The rules of the Commercial Court thus give the judge a number of powers designed to encourage such co-operation. These include the power to strike out or limit a party's case, to make conditional orders, to require explanations for default and to make costs orders. The purpose of these powers is to make case management more effective and ultimately to reduce costs.

Case management has also been introduced in the Competition List.[379] This type of reform is relevant to non-commercial matters too. Family matters are now case managed in the High Court in a manner appropriate to their subject matter. Thus there is a progressive development of case management appropriate to the type of case before the court.

(ii) Case management in the Supreme Court

It was noted earlier in this Report that greater efficiencies have been attained in the High Court in recent years through case management and the appointment of additional judges. As already discussed, however, the latter means that there are 36 High Courts processing litigation in respect of which there is only one appeal court — the Supreme Court — which can hear a maximum of two appeals at a time. This logjam would be best resolved by the creation of a Court of Appeal.

In the meantime, it should be noted that case management initiatives have been used in the Supreme Court in order to attempt to address the current situation. For example, the Chief Justice now operates two lists of appeals to the Supreme Court, the ordinary list and the priority list. The purpose of this listing is to ensure that the most urgent appeals are heard as promptly as possible. As was noted earlier in this Report, the priority list itself is now backlogged.

As well as operating a priority list, the Court has also made changes to the way in which cases before it are dealt with. Since 12 March 2007, a Practice Direction has been in force which requires that all steps in proceedings before the Court be taken within a reasonable time or the time prescribed by any Rule or Practice Direction and provides that: ''Failure to comply with a Practice Direction of the Court may affect the issue of costs''.

Other aspects of this Practice Direction include a requirement to set out grounds of appeal clearly and succinctly and to avoid unnecessary repetition or the inclusion of alternative versions of the same point of appeal.

Written submissions must be lodged by the appellant four weeks before the hearing and respondent must lodge replying submissions within one week thereafter. Electronic copies of the submissions must be sent by e-mail to the office of the Supreme Court.

Appeals are listed for mention before the Chief Justice on the Thursday of the penultimate week before the date fixed for hearing. This is for the purpose of confirming that the written submissions and any other relevant documentation have been filed in advance of the hearing.

379 See Rules of the Superior Courts (Competition Proceedings), 2005 (S.I. 130 of 2005).

The purpose of all of these procedural initiatives is to ensure that appeals are dealt with as efficiently as possible.

(iii) The future of case management

It is clear from international and Irish experience that case management represents one of the primary methods of improving the efficiency of court practice and procedure. It is likely that in the future this approach will play an even more significant part in the practice of Irish law. The Working Group approves of the use of case management and supports its extension in the future. However, it is also important to note that case management cannot be successfully undertaken without adequate judicial resources. It is a time-intensive process which requires a judge to become involved at an early stage of the proceedings and to control the pace of the proceedings. Judges cannot manage cases if they do not have sufficient time available to devote to supervising each case. In particular, it would not be feasible to adopt a case management approach where a judge has a significant caseload to be processed in a short period of time. It is thus essential that any extension of the case management system be supported with the appropriate resources to operate it effectively.

18. The Superior Courts Rules Committee

The Superior Courts Rules Committee is the body charged under statute with making, annulling or altering rules of court, with the concurrence of the Minister for Justice, Equality and Law Reform, in respect of pleading, practice and procedure generally in civil cases before the Supreme Court and High Court and in criminal cases before the latter Court or the Court of Criminal Appeal. The Committee has, in addition, a general brief to report to the Minister on what amendments or alterations should, in its opinion, be made in the practice, procedure, or administration of the courts concerned with a view to the improvement of the administration of justice. The Committee is chaired by the Chief Justice and composed of members of the judiciary and members of the Supreme and High Court nominated, respectively, by the Chief Justice and the President of the High Court, as well as nominees of both branches of the legal profession, the Attorney General and the Chief Executive Officer of the Courts Service or their representatives, and the Registrar of the Supreme Court. Most recently, and on foot of recommendations of the Committee on Court Practice and Procedure in its 28th Interim Report, the arrangements as to administrative support for the Superior Courts Rules Committee were revised by amendments introduced by the Civil Law (Miscellaneous Provisions) Act, 2006, the Courts Service being given the task of providing secretarial, clerical and administrative support to that Committee and the Rules Committees for the Circuit Court and District Court.[380] These services to the Rules Committees have been unified within a Rules Committees Support Unit within the Directorate of Reform and Development.

The Superior Courts Rules Committee has been engaged in an extensive programme of procedural modernisation and reform in recent years. Perhaps the most notable initiatives introduced in that period were the rules establishing the Commercial Court[381] and the Competition List[382] and prescribing the case management regimes for the areas of litigation they cover, and the rules governing personal injuries procedure in implementation of the

380 Section 6(2)(ga) of the Courts Service Act 1998 as inserted by section 18 of the Civil law (Miscellaneous Provisions) Act 2008. See also sections 20, 21 and 22 of the 2008 Act.
381 Rules of the Superior Courts (Commercial Proceedings), 2004 (S.I. 2 of 2004).
382 Rules of the Superior Courts (Competition Proceedings), 2005 (S.I. 130 of 2005).

Personal Injuries Assessment Board Act, 2003,[383] facilitating accompaniment of family law litigants and reporting of family law proceedings under the Civil Liability and Courts Act, 2004,[384] modernising the procedure in respect of proceedings concerning arbitrations,[385] simplifying the procedures for statutory applications and appeals,[386] responding to the recommendations of the Legal Costs Working Group[387] and facilitating digital audio recording of proceedings.[388] Among measures recently approved by the Rules Committee for concurrence by the Minster are those to enable implementation of the Criminal Justice (Mutual Assistance) Act, 2008 and to facilitate discovery of electronically stored information.

19. The Committee on Court Practice and Procedure

The Committee on Court Practice and Procedure was established by the Minister for Justice on 13 April 1962 with the following remit:

> **''(a) To inquire into the operation of the courts and to consider whether the cost of litigation could be reduced and the convenience of the public and the efficient dispatch of civil and criminal business more effectively secured by amending the law in relation to the jurisdiction of the various courts and by making changes, by legislation or otherwise, in practice and procedure;**
>
> **(b) to consider whether, and if so, to what extent, the existing right to jury trial in civil actions should be abolished or modified;**
>
> **(c) to make interim reports on any matter or matters arising out of the Committee's terms of reference as may from time to time appear to the Committee to merit immediate attention or to warrant separate treatment.''**

The terms of reference of the Committee were subsequently extended by the Minister in July 1973 to include the making of ''recommendations on such matters (including matters of substantive law) as the Minister for Justice may from time to time request the Committee to examine.'' The Committee is composed of a combination of judges, members of the legal profession and individuals from business and public life, and is chaired by a judge of the Supreme Court.

Since it was established, the Committee has produced 29 reports on various aspects of court procedure, jurisdiction and other issues, whether at the request of the Minister or on its own initiative. The most recent reports recommended the establishment of a Commercial Court in Ireland (27th Interim Report), the development of the working arrangements for the Courts Rules Committees (28th Interim Report) and reforms of practice and procedure relating to personal injuries litigation (29th Interim Report).

20. The Directorate of Reform and Development, Courts Service

The Courts Service Act, 1998 gave to the Courts Service an important advisory role not previously enjoyed by the court administration. Section 6(2) of the 1998 Act, in enumerating

383 Rules of the Superior Courts (Personal Injuries Assessment Board Act, 2003), 2004 (S.I. 517 of 2004).
384 Rules of the Superior Courts (section 40, Civil Liability and Courts Act 2004), 2005 (S.I. 247 of 2005).
385 Rules of the Superior Courts (Arbitration), 2006 (S.I. 109 of 2006).
386 Rules of the Superior Courts (Statutory Applications and Appeals), 2007 (S.I. 14 of 2007).
387 Rules of the Superior Courts (Costs), 2008 (S.I. 12 of 2008).
388 Rules of the Superior Courts (Recording of Proceedings), 2008 (S.I. 325 of 2008).

the specific powers which the Courts Service was to have to enable it to carry out its functions under s. 5, provided that the Courts Service could "make proposals to the Minister in relation to the distribution of jurisdiction and business among the courts and matters of procedure".[389] This provision, for the first time, has given a formal role to the courts administration in fostering change in both in the structure of our courts system and in court process, civil and criminal. The role coexists with that of the Rules Committees referred to above, but is complemented by the granting to the Courts Service of representation on each of those committees.[390]

The Directorate of Reform and Development was established in March 2002 as a means of initiating and supporting jurisdictional and procedure reform initiatives, whether rooted in court rules, practice directions or primary legislation. The Director of Reform and Development, as delegate of the Chief Executive, represents the Courts Service on the Rules Committees of the Superior Courts and the Circuit Court and another officer of the Directorate sits on the District Court Rules Committee.

The Directorate's reform activity may be categorised in terms of its court rules initiatives, its proposals for primary legislative reform and its participation in or support of committees engaged in legal reform.

(i) Court procedural initiatives

In the area of court procedure, the Directorate has, since its establishment, initiated court rules amendment proposals considered or adopted by the Superior Courts. Those affecting the jurisdiction of the Superior Courts have included:

1. Court rules and procedure in respect of fund management and accounting in the High Court, facilitating computerisation of ledgers and electronic transactions, modernising business processes, implementation of new investment policy, new governance and accountability arrangements,
2. The Proceeds of Crime and Financing of Terrorism Rules,[391]
3. Various rules to facilitate operation of EU Directives in the area of judicial cooperation in civil and commercial proceedings,
4. Rules to implement the Criminal Law (Insanity) Act, 2006 concerning assessment of fitness to plead and treatment of mentally ill people accused of crimes,
5. Rules to facilitate implementation of the Criminal Justice Acts of 2006 and 2007 concerning bail and operation of suspended sentences.

(ii) Proposals for primary legislative reform

The Directorate regularly furnishes proposals concerning all court jurisdictions relating to court jurisdiction, operations and procedure to the Department of Justice, Equality and Law Reform for incorporation in primary legislation. By way of example, the Civil Law (Miscellaneous Provisions) Act, 2008 contains various provisions initiated by the Directorate including: provisions on court fees,[392] qualifications for senior court officer posts,[393] service

389 Section 6(2)(f), Courts Service Act 1998.
390 Section 30, Courts Service Act 1998.
391 Rules of the Superior Courts (Proceeds of Crime and Financing of Terrorism), 2006.
392 Section 9 substitutes a new section 65 of the Courts of Justice Act 1936.
393 Sections 15 and 29.

of court documents,[394] provision by the Courts Service of support for court rules committees (see above), signing of District Court orders and warrants,[395] videoconferencing in civil proceedings (on foot of the recommendations of the report of the Committee on Videoconferencing),[396] assistance to blind or partially sighted party or legal representatives,[397] exercise of powers by County Registrars concurrently,[398] and access by family proceedings reporters to pleadings.[399]

(iii) Legal reform bodies and projects

The Directorate has participated in or collaborated with various bodies and committees concerned with reform of civil and criminal law, both procedural and substantive. On its establishment, the Directorate provided rapporteurship and support services to the Working Group on Jurisdiction of the Courts in producing its Report on Criminal Jurisdiction in May 2003, some of the recommendations of which were implemented in the Criminal Justice Act, 2006.[400] The Director of Reform and Development is a member of the Company Law Review Group and was active on that Group's behalf in overseeing preparation of the provisions concerning insolvency of the Scheme of Bill consolidating and reforming the Companies Acts. The Committee to review Jury Selection and Service established by the Chief Executive of the Courts Service made recommendations regarding selection and eligibility for and disqualification from jury service, information and facilities for jurors, separation of jurors and ancillary issues, some of which were implemented in Part 6 of the Civil Law (Miscellaneous Provisions) Act, 2006.

21. The Legal Costs Working (Haran) Group and the Legal Costs Implementation Advisory Group (Miller)

The Haran group was established to examine the levels and methods of charging legal costs and fees and recommend initiatives or changes which ''would lead to, or assist in, a reduction of costs associated with civil litigation, [and] would improve accessibility to justice and provide for greater transparency.''[401] It reported in December 2005. An Implementation Group was established to facilitate implementation of its recommendations and it reported in November 2006. Some of the recommendations of these bodies were incorporated in the Rules of the Superior Courts (Costs), 2008 (S.I. 12 of 2008) and a Scheme of a Costs Bill is in preparation to give effect to other of their recommendations.

22. The Law Reform Commission

The Law Reform Commission has examined various areas that have relevance to the practice and procedure of the Superior Courts. In 2005, the Commission agreed to begin a Joint Project with the Courts Service and the Department of Justice, Equality and Law Reform to consider consolidating into a single Courts Act the existing legislative provisions which describe the essential jurisdiction of the courts. The Law Reform Commission has since published a Consultation Paper on Consolidation and Reform of the Courts Acts,[402] which, in addition to consolidation, made provisional recommendations for reform of

394 Sections 16 and 24.
395 Section 23.
396 Section 26. The Committee on Videoconferencing reported in January 2005.
397 Section 28.
398 Section 30.
399 Section 31.
400 Sections 21 and 22 of that Act.
401 Quoted from the terms of reference set out at page 7 of the Group's report.
402 July 2007 (LRC CP46-2007).

operation of the courts. A draft Bill is currently in preparation as part of the Final Report of the Commission. More recently, the Law Reform Commission published a Consultation Paper on Alternative Dispute Resolution.[403]

23. The Irish Sentencing Information System (ISIS)

The Irish Sentencing Information System (ISIS) was established by the Courts Service Board to plan for and provide information on sentencing. The steering committee for the project, under the chairmanship of Mrs. Justice Susan Denham of the Supreme Court, comprises a judge from the High, Circuit and District Courts and a university law professor with expertise in sentencing law.

ISIS involves an examination of the feasibility of providing a computerised information system on sentencing. The objective is to enable a judge, by entering relevant criteria on the database, to access information about the range of sentences and other penalties imposed for particular types of offences in previous cases. The Committee established a pilot project in June 2006 in Dublin Circuit Criminal Court. A further pilot project commenced in Cork Circuit Court in April 2008. A District Court pilot project commenced in January 2009. A prototype database is being developed to store the information on sentencing for subsequent retrieval and searching. It is hoped that the first pilot projects will go ''live'' in 2009.

24. The Family Law Pilot Reporting Project

This project was undertaken by Dr. Carol Coulter at the request of the Courts Service, availing of section 40(3) of the Civil Liability and Courts Act, 2004 permitting the reporting of family proceedings subject to certain conditions. In her final report on the project of October 2007, Dr. Coulter made various observations and recommendations on the Family Law System.[404] A committee was established by the Courts Service Board under the chairpersonship of Mr. Justice Kearns of the Supreme Court to (a) consider Dr. Coulter's recommendations in so far as they relate to the Courts Service and make proposals concerning their implementation, (b) consult with the Presidents and Judges of the courts concerning the recommendations and make such proposals arising from the consultations as are considered appropriate and (c) oversee the Family Law Reporting Project for the next 12 months and review at the end of the 12 month period. It is understood that the committee will furnish its report early in 2009.

25. Court Building Programme

The physical infrastructure of the court system inevitably has an impact on its effectiveness. If there are not enough courtrooms, hearings cannot take place. Great improvements have been made in this area in recent years. The new Criminal Courts Complex is due to open in 2010. This will assist in the efficient processing of criminal matters and will free up space in the Four Courts complex for other courts. This will enable more court sittings.

The Courts Service has also undertaken an extensive Building Programme in relation to provincial courts. See Appendix G. Many courts outside Dublin have been either renovated or newly constructed. This has been of considerable benefit to the Superior Courts also, as it has permitted the High Court to hold more sittings out of Dublin. The High Court now

403 July 2008 (LRC CP-50 2008).
404 See part 2 of the Report.

regularly hears matters outside Dublin, which enables the faster listing of cases for hearing. This has further reduced delays in the hearing of cases in the High Court.

B. Conclusions and Recommendations

It can be seen from the foregoing that a great deal of work on the court systems has already been undertaken to reform the practice and procedures of the Superior Courts.

The Working Group recommends the ongoing development and implementation of programmes of work to achieve greater efficiency and effectiveness in the courts, in particular in relation to information technology, e-courts and case management.

The establishment of a Court of Appeal is one reform which is vital for the Superior Courts to function efficiently into the future. The establishment of such a court would alleviate the backlog of cases before the Supreme Court and would safeguard against the build up of a similar backlog again in the future. The impact of this reform would be immediate and out of proportion to the relatively low demands it would make on resources.

Appendices

APPENDIX A

Advertisement for Submissions

Invitation for Submissions

Working Group on a Court of Appeal

The Government has established a Working Group under the chairmanship of the Honourable Mrs. Justice Susan Denham, Judge of the Supreme Court, to:

(a) review and consider the necessity for a general Court of Appeal for the purposes of processing certain categories of appeals from the High Court

(b) address and consider such legal changes as are necessary for the purposes of establishing such a Court of Appeal, and

(c) make such other recommendations as are appropriate for the purposes of ensuring greater efficiencies in the practice and procedures of the Superior Courts.

The Group now invites written submissions from any interested person, organisation or group in relation to the matters set out above. Submissions should be confined to these matters.

The deadline for receipt of submissions is Thursday, 12th April 2007.

All submissions received will be subject to the provisions of the Freedom of Information Act 1997, as amended.

Submissions in writing can be forwarded to: **Ms. Helen Priestley, Working Group on a Court of Appeal, Courts Service, 15/24 Phoenix Street North, Smithfield, Dublin 7.**
Tel: (01) 8886462
Or emailed to: CourtofAppealWG@courts.ie

APPENDIX B

Persons or Groups who Made Submissions

The following sent submissions to the Working Group following the publication of advertisements in the national newspapers on 14 March 2007:

1. The Director of Public Prosecutions
2. The Courts Service
3. Maurice Fitzgerald
4. Paul McDonald
5. Joseph B. Mannix

APPENDIX C

Analysis by the Hon. Mr. Justice Geoghegan of cases before the Supreme Court in the Legal Year 1 October 2005 – 31 July 2006

A general analysis was undertaken by the Hon. Mr. Justice Geoghegan, Judge of the Supreme Court, of some of the cases which were ready for hearing in the following terms in the Legal Year from October 2005 to July 2006, although the cases may not have been heard, or judgment may not have been given, in those terms. It was an exercise to assess which appeals could have been conveniently dealt with by a Court of Appeal, if it had existed, and which could have been appropriate for the Supreme Court. While the analysis was subjective, and undertaken to give an overview of the situation, it was a most useful exercise. In the left hand column are the cases for the Supreme Court. In the right hand column are cases which would go to a Court of Appeal.

MICHAELMAS TERM 2005

SUPREME COURT	COURT OF APPEAL
Curtin v. Dáil Éireann & ors.	Masterson v. DPP
Harris, Robert v. Quigley J.J. & anor.	M. v. DPP
Garvey, Alan v. Minister for Justice Equality & Law Reform & The Governor of Mountjoy Prison & the Attorney General, Notice Party	G. v. DPP
Ranbaxy Laboratories Ltd. & ors. v. Warner-Lambert Company	H. v. DPP
Parolya & anor v. Minister for Justice Equality & Law Reform	DPP v. Reilly, John
McKinley, Nigel v. the Information Commissioner	Dunphy, Sabrina (late a minor) v. DPP
Foy, Lydia v. t-Árd Claraitheoir & the Attorney General	Newmarket Co-operative Creameries Limited and Newmarket Retail Limited (formerly known as Newmarket Research Limited) v. Timothy Lucey, James M. Lucey and Mary Singleton (practising under the style of James Lucey & Sons, Solicitors)
Gilligan, John v. Special Criminal Court & ors.	Sugg, Albert v. O'Keeffe, Shaun & anor.

MICHAELMAS TERM 2005—*continued*

SUPREME COURT	COURT OF APPEAL
Adebayo; Igwe; Jacob & ors; Odunukan v. Commissioner of an Garda Síochána & ors.	Guckian, Michelle v. Genport Ltd t/a Sachs Hotel
DPP v. Redmond, Sean	Lynch, Patrick v. English, Terence & ors.
Advanced Totes Ltd v. Bord na gCon and Notice Party	Palmer, Thomas & anor. v. Doherty, Patrick
DPP v. Cronin Mark	Birem (minor) v. Carrigan
	Ramseyer, Nuala v. Mahon, Brian
	Stynes, Stephen v. Kielty, Ciaran
	Hedderman, Sean v. McGrath, Patrick
	King, William & ors. v. Aer Lingus plc
	Breen, Lauren (minor) v. Breen, Ann & MIBI
	Kehoe, Cecilia v. Barry, Anna
	Finn, Bridie v. McManus, Frank & ors.
	O'Maoileoin, Michael B. v. The Official Assignee
	M. v. DPP
	K. v. K.

HILARY TERM 2006

SUPREME COURT	COURT OF APPEAL
Akinyemi, Grace v. The Minister for Justice, Equality and Law Reform	Payne, David v. Shovlin, Phil; McDonald, Ken & anor.
Wildgust, Harold & anor. v. The Governor & Company of the Bank of Ireland & anor.	O'Brien, Denis v. Mr. Justice Moriarty, Sole Member of Tribunal of Inquiry
C. v. Ireland, AG & DPP	R. family appeals
D.P.P. v. O'S	W. v. DPP & The President of the Circuit Court
S. & ors. v. The Minister for Justice, Equality and Law Reform	K. v. DPP
H. v. DPP	Lett & Co. Ltd. v. Wexford Borough Council, Minister for Communications, Marine, Irl & AG
DPP v. Kelly, Martin	G. v. DPP
McFarlane, Brendan v. DPP & The Members of the Special Criminal Court (Notice Parties)	B. v. DPP
1. Opesyitan, Alaba & ors. 2. Fontu 3. Atanasov v. Refugee Appeals Tribunal & ors.	O'Sullivan (a minor) suing by her father and next friend Colman O'Sullivan v. Kiernan & anor.
The Attorney General v. Heywood, Robert Lloyd Heywood, Robert Lloyd v. Rice Walter	Dwyer, Roger v. Bus Atha Cliath/Dublin Bus

HILARY TERM 2006—*continued.*

SUPREME COURT	COURT OF APPEAL
Delahunty, Margaret v. Player & Wills (Ireland) Limited & ors.	Rock, Dermot v. Dublin City Council & ors.
O. D. v. the Director of Public Prosecutions & ors. O. C. v. same	Morrison Outlets (Rathdowney) Ltd. v. Abbeyleix Catering Co. Ltd & ors.
Sheridan, Richard v. Kelly, Patrick & anor.	West Donegal Land League Ltd v. Udaras na Gaeltachta & ors.
	Scrollside Ltd t/a Zed FM v. Broadcasting Commission of Ireland
	Hussey, Sean v. Clondalkin Concrete Ltd & ors.
	Carroll, Rosemary v. Tarpey, Veronica & ors.
	Crumlin Investments Limited v. RTV Limited
	Mulligan, Laurence v. Laurence Mechanical Services Ltd & anor. & Amlac Ltd. Third Party
	Corcoran, Donal v. Holmes, Gordon & anor.
	M. v. DPP
	Glavey, Thomas v. Connolly, Sean & anor
	Clancy v. DPP
	Q. v. The Judge of the Northern Circuit & the DPP
	R. v. DPP
	Weldon Natasha (minor) v. Northern Area Health Board & ors.
	Sherlock, Thomas v. McNamara, Kim
	Guilfoyle, Barry v. Farm Development Co-Operative Ltd
	McLoughlin, Michael & anor. v. Tipperary North Riding County Council & Minister for the Environment
	Byrne, Peter v. John S. O'Connor & Co. & by order Admiral Underwriting Agencies (Irl) Ltd
	T. v. DPP
	Kenny, James v. Cowley, John
	O'Brien, Denis v. Mirror Group Newspapers & ors.

EASTER TERM 2006

SUPREME COURT	COURT OF APPEAL
Lynch, Enda v. His Hon. Judge Carol Moran & DPP	Attorney General v. Skripakova, T
Ryanair Ltd v. Labour Court & IMPACT, Notice Party	A.G. (at the relation of O. F. Fishing Ltd) v. Port of Waterford Company
Shortt, Francis v. Commissioner of An Garda Síochána & ors.	Kearns, Ena v. Gleneagle Hotel (Killarney) Ltd.
O. D. v. The Director of Public Prosecutions & ors. O. C. v. same	McGrath, Michael v. Irish Ispat Ltd. (In vol. liq) formerly Irish Steel Ltd.
Sweeney, Samantha v. Irl & Ag & DPP & Judge Catherine Murphy Notice Parties	H. v. DPP & District Judge MacGruairc
Short, Constance & ors. v. Irl & AG & British Nuclear Fuels Plc	In Re: Salthill Properties Ltd (In Rec) & Cos Act Salthill Properties Limited (In Rec) v. Porterridge Trading Limited
DPP v. Malone, Peadar (unless Act is amended to allow C.S. to go to C.A.	AXA Insurance Ltd v. Barrett, Terence
DPP v. Gilligan, John	Ryan, Larry Hugh v. Minister for Defence & ors.
	Sheehan, Derek v. Mid Western Health Board & Dr. Abid Khattak
	O'Brien, Denis v. Mr. Justice Moriarty, Sole Member of Tribunal of Inquiry

TRINITY TERM 2006

SUPREME COURT	COURT OF APPEAL
DPP v. P.O'C	Akinyemi, Grace v. The Minister for Justice, Equality and Law Reform
Albatros Feeds Limited v. Minister for Agriculture and Food Irl. & A.G.	Noonan, Veronica (AKA Veronica Hoban) v. DPP
Clinton, Paul v. An Bord Pleanála, Dublin City Council and by order the Attorney General	Fitzpatrick, Orla v. Leas Ceann Comhairle & ors.
The Competition Authority v. O'Regan, John & ors.	Cremin, Sean & ors. v. Lynch, Sean
Riordan, Denis v. Government of Ireland & ors.	Orji, Stephen & Ors v. Minister for Justice, Equality and Law Reform & ors.
	JK v. DPP
	Cotter v. Acarco Ltd & ors.

APPENDIX D

Cases before the Court of Criminal Appeal in Legal Year 1 October 2005 – 31 July 2006

In analysing the work of a Court of Appeal (which would include both civil and criminal work) it is useful to consider the number of cases before the Court of Criminal Appeal. Below are listed the cases which were heard in the Legal Year 2005/2006.

Michaelmas Term '05

Povey (Court Martial Appeal)
D.P.P. -v- Walsh
D.P.P. -v- Conway
D.P.P. -v- B
D.P.P. -v- Rogers
D.P.P. -v- F
D.P.P. -v- Donoghue
D.P.P. -v- Daly
D.P.P. -v- Kirwan
D.P.P. -v- H
D.P.P. -v- Keith Land
D.P.P. -v- Fee
D.P.P. -v- McKenna
D.P.P. -v- Kirwan
D.P.P. -v- McKevitt
D.P.P. -v- Wildes
D.P.P. -v- M
D.P.P. -v- D
D.P.P. -v- Booth
D.P.P. -v- O'Driscoll
D.P.P. -v- Gately
D.P.P. -v- McG
D.P.P. -v- Reilly
D.P.P. -v- Costigan
D.P.P. -v- McKevitt

D.P.P. -v- McAuley
D.P.P. -v- McKevitt
D.P.P. -v- Jie
D.P.P. -v- O'Driscoll
D.P.P. -v- Larkin
D.P.P. -v- Varian
D.P.P. -v- Murphy
D.P.P. -v- Maher
D.P.P. -v- Whelan
D.P.P. -v- D
D.P.P. -v- Houlihan
D.P.P. -v- Swan
D.P.P. -v- Kelly
D.P.P. -v- Geoghegan
D.P.P. -v- Brennan
D.P.P. -v- Finnamore
D.P.P. -v- McG
D.P.P. -v- Tanner
D.P.P. -v- Binead
D.P.P. -v- Donohue
D.P.P. -v- Gately
D.P.P. -v- N
D.P.P. -v- Costigan
D.P.P. -v- M
D.P.P. -v- Jie
D.P.P. -v- Jones
Brennan (Court Martial Appeal)
D.P.P. -v- Matthews
D.P.P. -v- McEvoy
D.P.P. -v- Murphy
D.P.P. -v- McGrath
D.P.P. -v- Rogers
D.P.P. -v- Melia
D.P.P. -v- W
D.P.P. -v- B
D.P.P. -v- R
D.P.P. -v- W
D.P.P. -v- Crowley
D.P.P. -v- D
D.P.P. -v- D
D.P.P. -v- Fraher
D.P.P. -v- Booth
D.P.P. -v- McD
D.P.P. -v- Binead
D.P.P. -v- Baker
D.P.P. -v- Matthews
D.P.P. -v- O'Driscoll
D.P.P. -v- Curtis
D.P.P. -v- S
D.P.P. -v- McKevitt
Brennan (Court Martial Appeal)

D.P.P. -v- Jones
D.P.P. -v- Delaney
D.P.P. -v- Gordon
D.P.P. -v- Spicer
D.P.P. -v- Fay
D.P.P. -v- W
D.P.P. -v- Wilson
D.P.P. -v- Scannell
D.P.P. -v- O'Dwyer
D.P.P. -v- McKeever
D.P.P. -v- White
D.P.P. -v- M
D.P.P. -v- Manning
D.P.P. -v- McMahon
D.P.P. -v- Lyons
D.P.P. -v- Lane
D.P.P. -v- Barretto
D.P.P. -v- Bowers
D.P.P. -v- Karpivic
D.P.P. -v- McKeever
D.P.P. -v- B
D.P.P. -v- N
D.P.P. -v- Matthews
D.P.P. -v- Wilson
D.P.P -v- White
D.P.P. -v- Manning
D.P.P. -v- Rath
D.P.P. -v- Whelan
D.P.P. -v- Kirby

Hilary Term '06

D.P.P. -v- O'R
D.P.P. -v- B
D.P.P. -v- O'R
D.P.P. -v- M
D.P.P. -v- Binead
D.P.P. -v- Doyle
D.P.P. -v- Shevlin
D.P.P. -v- Swan
D.P.P. -v- Frahill
D.P.P. -v- Kelly
D.P.P. -v- Manning
D.P.P. -v- C
D.P.P. -v- Bowes
D.P.P. -v- M
D.P.P. -v- Murphy
D.P.P. -v- Farrell
D.P.P. -v- Cahill
D.P.P. -v- Byrne

D.P.P. -v- Dowdall
D.P.P. -v- Quigley
D (Court Martial Appeal)
D.P.P. -v- Wilson
D.P.P. -v- L
D.P.P. -v- Cleary
D.P.P. -v- Dundon
D.P.P. -v- McCarthy
D.P.P. -v- C
D.P.P. -v- Kelly
D.P.P. -v- Birney
D.P.P. -v- Brennan
D.P.P. -v- Gilson
D.P.P. -v- O'Donnell
D.P.P. -v- Troy
D.P.P. -v- Birney
D.P.P. -v- Brennan
D.P.P. -v- Gilson
D.P.P. -v- O'Donnell
D.P.P. -v- Troy
D.P.P. -v- McCarthy
D.P.P. -v- O'Driscoll
D.P.P. -v- F
D.P.P. -v- Tanner
D.P.P. -v- C
D.P.P. -v- Lynch
D.P.P. -v- Fitzgerald
D.P.P. -v- Gonnolly
D.P.P. -v- Crean
D.P.P. -v- O'Driscoll
D.P.P. -v- McNevin
D.P.P. -v- K
D.P.P. -v- Loving
D.P.P. -v- McMullen
D.P.P. -v- Dolan
D.P.P. -v- Staunton
D.P.P. -v- F
D.P.P. -v- O'Reilly
D.P.P. -v- Maguire
D.P.P. -v- D
D.P.P. -v- Carroll
D.P.P. -v- Christie
D.P.P. -v- Allingham
D.P.P. -v- Barry
D.P.P. -v- McG
D.P.P. -v- Dundon
D.P.P. -v- McCarthy
D.P.P. -v- O'Connor
D.P.P. -v- O'Brien
D.P.P. -v- McDonald
D.P.P. -v- D

D.P.P. -v- Walsh
D.P.P. -v- Dudaev
D.P.P. -v- Murphy
D.P.P. -v- Varian
D.P.P. -v- O'Connell
D.P.P. -v- Howard
D.P.P. -v- Staunton
D.P.P. -v- Murray
D.P.P. -v- Jackson
D.P.P. -v- McCann
D.P.P. -v- McEvoy
D.P.P. -v- Gregory
D.P.P. -v- P
D.P.P. -v- Mulvey
D.P.P. -v- O'Reilly
D.P.P. -v- Mason
D.P.P. -v- McGinley
D.P.P. -v- Kelly
D.P.P. -v- Dundon
D.P.P. -v- Ryan
D.P.P. -v- McCarthy
D.P.P. -v- McCarthy
D.P.P. -v- McCarthy
D.P.P. -v- Sheehan
D (Court Martial Appeal)
D.P.P. -v- Bullman
D.P.P. -v- Cleary
D.P.P. -v- O'R
D.P.P. -v- Holland
D.P.P. -v- O'N
D.P.P. -v- B
D.P.P. -v- R
D.P.P. -v- McKeever
D.P.P. -v- Cawley
D.P.P. -v- McInerney
D.P.P. -v- Harris
D.P.P. -v- Norton
D.P.P. -v- Murphy
D.P.P. -v- O'Connor
D.P.P. -v- Rattigan
D.P.P. -v- Loving
D.P.P. -v- O'Hegarty
D.P.P. -v- Dempsey
D.P.P. -v- Dempsey
D.P.P. -v- McD
D.P.P. -v- S
D.P.P. -v- Holland
D.P.P. -v- F
D.P.P. -v- Murphy
D.P.P. -v- C
D.P.P. -v- Morgan

D.P.P. -v- Kinsella
D.P.P. -v- D
D.P.P. -v- Reilly
D.P.P. -v- Reilly
D.P.P. -v- Holland
D.P.P. -v- Delahunty
D.P.P. -v- Percival
D.P.P. -v- Potts
D.P.P. -v- Walsh
D.P.P. -v- Stapleton
D.P.P. -v- Sheehan
D.P.P. -v- Rogers
D.P.P. -v- Potts
D.P.P. -v- Percival
D.P.P. -v- Delahunty
D.P.P. -v- Manning
D.P.P. -v- Gleeson
D.P.P. -v- S
D.P.P. -v- Murray
D.P.P. -v- K
D.P.P. -v- S
D.P.P. -v- Murray
D.P.P. -v- Deegan
D.P.P. -v- Jordan
D.P.P. -v- Kenny
D.P.P. -v- Doyle
D.P.P. -v- Fraher
D.P.P. -v- Walsh
D.P.P. -v- McGinty
D.P.P. -v- Ryan
D.P.P. -v- McCarthy
D.P.P. -v- McCarthy
D.P.P. -v- McCarthy
D.P.P. -v- Sheehan
D.P.P. -v- Mullally
D.P.P. -v- McMahon
D.P.P. -v- Goodison
D.P.P. -v- Coyne
D.P.P. -v- Balogun
D.P.P. -v- Kirby
D.P.P. -v- D
D.P.P. -v- Keogh
D.P.P. -v- Barry
D.P.P. -v- Butler
D.P.P. -v- Long
D.P.P. -v- Finlay
D.P.P. -v- Mark Tallant
D.P.P. -v- O'Flynn Construction Ltd.
D.P.P. -v- Reilly
D.P.P. -v- Rattigan
D.P.P. -v- Corcoran

D.P.P. -v- Egezarov
D.P.P. -v- C
D.P.P. -v- S
D.P.P. -v- Long
D.P.P. -v- Jancauskiene
D.P.P. -v- Deery
D.P.P. -v- Mooney
D.P.P. -v- McMahon
D.P.P. -v- Kelly
D.P.P. -v- Leahy
D.P.P. -v- Barry
D.P.P. -v- Galvin
D.P.P. -v- Coleman

Easter Term '06

D.P.P. -v- Mullally
D.P.P. -v- O'R
D.P.P. -v- Mc Cormack
D.P.P. -v- Fox
D.P.P. -v- Dudaev
D.P.P. -v- F
D.P.P. -v- Costigan
D.P.P. -v- Cleary
D.P.P. -v- D
D.P.P. -v- F
D.P.P. -v- Kelly
D.P.P. -v- Mullally
D.P.P. -v- Drohan
D.P.P. -v- C
D.P.P. -v- Rice
D.P.P. -v- Bingham
D.P.P. -v- McDonagh
D.P.P. -v- Leahy
D.P.P. -v- Foley
D.P.P. -v- D
D.P.P -v- McKeever
D.P.P. -v- Birney
D.P.P. -v- Brennan
D.P.P. -v- Gilson
D.P.P. -v- O'Donnell
D.P.P. -v- Troy
D.P.P. -v- C
D.P.P. -v- Drohan
D.P.P. -v- D
D.P.P. -v- Wallace
D.P.P. -v- Power
D.P.P. -v- C
D.P.P. -v- McEvoy
D.P.P. -v- Jordan

D.P.P. -v- Deegan
D.P.P. -v- O'R
D.P.P. -v- Pearson
D.P.P. -v- P
D.P.P. -v- Newell
D.P.P. -v- C
D.P.P. -v- McMahon
D.P.P. -v- Casey
D.P.P. -v- Nolan
D.P.P. -v- Cunningham
D.P.P. -v- Woods
D.P.P. -v- Heaney
D.P.P. -v- Mc Guinness
D.P.P. -v- Fleming
D.P.P. -v- M
D.P.P. -v- O'Mahony
D.P.P. -v- Gilligan
D.P.P. -v- Crossley
D.P.P. -v- Crossley
D.P.P. -v- Duffy
D.P.P. -v- McMahon
D.P.P. -v- Lambe
D.P.P. -v- Geraghty
D.P.P. -v- Casey

Trinity Term '06

D.P.P. -v- Gilligan
D.P.P. -v- O'R
D.P.P. -v- Crossley
D.P.P. -v- Crossley
D.P.P. -v- Duffy
D.P.P. -v- Duignan
D.P.P. -v- Humphries
D.P.P. -v- Farrell
D.P.P. -v- Brennan
D.P.P. -v- Mullen
D.P.P. -v- O'Connor
D.P.P. -v- Geoghegan
D.P.P. -v- Melia
D.P.P. -v- Maguire
D.P.P. -v- McCarthy
D.P.P. -v- Mullen
D.P.P. -v- O'Connor
D.P.P. -v- Geoghegan
D.P.P. -v- Melia
D.P.P -v- S
D.P.P. -v- Tudor
D.P.P. -v- Byrne
D.P.P. -v- Meehan

D.P.P. -v- Smith
D.P.P. -v- Meehan
D.P.P. -v- Jordan
D.P.P. -v- Rogers
D.P.P. -v- Smith
D.P.P. -v- Murphy
D.P.P. -v- Jones
D.P.P. -v- O'Mahony
D.P.P. -v- Jones
D.P.P. -v- Kearns
D.P.P. -v- Ward
D.P.P. -v- Collins
D.P.P. -v- McG
D.P.P. -v- Maguire
D.P.P. -v- McCarthy
D.P.P. -v- McD
D.P.P. -v- K.
D.P.P. -v- O'Sullivan
D.P.P. -v- Balogun
D.P.P. -v- McGee
D.P.P. -v- O'Donoghue
D.P.P. -v- Binead
D.P.P. -v- Donohoe
D.P.P. -v- Power
D.P.P. -v- McD
D.P.P. -v- Maguire
D.P.P. -v- McCarthy
D.P.P. -v- Gerard F.May Roofing Ltd.
D.P.P. -v- Comerford
D.P.P. -v- O'Shea
A.G. -v- Araujo
D.P.P. -v- C
D.P.P. -v- Varian
D.P.P. -v- O'Driscoll
D.P.P. -v- Murphy
D.P.P. -v- O'Dwyer
D.P.P. -v- Larkin
D.P.P. -v- Fee
D.P.P. -v- McKenna
D.P.P. -v- Sweeney
D.P.P. -v- Beasley
D.P.P. -v- L
D.P.P. -v- Smith
D.P.P. -v- Matthews
D.P.P. -v- McKevitt
D.P.P. -v- Hinchon
D.P.P. -v- Kenny
D.P.P. -v- Brady
D.P.P. -v- D
D.P.P. -v- Sweeney
D.P.P. -v- Sweeney

D.P.P. -v- Furlong
D.P.P. -v- Mc Donagh
D.P.P. -v- McGuinness
D.P.P. -v- Cullen
D.P.P. -v- McCann
D.P.P. -v- O'M
D.P.P. -v- Nally
D.P.P. -v- Meehan
D.P.P. -v- Cooke
D.P.P. -v- Gartlan
D.P.P. -v- Nazarok
D.P.P. -v- McCullough
D.P.P. -v- McEvoy
D.P.P. -v- D
D.P.P. -v- O'S
D.P.P. -v- E
D.P.P. -v- O'Grady
D.P.P. -v- McKenna
D.P.P. -v- Wallace
D.P.P. -v- Cronin
D.P.P. -v- Kelly
D.P.P. -v- C
D.P.P. -v- Ladipo
D.P.P. -v- C
D.P.P. -v- Slonski
D.P.P. -v- Hassan
D.P.P. -v- O'Donoghue
D.P.P. -v- Gallagher
D.P.P. -v- Matthews
D.P.P. -v- Lyons
D.P.P. -v- Tudor
D.P.P. -v- M
D.P.P. -v- O'Leary
D.P.P. -v- Daniels
D.P.P. -v- Keaney
D.P.P. -v- Fee
D.P.P. -v- McKenna

APPENDIX E

Proposed Draft Amendments to Article 34

Article 34:

1. Justice shall be administered in courts established by law by judges appointed in the manner prescribed by this Constitution, and save in such special and limited cases as may be prescribed by law, shall be administered in public.

2. The Courts shall comprise Courts of First Instance, ***a Court of Intermediate Appeal*** and a Court of Final Appeal.

3.1° The Courts of First Instance shall include a High Court invested with full original jurisdiction in and power to determine all matters and questions of law or fact, civil or criminal.

3.2° Save as otherwise provided by this Article, the jurisdiction of the High Court shall extend to the question of the validity of any law having regard to the provisions of the Constitution, and no such question shall be raised (whether by pleading, argument or otherwise) in any court established under this or any other Article of this Constitution other than the High Court, ***the Court of Appeal*** or the Supreme Court.

3.3° No Court whatever shall have jurisdiction to question the validity of a law, or any provision of a law, the Bill for which shall have been referred to the Supreme Court by the President under Article 26 of this Constitution, or to question the validity of a provision of a law where the corresponding provision in the Bill for such law shall have been referred to the Supreme Court by the President under the said Article.

4.1° The Courts of First Instance shall also include courts of local and limited jurisdiction with a right of appeal as determined by law.

5.1° The Court of Intermediate Appeal shall be called the Court of Appeal.

5.2° ***The Court of Appeal shall, with such exceptions and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court, and shall have appellate jurisdiction from such decisions of other courts as may be prescribed by law.***

6.1° The Court of Final Appeal shall be called the Supreme Court.

6.2° The president of the Supreme Court shall be called the Chief Justice.

6.3° ***The Supreme Court shall have appellate jurisdiction from such decisions of the Court of Appeal, as the Supreme Court may, by the grant of leave, decide to hear and determine. Such leave shall not be granted unless the Supreme Court is satisfied that the appeal concerns a matter of exceptional public importance.***

6.4° ***In exceptional cases where having regard to the exigencies of such cases and where the public interest so requires, the Supreme Court may, subject to its own leave to appeal requirements, hear appeals from the High Court.***

6.5° No law shall be enacted excepting from the appellate jurisdiction of the Supreme Court ***or the Court of Appeal***, cases which involve questions as to the validity of any law having regard to the provisions of this Constitution.

6.6° The decision of the Supreme Court ***or of the Court of Appeal*** as to the validity of a law having regard to the provisions of this constitution shall be pronounced by such one of the judges of those Courts as each such Court shall direct, and no other opinion on such question, whether assenting or dissenting shall be pronounced, nor shall the existence of any such other opinion be disclosed.

6.7° The decision of the Supreme Court shall be final and conclusive in cases in which an appeal is heard by the Supreme Court. ***In all other cases the decision of the Court of Appeal shall be final and conclusive.***

7.1° Every person appointed a judge under this constitution shall make and subscribe the following declaration: ....

7.2° This declaration shall be made and subscribed by the Chief Justice in the presence of the President, and by each of the other judges of the Supreme Court, ***the judges of the Court of Appeal***, the judges of the High Court and the judges of every other Court in the presence of the Chief Justice or the senior available judge of the Supreme Court in open court.

7.3° The declaration shall be made and subscribed by every judge before entering upon his duties as such judge, and in any case not later than ten days after the date of his appointment or such later date as may be determined by the President.

7.4° Any judge who declines or neglects to make such declaration as aforesaid shall be deemed to have vacated his office.

APPENDIX F

Table setting out recommended consequential amendments on the establishment in the Constitution of a Court of Appeal

Article	Subject-matter	Recommendation
Preamble	Constitutional Objectives	No amendment
1.	National Sovereignty	No amendment
2.	National Territory	No amendment
3.	National Unity	No amendment
4.	Name of the State	No amendment
5.	Nature of the State	No amendment
6.	Popular Sovereignty	No amendment
7.	National Flag	No amendment
8.	National Language	No amendment
9.	Citizenship	No amendment
10.	National Resources	No amendment
11.	National Revenues	No amendment
12.	The President	Consider the amendment of Article 12.8. in relation to the President's swearing-in
13.	Presidential Powers	No amendment
14.	Presidential Commission	Consider amending Article 14.2.2° to provide for the President of the Court of Appeal's membership of the Commission in lieu of the President of the High Court
15.	National Parliament	No amendment
16.	Dáil Éireann	No amendment
17.	Estimates	No amendment
18.	Seanad Éireann	No amendment
19.	Vocational Group.	No amendment

Article	Subject-matter	Recommendation
20.	Legislation	No amendment
21.	Money Bills	No amendment
22.	Definition of a Money Bill	No amendment
23.	Consideration of Bills	No amendment
24.	Urgent Bills	No amendment
25.	Signing/Promulgating Laws	No amendment
26.	Reference of Bills to Supreme Court	No amendment
27.	Reference of Bills to People	No amendment
28.	The Government	No amendment
28A.	Local Government	No amendment
29.	International Relations	No amendment
30.	The Attorney General	No amendment
31.	The Council of State	Amend Article 31, in lieu of the President of the High Court, include the President of the Court of Appeal as a member of the Council
32.	Convening Council of State	No amendment
33.	Comptroller & Auditor-General	No amendment
34.	The Courts	Amend Article 34 to: • Establish a Court of Appeal. • Confer constitutional jurisdiction upon it. • Re-cast jurisdictions of all three Superior Courts
35.	Judicial Independence	Amend Article 35 to allow removal of Court of Appeal judges only on the same grounds as judges of the High and Supreme Courts
36.	Organisation of Courts	Consider amending Article 36 to refer to Court of Appeal
37.	Delegation of judicial powers	No amendment
38.	Trial of Offences	No amendment
39.	Treason	No amendment
40.	Personal rights	Consider amending Article 40.4. to include a role for the Court of Appeal in habeas corpus proceedings
41.	The Family	No amendment
42.	Education	No amendment
43.	Private Property	No amendment
44.	Religion	No amendment
45.	Directive Principles of Social Policy	No amendment
46.	Amendment of the Constitution	No amendment
47.	The Referendum	No amendment
48.	Repeal of 1922 Constitution	No amendment
49.	Transfer of powers	No amendment
50.	Transfer of laws	No amendment

APPENDIX G

Development of Courts Outside Dublin

Venues highlighted in **bold** have been completed.

District 1:

Buncrana
Letterkenny
Carndonagh
An Clochan Liath
An Fal Carrach
Na Gleannta

District 2:

Sligo
Tubbercurry
Manorhamilton
Easky
Ballyshannon
Donegal
Carrick-on-Shannon
Ballinamore

District 3:

Ballina
Beal an Mhuirthead
Castlebar
Westport
Acaill
Swinford
Claremorris

District 4:

Castlerea Remand Court
Roscommon
Castlerea
Strokestown
Boyle
Ballinasloe
Loughrea
Tuam

District 5:

Monaghan
Ballieborough
Cavan
Clones
Virginia
Carrickmacross
Castleblayney

District 6:

Dundalk
Drogheda

District 7:

Clifden
An Spideal
Galway
Cil Ronain

District 8:

Borrisokane
Nenagh
Roscrea
Templemore
Tipperary

District 9:

Longford
Mullingar
Athlone

District 10:
Trim
North Kildare
Navan
Kells
Ardee

District 12:
Ennis
Kilrush
Ennistymon
Gort
Shannon
Killaloe
Athenry

District 13:
Abbeyfeale
Listowel
Newcastlewest
Kilmallock

District 14:
Limerick Circuit Court
Limerick Criminal Court
Thurles

District 15:
Portarlington
Portlaoise
Birr
Edenderry
Tullamore

District 16:
Bray
Baltinglass
Wicklow.
Arklow

District 17:

An Daingean
Cahirciveen
Kenmare
Killarney
Tralee

District 18:

Bandon
Clonakilty
Macroom
Skibbereen
Castletownbere
Bantry

District 19:

Cork Circuit Court
Cork District Court

District 20:

Mallow
Midleton
Cobh
Fermoy

District 21:

Clonmel
Lismore
Carrick-on-Suir
Dungarvan
Youghal

District 22:

Kilkenny
Carlow
Castlecomer

District 23:

Wexford
Enniscorthy
Gorey
New Ross

District 24

Waterford

District 25

Athy
Naas
Kildare
North Kildare (Maynooth)

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