Executive Summary of Report of the Working Group on a Court of Appeal

May 2009

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Executive Summary
Working Group on a Court of Appeal

Introduction

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 established the Working Group on a Court of Appeal. The Group was asked to consider the necessity for a general Court of Appeal and any legal changes that would be needed to establish such a court and to make recommendations to ensure greater efficiencies in the practice and procedure of the Superior Courts.[1]

The Working Group[2] has analysed the infrastructure of the Superior Courts and reached a number of conclusions and recommendations; considered the constitutional amendments required for a new Court of Appeal; assessed the statutory changes and new rules required in the event of the establishment of any new Court of Appeal; and examined the efficiencies in the practices and procedures of the Superior Courts.

The Problem

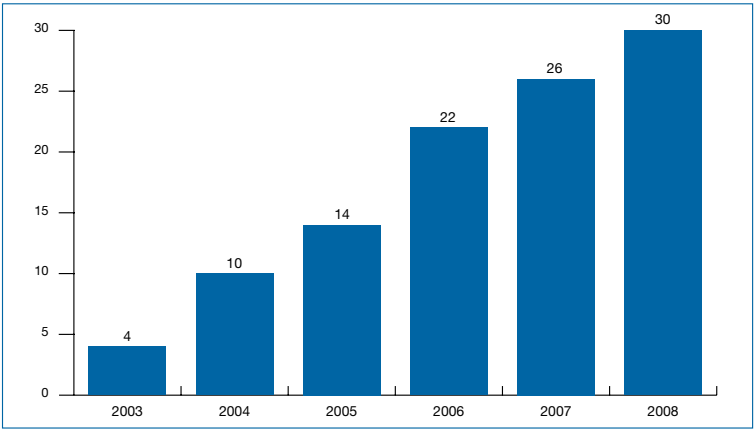
There has been a very large increase in the volume and complexity of litigation in the High Court and the Supreme Court. This has placed the current court structures under

1 Terms of Reference in Appendix I.
2 Membership of the Working Group in Appendix II.

considerable pressure. This has been alleviated in the High Court by the appointment of additional judges at that level. The difficulty with the present system, however, is that appeals in High Court cases may be brought only to the Supreme Court. Unlike its common law counterparts throughout the world, Ireland does not have a civil intermediate appellate court. This means that the Supreme Court has to hear all Superior Court appeals.

The Supreme Court has seen a significant increase in the volume and complexity of its appellate caseload. Unsurprisingly, this greater volume of cases has created a backlog of appeals in the Supreme Court. This has led to longer delays in the Supreme Court, with some cases now taking as much as 30 months to get a hearing **(Figure 1).** A delay in determining these appeals can cause uncertainty for individuals, for businesses and for government. It can put unnecessary emotional and financial pressure on litigants. It leaves others unsure about the law, which inhibits their ability to organise and plan their affairs. In short, delays create confusion and costs and are bad for business. This situation poses serious problems for the Irish legal system and for Irish society as a whole.

Fig. 1: Supreme Court waiting times 2003-2008 (in months)



In addition, the volume of cases coming before the Supreme Court raises the related issue of the correct role for the Court. As there is an automatic right of appeal from the High Court to the Supreme Court, the latter must hear cases which would, in other countries, be dealt with by an intermediate appellate court. In its analysis of other common law jurisdictions, the Report notes that there is a general international acceptance that appeal courts fulfil one of two functions. The first is to correct the errors of lower courts. The second is to ensure the consistency and coherence of the legal system by providing guidance to lower courts in cases involving issues of public interest or concern.

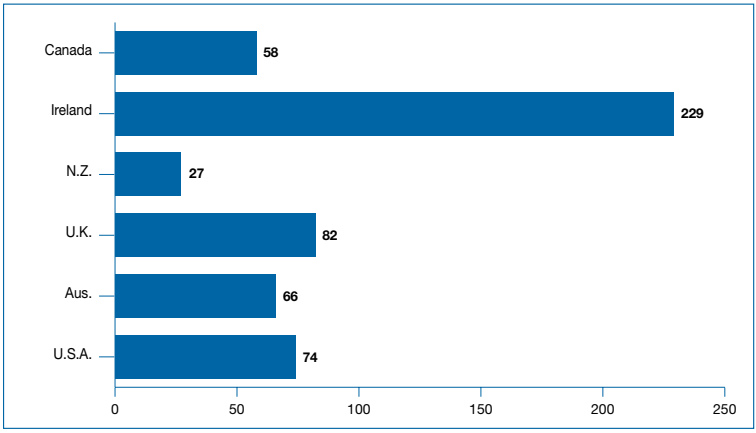
In Ireland, both of these functions are currently allocated to the Supreme Court. In other common law jurisdictions such as Canada, New Zealand, the United Kingdom, Australia and the United States, there is a division of these functions between an intermediate appellate court level and a court of final appeal.

As the Irish Supreme Court currently hears both types of case, it receives a far larger number of appeals than equivalent courts in other jurisdictions. **(Figure 2**). The Supreme

Court receives far more cases than it can dispose of each year. The Supreme Court does, however, process significantly more appeals than other common law courts of final appeal. Many of these cases could be definitively dealt with by a civil intermediate appellate court, which would leave the Supreme Court to focus on ensuring that the principles of Irish law are applied in a coherent, certain and consistent fashion.

This division of labour is achieved in other common law jurisdictions by having most appeal cases heard by an intermediate court of appeal and by the use of leave requirements, which act as a filter so that only those cases which involve a matter of public importance go to the court of final appeal. The experience of the Court of Criminal Appeal shows this sort of system can operate successfully in Ireland. The application of leave criteria to criminal appeals has meant that the majority of appeals are finalised in the Court of Criminal Appeal and the Supreme Court concentrates on the relatively small number of cases which raise important public interest issues. In 2008, for example, the Supreme Court received two appeals from the Court of Criminal Appeal.

Fig. 2: Matters disposed of by Courts of last resort in 2007



The Causes

There are a number of causes for the backlog of appeals in the Supreme Court. Some cases have to wait as long as 30 months to get a hearing.

1. More litigation — The primary reason for this backlog is that there is a greater volume of litigation coming before the courts. This growth in appellate litigation is due to a number of factors.

2. New legal issues — Technological and social changes have given rise to a range of new legal issues. New regulatory and statutory regimes have been created in both Irish and European law. This means that the Irish courts have been asked to deal with an ever-increasing caseload. In 2007, for example, there was a 26% increase on 2006 in cases commenced in the High Court.

3. More complexity — There has been a growth in the complexity of modern litigation. As cases become more complex, they require more time to be heard. In the Easter sittings of the High Court in 2006, for example, 34% of cases took more than a full day to be heard. 15% took more than a full legal week to be heard. As High Court cases can currently only be appealed to the Supreme Court, that Court is having to deal with lengthy complex appeals. This compounds the problem of the volume of appeals which it receives and contributes to the backlog of appeals.

4. High Court output — The number of High Court judges was increased to assist in coping with this trend at that court level. Cases are appealed to the Supreme Court from 36 sitting High Court judges. Each High Court judge operates as an individual High Court and hears the workload of a full High Court, considering a great number of cases every year. The only appellate court for these civil cases is the Supreme Court. It can sit in a maximum of two panels at any one time. Thus, at its full processing capacity, a two-panel Supreme Court is required to process appeals from a 36-panel High Court. This creates a significant institutional bottleneck in the Irish court system (See **Figures 3**, **4(a)** and **4(b)**). The Supreme Court does not have the capacity to process promptly the increased output of High Court appeals.

Fig. 3: Available Divisions of the High and Supreme Courts 1968-2008

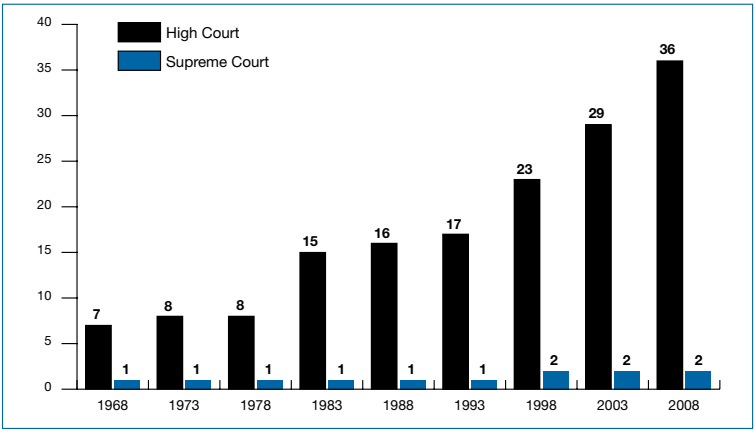
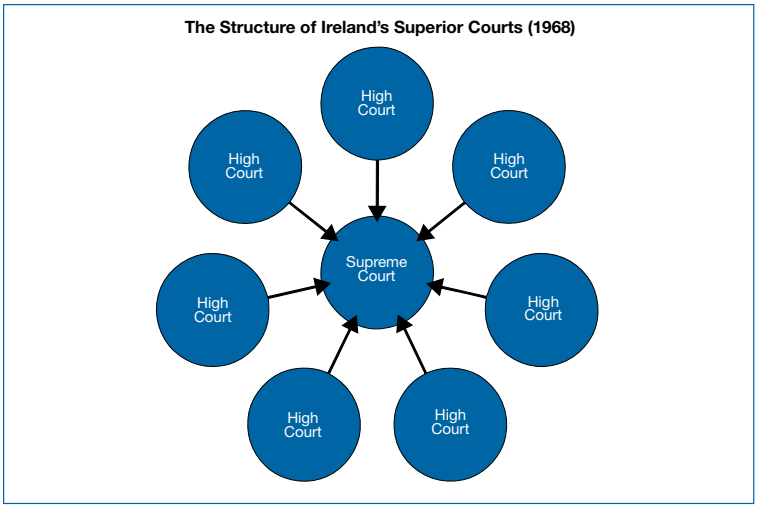
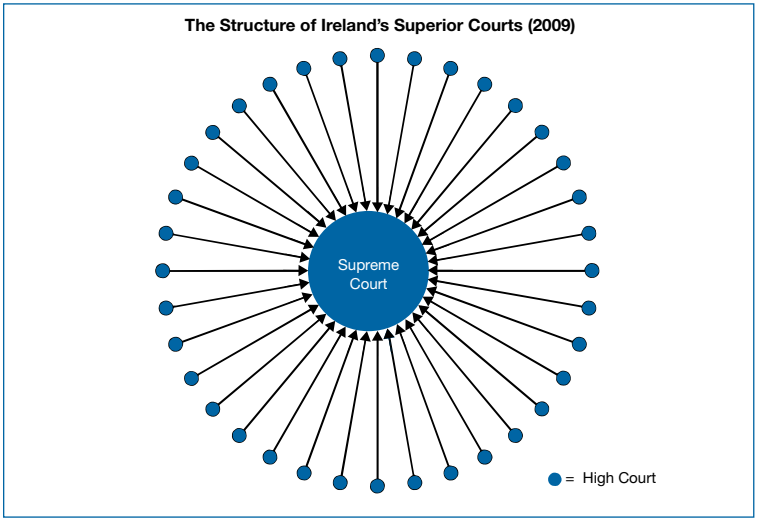


Fig. 4(a): A Comparison of the Capacity of the Superior Court System in 1968 and 2009



This diagram illustrates the number of High Courts in existence in 1968 from which decisions could be appealed to the Supreme Court.

Fig. 4(b): A Comparison of the Capacity of the Superior Court System in 1968 and 2009



This diagram illustrates the number of High Courts in existence in 2009 from which decisions may be appealed to the Supreme Court.

Initiatives to address the problem

These developments have occurred despite the undertaking of a series of efficiency initiatives in recent years. These initiatives have included:

(i) Introducing case management in the Superior Courts

(ii) Greater use of technology by the High and Supreme Courts

(iii) Encouraging resolution of issues and disputes outside the courts.

(i) Introducing case management in the Superior Courts

There has been an increased focus in recent years on using case management where possible in the Superior Courts. 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."**[3]

Perhaps the most striking example of case management reform may be seen in the Commercial Court. The Commercial Court is a special list in the High Court which operates under its own rules of procedure.[4] A key reform introduced by these rules 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. In the Commercial Court, the judge has the power to fix time limits, to make directions in respect of pleadings and to require certain issues to be dealt with as preliminary issues. He can also rule on evidential issues so as to reduce the length of the trial itself. 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.

These reforms reduce the length and cost of proceedings and have proved very successful in the Commercial Court. Similar rules have been introduced into the Competition list in the High Court. Family matters may also be case managed now in the High Court in a manner appropriate to their subject matter.

The Supreme Court also has used case management techniques to assist in the processing of its large caseload. For example, the Chief Justice 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. The priority list itself is now backlogged, due the large volume of cases coming to the Supreme Court each year.

The Supreme Court has also reformed the way in which cases are dealt with before it, in an effort to reduce delays and their associated costs. 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. It also provides that: "Failure to comply with a Practice Direction of the Court may affect

3 Courts Service, *Annual Report 2007*, at 7.
4 Order 63A R.S.C.

the issue of costs''. This encourages litigants to process their appeals in a prompt and efficient fashion.

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 the respondent must lodge replying submissions within one week thereafter.

Appeals are listed for mention before the Chief Justice on the Thursday of the penultimate week before the date fixed for hearing in order to confirm that the written submissions and any other relevant documentation have been filed in advance of the hearing.

The purpose of all of these procedural initiatives is to avoid unnecessary delays, to bring a greater focus to appellate proceedings and to ensure that appeals are dealt with as efficiently as possible.

(ii) Greater use of technology by the High and Supreme Courts

There has been an increased use of technology as a means of reducing the strain on the court system. There is 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. 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 to standardise and simplify processes and court forms across jurisdictions to improve efficiency. The Supreme Court is developing an e-court programme. Written submissions must be sent in advance of the hearing by e-mail to the office of the Supreme Court. This reduces the scope for delays caused by the paper filing of submissions.

(iii) Encouraging resolution of issues and disputes outside the courts

As well as focusing on the more efficient processing of cases within the court system, a number of steps have also been taken to remove certain matters from the court system and to have them dealt with by other bodies.

For example, the Government has established the Personal Injuries Assessment Board (PIAB) to assess damages in personal injuries cases. Similar specialist bodies like the Private Residential Tenancies Board (PRTB) and the Equality Tribunal have been established to deal with disputes which arise in particular specialised contexts.

Such initiatives assist in alleviating some of the pressure on the court system. They are not, however, a panacea for its ills. The establishment of statutory bodies such as the PIAB, the PRTB and the Equality Tribunal does remove a significant amount of administrative work from the judicial system. However, it has little impact on the caseload of the Supreme Court.

Questions of law which arise in the course of the operation of these systems 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.

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

In respect of ADR, there is already legislative provision which facilitates parties entering into binding arbitration. The government has recently published an Arbitration Bill (No. 33 of 2008) which will repeal the Arbitration Acts 1954-1998 and replace them with a comprehensive Act based on the provisions of the UNCITRAL Model Law on International Commercial Arbitration.

The availability of arbitration as a method of ADR takes a number of commercial disputes out of the court system. However, not all these cases can be dealt with *via* arbitration alone. The High Court is still required to rule on some issues that arise during the course of an arbitration. For example, in 2007, the Court dealt with 39 arbitration matters. This reflects the fact that arbitration, although a useful system which should be promoted, cannot fully replace the role played by the courts in commercial disputes. As the Committee on Court and Practice Procedure observed in its discussion of the Commercial Court in its *27*th Report published on 13 February 2002:

> **"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*."** (Emphasis added)

The consequences if the situation continues

If the problems described above are not addressed, they will become greater, not less, to the detriment of Irish society and the Irish economy.

The courts play a vital 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 world of business. A court system should provide clarity, certainty and an effective means of dispute resolution. An efficient court system is an important part of the infrastructural development of the State.

(i) Impact on citizens

The courts impact on the lives of citizens in a number of ways. They protect the constitutional rights of citizens. The speedy and efficient resolution of disputes is a value of particular importance in the area of family law, which involves the welfare of children. Parties to family law cases operate under enormous pressure. To delay unduly the hearing of a family law action, either at first instance or on appeal, prolongs this pressure and places a considerable strain on individuals and families. It is important that the legal system respond quickly to the needs of parties in these disputes.

(ii) Impact on the economy

The effectiveness of the court system profoundly affects 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 example of an area of activity in which certainty is essential. Companies and commercial actors must have confidence that they are acting in an efficient and 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 unneccessary economic and administrative costs. This is an important factor for business in Ireland. Also, 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.

Commercial life requires speedy resolution of legal issues. Former Attorney General, David Byrne, expressed the view in the 1998 *Bar Review* 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". Delays create costs and are bad for business.

It was for this reason that a Commercial Court was created in 2004 by establishing a special list in the High Court to deal with commercial matters. It has operated very successfully since its establishment, providing a speedy and effective means for resolving commercial disputes. By the end of 2007, dates for trial were available immediately for cases in the Commercial Court list. The gains in time that are made in the High Court are all too often lost, however, when commercial cases enter the Supreme Court List. As previously noted, a case may not be heard for up to 30 months in the Supreme Court. The result, discussed in Dowling, *The Commercial Court*, at pages 8-9, 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."**

Delays in the Supreme Court potentially undermine Ireland's attractiveness as a destination for high-value commercial or industrial activity:

(iii) Impact on infrastructure

One important issue which was highlighted by the National Development Plan 2007-2013: *Transforming Ireland — A Better Quality of Life for All* is the potential for lengthy court proceedings to hold up large-scale infrastructural projects. Infrastructural projects take a significant amount of time to plan and develop and are often necessary to address an existing or imminent structural deficit. Delayed provision of projects can exacerbate these difficulties and, potentially, 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 and often concern the decisions of administrative bodies. The challenged 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 no guarantee of an appeal from that Court being heard within a short period of time in the Supreme Court. The logistical pressures on the Supreme Court make it difficult to expedite these appeals. Even with priority, they may not be listed for up to 12 months. Without priority, they may not be heard for 30 months.

Fast-tracking these appeals to a dedicated Court of Appeal would avoid such delays and the associated social and economic costs. This option, however, is not available under our present court system.

(iv) Impact on regulation and governance

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 many crucial areas of social and economic activity. It is important 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 impede the effective performance of their regulatory functions. The prompt resolution of legal issues is crucial to the optimal functioning of any regulatory regime. Fast tracking such appeals to a Court of Appeal would avoid delays.

(v) Impact on international obligations

Delays in the current court system are placing Ireland at risk of breaching a number of its international obligations. 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 the European Court of Human Rights and/or the European Court of Justice for delays in the legal system.

(vi) Conclusions

Overall, therefore, a failure to address the problems posed by Ireland's Superior Court appeal system may be damaging for Irish society and for the Irish economy. Without a reform of the system, increased delays are inevitable. Delays produce adverse social, economic and commercial consequences. They also place Ireland in danger of breaching a number of its international obligations.

It is the responsibility of the courts to provide speedy dispute resolution and legal certainty. The systemic weakness in the Irish Superior Court structure means that our legal system cannot perform this task adequately. The situation should not continue. Without reform, it is likely to get worse. The Supreme Court hears significantly more cases each year than any of its international counterparts. Despite this, it is unable to ensure the prompt hearing of appeals and a backlog of appeals is growing.

Put simply, there are too many appeals, raising too many complex issues, to be dealt with by the Supreme Court alone. For this reason, it is the opinion of the Working Group that urgent reform of the system is necessary.

The Solutions

The Report considers a number of possible solutions to the problems with the current court system.

(i) Preserve the status quo

The preservation of the existing system is not a tenable proposition. Without change, the backlog of appeals will continue and grow.

(ii) Appoint more judges to the Supreme Court

The appointment of more judges to the Supreme Court to allow that Court to sit in more panels is not recommended by the Working Group. While it would assist in clearing the current backlog of cases, allowing the Supreme Court to sit in divisions is inherently problematic. One of the main risks is that it may create inconsistency in the rulings of the highest court in the State, which would generate uncertainty in the law. The Report 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 persons and on commercial entities operating under Irish law.

Furthermore, it would not alter what has been identified in the Report as one of the major flaws 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 discussion in Chapter 7 of the Report indicated that the modern view in common law jurisdictions is that the court of last resort should hear only cases of public significance and not deal predominantly with error correction. Moving the backlog through the Supreme Court at a faster rate would not address that problem in the current system.

In addition to the appointment of additional judges to the Supreme Court, expanding the panels would also require additional court rooms and court staff. The cost implications involved in adopting this option would be similar to those involved in establishing a Court of Appeal.

(iii) Establish a Court of Appeal

The Working Group recommends the establishment of a Court of Appeal. This would have the effect of ensuring the speedy resolution of appeals from the High Court.

The Working Group recommends the introduction of a leave stage for appeals from the Court of Appeal to the Supreme Court in line with the practice in other common law jurisdictions. This will mean that the Court of Appeal will be the court of final appeal for the majority of High Court appeals. Only cases of public importance will obtain leave for a further appeal to the Supreme Court.

The Working Group has also considered the possibility that some cases might leapfrog the Court of Appeal and be dealt with directly by the Supreme Court. Having this kind of flexibility in the court system will enable it to avoid the type of backlog that has emerged in the Supreme Court lists and will ensure that cases are dealt with in the most efficient way.

The Report analysed the court systems in a number of other common law jurisdictions and found that the existence of an intermediate appellate Superior Court, a Court of Appeal, reduced the number of appeals going to the Supreme Court or equivalent court of last resort. The Supreme Court is thus free to ensure the coherence and consistency of the law, while appeals concerning matters of error correction are dealt with by the Court of Appeal.

It is important to note that there would very rarely be two appeals in a set of proceedings. The vast majority of cases would not go from the High Court to a Court of Appeal and then on again to the Supreme Court. Most litigation would be dealt with finally in the Court of Appeal with no further appeal being available save in very exceptional circumstances.

The Costs and Benefits of a Court of Appeal

The advantages of establishing a Court of Appeal would be manifold. Individual citizens would have the protection of a speedy and definite court system. Businesses would be able to operate in the knowledge that certainty in the law and the speedy resolution of disputes would be guaranteed in the Irish legal system. Cases concerning important infrastructural developments could be processed quickly. Ireland's potential breaches of its international obligations would be addressed also by the provision of a speedy appeals process.

Establishing a Court of Appeal would require similar expenditure on judges, registrars, court officers and equipment as the creation of additional divisions of the Supreme Court. By dealing with the current delay problem, the Court of Appeal is likely to reduce commercial and administrative expense, thereby saving costs. The advantages of the new system to the individual, business, the economy and the State as a whole would outweigh any costs.

A Statutory Court of Appeal will not work

One of the key issues considered in the Report was the appropriate mode of establishing a Court of Appeal. The Report highlights a number of problems with the existing Court of Criminal Appeal and does not recommend using it as a model for any new Court of Appeal. Instead, it recommends the replacement of the Court of Criminal Appeal with a new Court of Appeal with both civil and criminal jurisdiction.

The new Court of Appeal could not be established adequately by statute alone. The possibility of appointing judges to sit permanently on a new statutory court would be fraught with difficulty. A statutory Court of Appeal would have no permanent panel of judges but would be staffed by judges of various other courts on an *ad hoc* basis. A permanent panel of judges ensures a consistent jurisprudence.

Furthermore, the inability of a Court of 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 High Court appeals. 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 risk of a challenge being taken to the jurisdiction or status of the Court of Appeal.

An amendment to the Constitution will be necessary

The Working Group recommends that a constitutional amendment is necessary to establish a Court of Appeal. Such a Court would hear both criminal and civil jurisdiction and would be entitled to consider constitutional issues.

Establishing a new Court of Appeal by constitutional amendment would have many advantages.

First, it would create an efficient system and abolish the current delays.

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

Thirdly, allowing a new Court of Appeal to exercise jurisdiction in constitutional matters would facilitate the more efficient flow of appeals.

Fourthly, the reform would bring Ireland into line with other common law court systems. It would mean that procedural reforms in the High Court would not be frustrated by delays further up the system. For example, the progress gained in the Commercial Court could be capitalised on, instead of being lost on appeal.

Fifthly, this option would enable the establishing of dedicated Court of Appeal panels where that was considered appropriate. This could, for example, facilitate the fast-tracking of cases where time is of the essence. Child abduction cases, European Arrest Warrants, commercial disputes or actions concerning infrastructural projects could all be dealt with promptly and efficiently by a dedicated and experienced appellate panel.

Sixthly, 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.

The establishment of a new court is an important reform of the institutions of the State and it is fitting that the people — the ultimate sovereign authority of the State — decide this issue.

The Form of the Constitutional Amendment

A. Permissive Amendment:

In its Report, the Working Group considered whether a permissive or self-executing amendment to the Constitution would be sufficient to establish a Court of Appeal. A permissive 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.

A self-executing amendment would simply insert into the Constitution a provision establishing the new Court.

Looking first at the permissive amendment option, the difficulty is that it would leave untouched those parts of the Constitution that currently presume that Ireland has a two tier Superior Court system. As the Report points out, this could generate uncertainty as to the status of the new Court and its constitutional jurisdiction.

A self-executing amendment would create these same difficulties. The reason for this is that the current text of the Constitution is structured in such a way that it presumes, at various

points throughout the text, the existence of only two Superior Courts, the High Court and the Supreme Court.

B. Consolidating Amendment:

The Working Group recommends in its Report the use of a consolidating amendment which would establish clearly the new Court. A consolidating amendment would eliminate any incoherence in the Constitution. It would also clarify the status of the new Court and confirm its constitutional jurisdiction. As well as this, the independence of the judiciary appointed to the Court could be ensured by the amendment of Article 35.

The Need for Legislative Change

As well as an amendment to the Constitution, legislation would be needed. The issue of statutory reform is addressed in the Report as part of the second term of reference.

The Need for new Rules of Court

Each court operates under procedural rules which are set out in and amended by statutory instruments. The new Court of Appeal would require such rules. Additionally, amendments would need to be made to the existing Rules of the Superior Courts, which govern the High Court and the Supreme Court, to accommodate the role of the Court of Appeal. The Report explores potential reform to the practice and procedure of the Superior Courts in accordance with the third term of reference by setting out the practice in other jurisdictions with a three-tier Superior Court structure and identifying areas of Rules of the Superior Courts which might require amendment if a Court of Appeal were established.

Workload in the new Superior Court System

(i) The High Court

There would be no change to the workload of the High Court.

(ii) The Court of Appeal

When the Court of Appeal became fully operational, its work would relate to the processing of the majority of appeals from the High Court in civil and criminal matters.

The cases dealt with by the Court of Appeal would be those criminal cases currently dealt with by the statutory Court of Criminal Appeal and all civil appeals from the High Court except for any which reach the leave requirements for leapfrogging to the Supreme Court. The Working Group has estimated that the workload of the Court of Appeal would be approximately 700 cases per year (See discussion in Chapter 9 of the Report).

(iii) The Supreme Court

As leave would be required to obtain a hearing in the Supreme Court, the number of cases coming before that Court would be reduced to a level commensurate with that of its counterparts internationally. The Working Group has estimated that, following the establishment of the Court of Appeal, the workload of the Supreme Court would be approximately 80 cases per year (See discussion in Chapter 9 of the Report).

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.**

Appendix I

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.

Appendix II

Membership of the Working Group on a Court of Appeal

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. and Dr. Eoin Carolan, B.L., Research Assistants to the Working Group.