



The Law Reform Commission
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

CONSULTATION PAPER

**CONSOLIDATION AND REFORM OF
THE COURTS ACTS**

(LRC CP 46-2007)

IRELAND

**Law Reform Commission
35-39 Shelbourne Road, Ballsbridge, Dublin 4**

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LAW REFORM COMMISSION

Background

Law Reform Commission is an independent statutory body whose main aim is to keep the law under review and to make practical proposals for its reform. It was established on 20 October 1975, pursuant to section 3 of the *Law Reform Commission Act 1975*.

The Commission's Second Programme for Law Reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas in December 2000. The Commission also works on matters which are referred to it on occasion by the Attorney General under the terms of the Act.

To date the Commission has published 83 Reports containing proposals for reform of the law; eleven Working Papers; 45 Consultation Papers; a number of specialised Papers for limited circulation; An Examination of the Law of Bail; and 27 Annual Reports in accordance with section 6 of the 1975 Act. A full list of its publications is contained on the Commission's website at www.lawreform.ie

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Law Reform Commission consists of a President, one full-time Commissioner and three part-time Commissioners.

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<i>Part-time Commissioner:</i>	Marian Shanley, Solicitor
<i>Part-time Commissioner:</i>	Donal O'Donnell, Senior Counsel
<i>Secretary/Head of Administration</i>	John Quirke

Research Staff

<i>Director of Research:</i>	Raymond Byrne BCL, LLM (NUI), Barrister-at-Law
<i>Project Manager Chronological Tables to the Statutes:</i>	Deirdre Ahern LLB, LLM (Cantab), Solicitor
<i>Legal Researchers:</i>	John P. Byrne BCL, LLM (NUI), Barrister-at-Law Áine Clancy BCL, LLM (NUI) Philip Flaherty BCL, LLM (NUI), Diop sa Gh Cliona Kelly BCL, PhD (NUI) John Kenny LLB, LLM (Cape Town) Eimear Long LLB, Barrister-at-Law Eóin MacDomhnaill BCL, LLM (Dub) Margaret Maguire LLB, LLM (NUI) Jane Mulcahy BCL, LLM (NUI) Tara Murphy BCL, LLM (Essex) Richard McNamara BCL, LLM (NUI) Charles O'Mahony BA, LLB (NUI), LLM (Lond), LLM (NUI) Tina O'Reilly BCL, LLM (NUI) David Prendergast LLB, LLM (Lond), Barrister-at-Law Keith Spencer BCL, LLM (Dub), BCL (Oxon), Barrister-at-Law Nicola White LLB, LLM (Dub), Attorney-at-Law (NY) Joanne Williams LLB, LLM (NUI), Barrister-at-Law

Administration Staff

<i>Project Manager:</i>	Pearse Rayel
<i>Executive Officer:</i>	Denis McKenna
<i>Legal Information Manager:</i>	Conor Kennedy BA, H Dip LIS
<i>Cataloguer:</i>	Eithne Boland BA (Hons), HDip Ed, HDip LIS
<i>Information Technology Officer:</i>	Liam Dargan
<i>Private Secretary to the President</i>	Debbie Murray
<i>Clerical Officer:</i>	Ann Browne

Principal Legal Researcher on this Consultation Paper

Claire Bruton LLB, LLM (Lond), Barrister-at-Law

Contact Details

Further information can be obtained from:

Secretary/Head of Administration

Law Reform Commission
35-39 Shelbourne Road Ballsbridge Dublin 4

T: +353 1 637 7600

F: +353 1 637 7601

E: info@lawreform.ie

W: www.lawreform.ie

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In November 2005 the Commission established a Working Group to assist it on issues relating to this Consultation Paper. The members of the Working Group met on four occasions to discuss aspects of the project and to appraise the material provided.

The members of the Working Group are:

Robert Browne, Assistant Secretary General, Department of Justice, Equality and Law Reform

Raymond Byrne Director of Research, Law Reform Commission

John Cronin, Principal Officer, Courts Policy Division, Department of Justice, Equality and Law Reform

Professor Hilary Delany, School of Law Trinity College Dublin

Mr Justice Hugh Geoghegan, Supreme Court

Mrs Justice Catherine McGuinness, President, Law Reform Commission

Benedict Ó Floinn, Barrister at Law

Patricia T. Rickard Clarke, full-time Commissioner, Law Reform Commission

Noel Rubotham Director of Reform and Development, Courts Service

Claire Bruton is Secretary and Researcher to the Group.

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INTRODUCTION

A Background

1. This Consultation Paper forms part of the Commission's *Second Programme of Law Reform 2000-2007*¹ which, under the heading The Legal System, refers to access to the law for the citizen. The Second Programme also refers to the Commission's general remit under the *Law Reform Commission Act 1975* to reform the law, which includes the consolidation of statute law. 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 the task of consolidating into a single Courts Act the existing legislative provisions which describe the essential jurisdiction of the courts in Ireland,² the Supreme Court, the Court of Criminal Appeal, the High Court, the Circuit Court and the District Court.

2. In the Commission's view, there is a clear need for consolidation of the legislation concerning the jurisdiction of the courts, which is a key aspect of access to the law for the citizen. Since 1922, almost 60 Courts Acts have been enacted,³ but none has involved a complete consolidation. The main Acts in this respect - the *Courts of Justice Act 1924*, the *Courts (Establishment and Constitution) Act 1961* and the *Courts (Supplemental Provisions) Act 1961* - have involved part-consolidation, but they have also specifically carried over some aspects of the powers and jurisdiction of the

¹ *Second Programme for Examination of Certain Branches of the Law with a view to their reform 2000-2007* (Pn 9457 2000). Available at www.lawreform.ie

² Since 2003, the Commission has also been engaged in a Joint Project with the Department on eConveyancing, which also forms part of the Commission's Second Programme of Law Reform. This has led to publication of the Commission's *Report on Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74-2005), which included a draft *Land and Conveyancing Bill* setting out comprehensive reform and modernisation of substantive land and conveyancing law. The *Land and Conveyancing Law Reform Bill 2006* which followed from this Report, was passed by Seanad Éireann in November 2006 and was restored to the Dáil Éireann Order Paper in June 2007. The Commission has also published a *Report on eConveyancing: Modelling the Irish Conveyancing System* (LRC 81-2006), which includes a modelling of the current conveyancing process. The Commission intends to publish a final Report on this area in 2008, which will set out a road map for the eventual introduction of eConveyancing in Ireland.

³ See the list of 56 Courts Acts passed since 1922 at the end of Chapter 4, below.

pre-independence courts, which is set out in a large number of pre-1922 Acts, including the *Supreme Court of Judicature (Ireland) Act 1877*. The Commission considers that consolidation of this area would contribute to access to the law and to the overall objective of replacing in modern form all pre-1922 legislation, which has been greatly aided by the enactment of the *Statute Law Revision Act 2007*.⁴

3. The Commission also notes that the Department of Justice's 1962 *Programme of Law Reform*⁵ indicated an intention to consolidate the legislative provisions on the jurisdiction of the courts – both pre-1922 and post-1922. This did not occur, and so this Joint Project is the first attempt to engage in this task. In doing so, the Commission has been greatly assisted by the members of the Working Group established for this purpose. The Commission is also particularly conscious of previous work by two members of the Working Group Professor Hilary Delany (former Commissioner) and Mr Benedict Ó Floinn Barrister-at-Law who had been involved in the preparation of a draft Courts Bill which set out in consolidated form the relevant legislative provisions in the Courts Acts enacted from 1924 to 1999. The Commission, and the Working Group have had the benefit of this draft Bill in the preparation of the draft Courts Bill appended to this Consultation Paper.

4. Since this Joint Project incorporates the relevant pre-1922 legislation concerning the jurisdiction of the courts, the Commission found it necessary to examine the history of the courts system in Ireland. The Commission explains this in detail in Chapter 2 but a specific example can be given here. Most of the current jurisdiction of the Circuit Court is set out in the Courts Acts passed since 1922, but some of its powers are those carried over from the pre-1922 Acts dealing with the County Courts, which the Circuit Court replaced in 1924. Thus, in order to understand the full jurisdiction of the Circuit Court, it is necessary to trace whatever remains of the pre-1922 Acts conferring jurisdiction on the County Courts.

5. The Commission's Joint Project has thus involved an initial audit of the extent to which pre-1922 courts-related legislation remains in place and a consequent attempt to incorporate, in modern form, at least some of those pre-1922 provisions into the draft Courts Bill attached to this Consultation Paper. To that extent, the Joint Project has involved an exercise in tidying up the existing law, that is, consolidation. The Commission was equally conscious that a number of areas of substantive reform of the jurisdiction of the courts had either been recommended by

⁴ See generally the Commission's *Consultation Paper on Statute Law Restatement* (LRC CP 45-2007).

⁵ Department of Justice *Programme of Law Reform* (Pr 6379 1962).

other bodies or should, in any event, be raised by the Commission in this Project. Consequently, in Chapter 3, the Commission has, in addition to consolidation, made provisional recommendations for reform of some areas of the jurisdiction of the courts.

6. In approaching this Project, therefore, the Commission has had in mind three overarching objectives. First, to present for discussion a consolidated draft Courts Bill incorporating the text of existing legislation, both pre-1922 and post-1922, dealing with the jurisdiction of the courts. This is intended to clarify the scale of the Project and to assist those responding to the Consultation Paper to comment on what should be included in a final draft Courts Bill. Second, to incorporate an examination of the recommendations, discussions and proposals for reform of the jurisdiction of the courts made by other relevant bodies (and by the Commission itself). This is intended to indicate that the Project involves important elements of reform and is not, therefore, limited to a consolidation of existing Courts Acts. Thirdly, to present a suitable scheme or framework for a new Courts Act. This is intended to emphasise that, bearing in mind the reform element of the Project, the proposed new Courts Act should include only those elements which are appropriate to describe the essential jurisdiction of the courts, taking into account the best available models in other States.

B Phasing of the Project

7. The Commission is conscious that, bearing in mind the scale and complexity of the Project, the ultimate objective of developing a new Courts Act will take some time. To this end, the Commission decided that the Project should be presented as being structured into three phases.

8. Phase 1 involves the publication of this Consultation Paper. This includes: an analysis of the history of the courts system, in order to understand the current jurisdiction of the courts; a number of specific reform proposals (reflecting the general statutory remit of the Commission); a proposed scheme or framework for a new Courts Act; and a single draft Courts Bill, incorporating the text of existing Courts Acts, with annotated commentary.

9. Phase 2 involves the Commission's usual consultation process on the content of the Consultation Paper with a view to making final recommendations in a Commission Report. Phase 2 will be completed with the publication of the Commission's Report, which will contain relevant recommendations for reform and the revised text of a draft Courts Bill. Depending on timing and resource issues, the Report may also incorporate any relevant reform proposals from the Commission itself (which is currently examining, for example, Alternative Dispute Resolution under its

Second Programme of Law Reform 2000-2007) or from other bodies (such as the Working Group established to consider the introduction of a Court of Appeal). The Report may also identify other areas which require further consideration, whether by the Commission or other bodies, thus pointing to Phase 3 of the Project.

10. Phase 3 of the Project involves, in effect, the ongoing review of the new Courts Act which will result from Phases 1 and 2. Phase 3 may thus include, initially, those areas identified in Phase 2 as requiring separate examination and which could not be incorporated into the Phase 2 Report and draft Courts Bill. Phase 3 will begin after the completion of the Commission's current *Second Programme of Law Reform 2000 to 2007* so that this raises the prospect that some of these areas may be incorporated into the Commission's *Third Programme of Law Reform*, which will run from 2008, or else may be examined by some other body.

11. The Commission now turns to outline the contents of this Consultation Paper.

C Outline of the Consultation Paper

12. In Chapter 1 the Commission sets out the general background against which the Consultation Paper has been prepared. This includes an overview of previous reforms of the jurisdiction of the courts, notably the 19th Century reforms and those which have occurred since the foundation of the State in 1922.

13. In Chapter 2, the Commission traces, by reference to each of the courts currently in place, the history and development of the courts system. This Chapter has allowed the Commission to identify the root title of the current courts and, accordingly, those pre-1922 provisions of relevance to the jurisdiction of the courts.

14. In Chapter 3, the Commission identifies eight discrete areas concerning the jurisdiction of the courts which could be examined in this phase of the Project in order to establish whether immediate reform is required. These are: the case stated procedure; the circumstances in which certain cases are not heard in public (the *in camera* rule); fixed charge penalties and the removal of court jurisdiction in some areas; appeals in civil and criminal matters; increase in the general monetary limits in the civil jurisdiction of the District Court and Circuit Court; the rules of courts committees; the right to choose a specific court of trial in a trial on indictment (the "right of election"); and the allocation of cases between the Circuit Criminal Court and the Central Criminal Court in criminal matters.

15. In Chapter 4, the Commission suggests a scheme or framework for a consolidated Courts Acts, based on a comparative analysis of the

Courts Acts in a number of other States. This also involves an analysis of what should be included – and excluded – from any new Courts Act. This suggested scheme or framework has been applied to the draft Courts Bill attached to the Consultation Paper.

16. The Appendix, published in CD form, contains the Commission's Working Draft of a consolidated Courts Bill, which incorporates the text of existing legislative provisions concerning the jurisdiction of the courts, including some pre-1922 provisions and relevant commentary on the statutory source for the text of each section. In addition, a number of commentaries on individual sections are contained in the Working Draft. The Commission emphasises that this draft Bill replicates the text of existing provisions in Courts Acts. As the commentary on specific sections makes clear, many of these provisions would require updating even if their essential content was repeated in any new Courts Act. It is also worth noting that the consolidated text of the Bill does not reflect any of the Commission's provisional recommendations in Chapter 3 of this Consultation Paper. The Commission's intention in publishing the draft Bill in this form is to provide interested parties with an opportunity to see what a codified Courts Bill might contain, and to facilitate comment on a full text draft of the existing provisions. It is clear that significant further redrafting will be involved in the transformation from the existing provisions into a new Courts Act.

17. This Consultation Paper is intended to form the basis for discussion and all recommendations made are, therefore, provisional in nature. Following further consideration of the issues and following consultation with interested parties, the Commission will make its final recommendations in a Report. Submissions on the provisional recommendations contained in this Consultation Paper are very welcome. In order for the Commission's final Report to be made available as soon as possible, those who wish to do so are requested to send their submissions in writing by post to the Commission or by email to info@lawreform.ie by **30 November 2007**.

CHAPTER 1 DEVELOPMENT OF REFORM OF COURTS

A Introduction

1.01 This Chapter places this Consultation Paper in context by examining the development of proposals for the reform of the legislation concerning the courts in this jurisdiction by a number of bodies. In other words, this Consultation Paper has not developed in a vacuum and accordingly has emerged from the established base of previous reform. This Chapter also outlines previous work of the Commission that has a resonance to the courts as outlined in this Chapter.

1.02 In Part B, the Commission provides an overview of previous reforms of the jurisdiction of the courts in the 19th Century, while Part C examines those reforms which have occurred since the foundation of the State in 1922. This is in order to set out the general backdrop against which this Consultation Paper has been prepared.

B Proposals for Reform pre 1922

(1) *The Supreme Court of Judicature (Ireland) Act 1877*

1.03 The primary reform relating to the jurisdiction of the courts before 1922 was the enactment of the *Supreme Court of Judicature (Ireland) Act 1877*. The two primary reforms effected by the *Supreme Court of Judicature (Ireland) Act 1877* were firstly, a change in the organisation of the courts, and secondly, the establishment of one Supreme Court of Judicature which could exercise common law and equity jurisdiction concurrently. The resulting Supreme Court of Judicature in Ireland had two divisions: a Court of Appeal which exercised a purely appellate jurisdiction and the High Court of Judicature, which was vested with original and appellate jurisdiction. The number of divisions of the High Court of Judicature was streamlined into a more logical group. Further the newly-established Court of Appeal was vested with jurisdiction to deal with appeals in a modern form. Prior to this, only a limited form of appeal by way of writ of error was available to applicants. The list of pre-1922 legislation contained in Chapter 4, below, indicates that significant other legislative reforms were also made to the jurisdiction of the other courts that operated in Ireland. We will return to these in Chapter 2 in the context of the historical origins of the current courts.

C Proposals for Reform post 1922

(1) *The Judiciary Committee*

1.04 The Government of the new Irish Free State recognised that it was necessary to reorganise the Irish judicial system in the wake of independence. In order to assist with such a task a committee consisting of suitably qualified individuals was appointed. The committee was entrusted to provide advice on “how best to give effect to the articles of the Constitution and to provide for the setting up of national Courts of Justice in the Saorstát”.¹

1.05 In 1923, a Judiciary Committee was appointed by the Executive Council of the Irish Free State:

“To advise the Executive Council of Saorstát Eireann in relation to the establishment in accordance with the Constitution of Courts for the exercise of the judicial power and the administration of justice in Saorstát Eireann and the setting up of the office and other machinery necessary or expedient for the efficient dispatch of legal business.”²

1.06 WT Cosgrave, President of the Executive Council, provided the Committee with an indication of the issues which they should consider:

“Questions such as those of the centralisation or decentralisation of the Courts, the numbers and grades of judges and judicial persons and officers and their respective qualifications for office and the manner of selection, the method of trial by jury, will be amongst the many subjects which must anxiously engage your attention.”³

1.07 The Committee was also requested to approach the question of the establishment of the Courts “untrammelled by any regard to the existing systems in this country”. In reality, however, the Committee was not provided with a blank canvas to devise a court structure, as the Irish Free State Constitution provided that the structure of the courts would include a High Court as a Court of First Instance, Courts of local and limited jurisdiction and a Supreme Court as the Court of Final Appeal.

1.08 The express unanimous recommendations of the Judiciary Committee are considered in detail in Chapter 2 of this Consultation Paper. The majority of the Committee’s recommendations were adopted in the

¹ Dáil Debates volume 4 31 July 1923.

² The Judiciary Committee *Report of the Judiciary Committee* (Stationery Office 1923) at 5.

³ *Ibid.*

Courts of Justice Act 1924. The most noteworthy of these recommendations were the call for the establishment of a Court of Criminal Appeal and the introduction of courts similar to the pre-1922 inferior courts but adopting the names of two of the courts that were formed as part of the Dáil Courts, the District Court and Circuit Court.

(2) *Report of the Joint Committee on The Courts of Justice Act 1924*

1.09 A Joint Oireachtas Committee was established in 1930 to examine and consider whether amendments were required to *The Courts of Justice Act 1924*, the Acts amending the 1924 Act and other Acts affecting the civil jurisdiction of the courts.⁴ The Committee sat a number of times and received submissions from those involved in the justice system. The Committee found that, on the whole, the 1924 Act was operating in a satisfactory manner. This can be seen from the relatively few amendments suggested by the Committee. The Committee considered matters within the structure established by the 1924 Act and did not consider any alteration to that structure.

1.10 The most important of the Committee's recommendations related to the manner in which civil appeals from the Circuit Court should be heard by the High Court and the transfer of actions from the Circuit Court to the High Court. The Committee determined that the interests of justices necessitated a change in the form of such appeals from being based on a transcript of the original trial to a *de novo* appeal. The Committee also deemed it necessary for section 25 of the 1924 Act, which provided for the transfer of actions from the High Court to the Circuit Court, to be amended so as to allow the High Court to consider whether it was reasonable for the action to have been commenced in that court. In addition the Committee recommended that the number of Supreme Court Judges be increased from 3 but did not specify a particular number. A number of the recommendations of the Joint Committee were enacted in the *Courts of Justice Act 1936*.

(3) *Committee on Court Practice and Procedure*

1.11 The Committee on Court Practice and Procedure was established in 1962 with the following terms of reference:

“(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:

⁴ Joint Committee on the Courts of Justice Act 1924 *Report of the Joint Committee on the Courts of Justice Act 1924* (Stationery Office 1930).

(b) To consider whether and if so to what extent the existing right to a 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 and

(d) To make recommendations on such matters (including matters of substantive law) as the Minister for Justice may from time to time request the Committee to examine.⁵

1.12 Between 1963 and 2004, the Committee published 29 reports dealing with court practice and procedure. The Committee considered a number of issues twice.⁶ Four of the most pertinent issues examined by the Committee were whether the Court of Criminal Appeal should be retained;⁷ a review of the Rules of Courts Committees;⁸ a consideration of whether the media be permitted to report on *in camera* matters⁹ and case management.¹⁰

1.13 The Reports of the Committee which are relevant to the jurisdiction of the courts are developed in more detailed in chapters 2 and 3 of this Consultation Paper. A number of these Reports led to legislative

⁵ The terms of reference were extended by warrant of the Minister for Justice in 1973 by the insertion of term of reference (d).

⁶ The Committee considered whether the preliminary examination of indictable offences should remain in place in its first and twenty fourth interim reports. See Committee on Court Practice and Procedure *First Interim Report of the Committee on Court Practice and Procedure: The Preliminary Examination of Indictable Offences* (Stationery Office Pn 7164 1963) and Committee on Court Practice and Procedure *Twenty Fourth Interim Report of the Committee on Court Practice and Procedure: Preliminary Examination of Indictable Offences* (Stationery Office 1997). The Committee also considered fixed charge penalties on two occasions. See Fifth Interim Report of the Committee on Court Practice and Procedure *Increase of Jurisdiction of the District Court and the Circuit Court*, (Stationery Office Dublin Pr. 8936 1966) and Fifteenth Interim Report of the Committee on Court Practice *On the Spot Fines* (PrI 2349 1971).

⁷ Committee on Court Practice and Procedure *Seventh Interim Report: Appeals from Convictions on Indictment* (Stationery Office Pr 9196 1966). The Committee concluded that the Court of Criminal Appeal should be abolished and its jurisdiction transferred to the Supreme Court. Provision for this abolition is contained in the *Courts and Courts Officers Act 1995* and awaits commencement.

⁸ Committee on Court Practice and Procedure *Twenty Eighth Interim Report The Court Rules Committees* (September 2003).

⁹ The Twenty Third Interim Report of the Committee on Court Practice and Procedure *The Provision of a Procedure to Enable Representatives of the Media to be heard by the Court, where an application is being made in Civil Proceedings to have a case heard otherwise than in Public* (1994).

¹⁰ Committee on Court Practice and Procedure *Twenty Seventh Interim Report A Commercial Court in Ireland* (2003).

change¹¹ but not all of the Committee's recommendations were implemented.¹²

(4) Programme of Law Reform 1962

1.14 The Department of Justice's 1962 Programme of Law Reform¹³ indicated an intention to consolidate the legislative provisions on the jurisdiction of the courts – both pre-1922 and post-1922. This proposal acknowledged that the *Courts (Establishment and Constitution) Act 1961* would be omitted from the ambit of the consolidated Act. The 1962 Programme also envisaged a law reform programme which would be pursued consistently and systematically over an extended period of time.

(5) Report of the Constitutional Review Group

1.15 The Constitutional Review Group was appointed to prepare a report on all aspects of the Constitution. This was to be prepared and presented to the All Party Oireachtas Committee in order to assist the Committee in its work.¹⁴ The Review Group was chaired by Dr TK Whitaker and was comprised of academics, senior lawyers and economists.

1.16 The terms of reference provided to the Review Group were:

¹¹ The most recent proposed legislative change based on recommendations made by the Committee is the *Civil Law (Miscellaneous Provisions) Bill 2006* which proposes that the Courts Service will provide a secretary to each of the Rules of Courts Committees. This follows a recommendation of the Committee on Court Practice and Procedure that a support unit be provided within the Courts Service for the Rules of Courts Committees. Committee on Court Practice and Procedure *Twenty Eighth Interim Report The Court Rules Committees* (September 2003).

¹² An example of where the recommendations of the Committee on Court Practice and Procedure were not followed is the *Criminal Justice Act 1999*. The issue of whether the preliminary examination of indictable offences should remain in place was considered twice by the Committee on Court Practice and Procedure in their First Interim and Twenty Fourth Interim Reports. In their First Interim Report, after examining the procedure in some detail, the Committee came to the conclusion that the procedure should no longer be compulsory. Instead, they argued that it should be for the accused to elect to have such examination completed by the District Court. See Committee on Court Practice and Procedure *First Interim Report of the Committee on Court Practice and Procedure: The Preliminary Examination of Indictable Offences* (Stationery Office Pn 7164 1963). The Committee again examined the issue in 1997 and came to a similar conclusion. They concluded that the preliminary examination should not be abolished as they were of the opinion that the procedure still had an important function in the judicial system. Committee on Court Practice and Procedure *Twenty Fourth Interim Report of the Committee on Court Practice and Procedure: Preliminary Examination of Indictable Offences* (Stationery Office 1997).

¹³ Department of Justice *Programme of Law Reform* (Pr 6379 1962).

¹⁴ Constitutional Review Group *Report of the Constitutional Review Group* (Pn 2632 1996).

“to review the Constitution, and in the light of this review, to establish those areas where constitutional change may be desirable or necessary, with a view to assisting the all-Party Committee on the Constitution, to be established by the Oireachtas, in its work.”

1.17 The Constitutional Review Group considered a number of issues relating to the jurisdiction of the courts. These are considered in more detail in Chapter 2.

(6) *Fourth Progress Report of The All-Party Oireachtas Committee on the Constitution: The Courts and the Judiciary*

1.18 Following their consideration of the Report of the Constitutional Review Group, the All Party Oireachtas Committee on the Constitution published their Fourth Progress Report on the Courts and the Judiciary.¹⁵ This Report was mainly concerned with the appointment of judges, but it also considered a number of the recommendations of the Constitutional Review Group relating to the jurisdiction of the courts. These are mentioned in Chapter 2 of this Consultation Paper.

(7) *Working Group on a Courts Commission*

1.19 The Working Group on a Courts Commission was established by the Minister for Justice with the following terms of reference

“1. To review (a) the operation of the Courts system, having regard to the level and quality of service provided to the public, staffing, information technology, etc; (b) the financing of the Courts system, including the current relationship between the Courts, the Department of Justice and the Oireachtas in this regard; (c) any other aspect of the operation of the Courts system which the Group considers appropriate.

2. In the light of the foregoing review, to consider the matter of the establishment of a Commission on the Management of the Courts as an independent and permanent body with financial and management autonomy (as envisaged in the December 1994 document entitled “A Government of Renewal”.)

3. To have investigative, advisory and recommendatory functions and to make a report (and any interim reports and recommendations as they see fit) to the Minister for Justice on the foregoing matters.”

¹⁵ The All-Party Oireachtas Committee on the Constitution Fourth Progress Report *The Courts and the Judiciary* (Pn 7831 1999).

1.20 In its first Report,¹⁶ the Working Group noted that the administrative structure of the courts had remained essentially the same since 1924 despite the increase in civil and criminal litigation.¹⁷ They also noted that their Report was the first major review of the management of the Courts system since the foundation of the State. According to the Working Group this deficiency was a major factor in the difficulties in the courts system at the time of their Report.

1.21 In order to rectify this deficiency and after considering a number of options, the Working Group recommended that there be established by statute as a matter of urgency an independent and permanent body to manage a unified Court system. The Working Group found that such changes would make justice more accessible to the public.¹⁸ The Working Group also provided a list of suitable functions for the proposed body and its recommended composition.¹⁹ The recommendations of the Working Group were enacted in the *Courts Service Act 1998* which established the Courts Service.

1.22 In its second Report, the Working Group considered case management and Court management.²⁰ The main recommendation of note to this Consultation Paper is their recommendation that appointments to the Presidency of each of the Benches be for a non-renewable term of 7 years.²¹ This recommendation was enacted in section 4 of the *Courts (No 2) Act 1997*. The primary reason advanced by the Working Group for their recommendation was that an increase in workload of the Presidents of the Benches resulted in it being impractical for an individual to remain in the position as President for a long period of time. The Working Group also considered the Rules of Courts committees and made a number of recommendations regarding their composition, some of which were enacted in legislation.²² Finally the Working Group highlighted a number of difficulties encountered with particular officers of the courts.

¹⁶ Working Group on a Courts Commission *First Report: Management and Financing of the Courts* (Pn 2690 Stationery Office April 1996)

¹⁷ *Ibid* at 9.

¹⁸ *Ibid* at 15.

¹⁹ *Ibid* at 10.

²⁰ Working Group on a Courts Commission *Second Report: Case Management and Court Management* (Pn 3071 Stationery Office 1996).

²¹ *Ibid* at 17.

²² The recommendation of the Working Group that the Chief Executive of the Courts Service be a member of the Rules of Courts Committee is enacted in section 30 of the *Courts Service Act 1998*. The recommendation that the ex-officio members of the Committees be permitted to delegate their membership is enacted in section 36 of the

1.23 In its third Report, the Working Group provided guidance to the Minister for Justice on the legal framework for the proposed Courts Service and broad management approaches to the changing structure.²³ In its fourth Report, the Working Group considered the role of the Chief Executive of the Courts Service.²⁴ In its fifth Report, the Working Group advised the Minister for Justice on the establishment of a Drugs Court.²⁵ In their final Report the Working Group considered judicial conduct and ethics and courts sittings and vacations.²⁶ The Working Group recommended that the term ‘legal vacation’ be abandoned as it is misleading and a misnomer given that the courts sit throughout the year.²⁷ The Working Group also recommended that a pilot family law project be established to record family law decisions and to produce family law statistics.²⁸

(8) Chief Justice Keane’s 2001 Lecture

1.24 In 2001, the then Chief Justice Mr Justice Keane delivered a lecture in which he demonstrated that there was a need for a fundamental reform of the court structure.²⁹ A particular criticism relating to the courts put forward by the Chief Justice was that there had been no critical analysis of the courts system since its inception in 1924. He compared the structure of the Irish courts with that of a number of jurisdictions. He exposed a number of anomalies and irrational features in the courts system in this jurisdiction. Amongst those elucidated by Mr Justice Keane were the apparent illogical allocation of indictable cases between the Central Criminal Court and the Circuit Court; the *de novo* nature of appeals in every civil case from the District and Circuit Courts and the three tier nature of the courts system. He also highlighted a number of instances of wasteful use of

Courts and Courts Officers Act 2002. It is proposed to enact the recommendation of the Working Group that resources of the Courts Service be provided to the Rules Making Committees. Section 45 of *the Civil Law (Miscellaneous Provisions) Act 2006* proposes that a member of the Courts Service will be provided to act as secretary for each of the three Court Rules Committees.

²³ Working Group on a Courts Commission *Third Report: Towards the Courts Service* (Pn 3273 Stationery Office 1996).

²⁴ Working Group on a Courts Commission *Fourth Report: The Chief Executive of the Courts Service* (Pn 3766 Stationery Office 1997).

²⁵ Working Group on a Courts Commission *Fifth Report: Drugs Court* (Pn 5186 Stationery Office 1998).

²⁶ Working Group on a Courts Commission *Sixth Report: Conclusion* (Pn 6533 Stationery Office 1998).

²⁷ *Ibid* at 119.

²⁸ *Ibid* at 78.

²⁹ This lecture is published as Keane “The Irish Courts System in the 21st Century: Planning for the Future” (2001) 6(6) Bar Review 321.

judicial resources: first hearing of appeals outside Dublin by the High Court on Circuit and, second, the licensing jurisdiction of the District and Circuit Courts.

1.25 Mr Justice Keane advocated the introduction of a rationally designed Irish courts system consisting at first instance level of a District Court with an enlarged civil jurisdiction and an expanded High Court to which all existing civil and criminal jurisdiction of the Circuit Court would be transferred. He recommended that a permanent Court of Appeal, with jurisdiction in civil and criminal matters, be established to hear appeals from the High Court and with leave to allow appeals to the Supreme Court. He argued that this Court of Appeal should hear appeals based on a transcript of the proceedings. He also alluded to the fact that appeals from all the courts in his proposed court structure would be heard by the Court of Appeal.

(9) Working Group on the Jurisdiction of the Courts

1.26 The Working Group on the Jurisdiction of the Courts was established in the aftermath of Chief Justice Keane's lecture. This Working Group, chaired by Mr Justice Fennelly of the Supreme Court, was entrusted, amongst other things, with the task of examining the existing jurisdiction of the courts in Ireland and ultimately to make recommendations as to any changes which, in the opinion of the Working Group, are desirable in interests of fair, expeditious and economic administration of justice.³⁰

1.27 The Working Group published its Report on the criminal jurisdiction of the courts in 2003. The Working Group met regularly during the preparation of the Report and held a public consultation. The Report provided a summary of the reports made by various bodies relating to the criminal jurisdiction of the courts since 1937. In general terms, the Working Group examined and made recommendations relating to a number of matters concerning the criminal jurisdiction of the courts. The Working Group considered the limits of the summary jurisdiction of the District Court and concluded that the maximum sentencing powers of the District Court should not be reduced. The Working Group recommended an increase to €10,000 in the level of fines that could be imposed in the District Court. The Working Group also examined 'either way' offences. Their recommendations in this regard are considered in further detail in Chapter 3 of this Consultation Paper. They also considered the issue of appeals in criminal matters, both summary and upon indictment. They recommended against any extension of the right of prosecution appeal from decisions against sentences handed down in the District Court. The Working Group also considered the allocation of criminal business on indictment; this is

³⁰ Working Group on the Jurisdiction of the Courts *The Criminal Jurisdiction of the Courts* (Stationery Office 2003) at 243.

considered in Chapter 3 below. They examined the Court of Criminal Appeal and recommended that the leave requirement be abolished. Finally the Working Group discussed the criminal trial process in general and made recommendations relating to a number of procedural matters.

1.28 A number of the recommendations in the Working Group's Report are discussed in more detail in Chapters 2 and 3 below.

(10) Statute Law Revision Acts 2005 and 2007

1.29 It is fair to say that, until recently, there has been a dearth of statute law revision Acts in this jurisdiction.³¹ Such Acts "are those which repeal Acts which are either dormant, spent ineffectual or simply out of date."³² This lacuna has made it difficult to assess with accuracy the content of the Irish statute book. This lacuna has been filled because the Attorney General's Office recently engaged in a process of identifying legislation enacted prior to 1922 that remained in force. This process led to the enactment of the *Statute Law Revision (Pre-1922) Act 2005*.

1.30 The *Statute Law Revision (Pre-1922) Act 2005* repealed 219 Acts that pre dated the foundation of the State, and which were no longer in force and were considered to be spent, or which were in force and were no longer considered to be of practical utility. The Act assists with the provision of an updated, relevant and coherent statute book. Part 1 of the Schedule to the Act provides for some Pre-Union Statutes which are repealed. None of these Acts appear to relate to courts. Part 2 of the Schedule provides for the repeal of some Statutes of England. The only statute in Part 2 that appears to relate to courts is the *Exchequer Court Act* of an uncertain date. Part 3 of the Schedule deals with the repeal of some of the Statutes of Great Britain enacted between 1701 and 1800. None of the Acts contained in this part appear to be concerned with the courts. Finally, Part 4 of Schedule sets out Statutes of Great Britain and Ireland from 1800 which are repealed by the Act. A number of these relate to the Courts, although it is important to note that as they have been repealed in the context of the Statute Law Revision Act, they are regarded as no longer having any relevance to the jurisdiction of the courts currently operating in Ireland. It is for the sake of completeness that the Commission notes them at this juncture. They are:

- *Court Houses (Ireland) Act 1818*³³

³¹ Excluding the two Acts discussed in this section, there have been 2 general Statute Law Revision Acts. They are the *Statute Law Revision (Pre-Union Statutes) Act 1962* and the *Statute Law Revision Act 1983*.

³² Byrne and Binchy *Annual Review of Irish Law 2005* (Thomson Roundhall 2006) at 537.

³³ 58 Geo 3 c 31.

- *Justices (Ireland) Act 1843*³⁴
- *Court of Chancery (Ireland) Regulation Act 1850*³⁵
- *Inferior Courts Officers (Ireland) Act 1858*³⁶
- *Court of Bankruptcy (Ireland) Officers and Clerks Act 1881*.³⁷

1.31 The 2005 Act was followed by the *Statute Law Revision Act 2007*. This Act repeals all public general statutes enacted before 6th December 1922, with the exception of a “white list” of Acts that are specifically and expressly preserved. The Act provides, for the first time, a comprehensive and complete list of pre-1922 statutes that are retained. The *Statute Law (Revision) Act 2007* lists 1,364 pre-1922 Acts that are to remain on the Statute Book. The Act was devised as part of the Government’s White Paper on *Regulating Better*³⁸ which identified the need for an evaluation of existing legislation. The 2007 Act is a novel form of Statute Law Revision Act because it contains, in Schedule 1, a definitive list of all pre 1922 Acts that have continuing legal effect and that are retained. The 2007 Act has greatly facilitated the Commission in its identification of pre-1922 legislation that is still of relevance to the courts in this jurisdiction. For example, the *Courts Act 1476*³⁹ provides that judges and barons are to wear their habits and coifs in term time.

1.32 The Commission wishes to acknowledge the immense work completed by the Office of the Attorney General at all stages of the preparation of material for the 2007 Act. The 2007 Act provides much needed clarity on the exact status of all pre-1922 legislation and is a clear base on which to develop a more accessible Irish Statute Book.⁴⁰

(11) Law Reform Commission Material

1.33 Since its inception in 1975, the Law Reform Commission has published a large number of Consultation Papers and Reports. A number of these make recommendations which affect the jurisdiction of the courts. For

³⁴ 6&7 Vic c 8.

³⁵ 13&14 Vic c 89.

³⁶ 21&22 Vic c 52

³⁷ 44&45 Vic c 23.

³⁸ Department of the Taoiseach *Regulating Better* (Stationery Office 2004).

³⁹ 16&17 Edw 4 c 22.

⁴⁰ See also the Commission’s *Consultation Paper on Statute Law Restatement* (LRC CP 45-2007).

example, the Commission recommended that rape be transferred to the exclusive jurisdiction of the Central Criminal Court.⁴¹

1.34 The Commission considered the structure of the family law courts in its *Report on Family Courts*.⁴² The Commission recommended that a system of Regional Family Law Courts be established and operate in 15 regional centres.⁴³ The Commission envisaged that these proposed Family Law Courts would be vested with a unified family jurisdiction wider than that of the Circuit Court.⁴⁴ The Commission recommended that the District Court jurisdiction in family law matters should be limited to the making of emergency and interim orders especially in situations of emergency.⁴⁵ The main reason advanced by the Commission for the retention of such jurisdiction by the District Court was the availability of a large number of District Judges and the broad geographical spread of the District Courts.⁴⁶ The Commission envisaged that all substantive decisions having long-term effect would be reserved to the jurisdiction of the Regional Family Law Court.

1.35 Most recently, the Commission considered prosecution appeals in cases brought on indictment and prosecution appeals against unduly lenient sentences in the District Court.⁴⁷ The Commission recommended against the introduction of a 'with prejudice' right of prosecution appeal from cases brought on indictment. Instead the Commission favoured a without prejudice prosecution appeal as the more desirable option. Further the Commission recommended against conferring a power on the Director of Public Prosecutions to appeal unduly lenient sentences in the District Court.

1.36 A number of other recommendations made by the Commission are considered in Chapters 2 and 3.

⁴¹ See Law Reform Commission *Consultation Paper on Rape* (December 1987) and Law Reform Commission *Report on Rape and Allied Offences* (LRC 24-1988).

⁴² Law Reform Commission *Report on Family Law Courts* (LRC 52-1996).

⁴³ The Working Group on a Courts Commission re-iterated this recommendation in its Final Report. Working Group on a Courts Commission *Sixth Report Conclusion* (Pn 6533 Stationery Office 1998) at 78.

⁴⁴ *Ibid* at 127.

⁴⁵ *Ibid* at 129.

⁴⁶ *Ibid* at 36.

⁴⁷ Law Reform Commission *Report on Prosecution Appeals and Pre-Trial Hearings* (LRC 81-2006).

CHAPTER 2 HISTORY OF THE COURTS IN IRELAND

A Introduction

2.01 In this Chapter, the Commission examines the history of the jurisdiction and development of the courts in Ireland. In order to appreciate the rationale underlying the distribution of jurisdiction among our courts at present, an examination of the jurisdiction exercised by their predecessors is necessary.¹ The courts today have very firm roots in the 19th and 20th century. It has been commented that the courts system put in place in 1924 was not much different to its pre-1922 predecessor:

“...while the structure headed by the Lord Chancellor was dispensed with and the administration of the Courts was given, inter alia, to the Department of Justice and certain powers to some judges, the system continued to reflect its historical roots.”²

2.02 The courts in place in Ireland have remained essentially unchanged since 1924 since they were established by *The Courts of Justice Act 1924*. While the court system was reconstituted by the *Courts (Establishment and Constitution) Act 1961*, the core elements of the 1924 court system were retained. The courts in Ireland since 1924 have been, therefore, in descending order :

- The Supreme Court
- The Court of Criminal Appeal
- The High Court
- The Circuit Court
- The District Court.

2.03 While both the 1924 and 1961 Acts provided for a change in title of some of the courts that existed prior to the foundation of the State in 1922, they also transferred functions and jurisdictions that had been carried out by their pre-1922 predecessors. As a result, the ‘Courts Acts’, for the purpose

¹ Delany *The Administration of Justice in Ireland* (4th ed IPA 1975) at 13.

² Working Group on a Courts Commission *First Report: Management and Financing of the Courts* (Pm 2690 Government Publications 1996) at 18.

of this Consultation Paper, involve a combination of pre-1922 and post-1922 Acts.

2.04 The purpose of the Commission's project on the Courts Acts is to set out in a single document a complete legislative statement of the jurisdiction of the courts, combining the pre-1922 and post-1922 provisions. In order to do this it is necessary to understand the historical development of the court system prior to 1922. To take a simple example, in order to provide a complete picture of the jurisdiction of the District Court, it is important to know that the District Court is the successor to the pre-1922 Justices of the Peace sitting at and outside Petty Sessions. It is then necessary to check whether any pre-1922 statutory provision conferring jurisdiction on the Magistrates' Courts that has been carried over by the post-1922 Courts Acts remain relevant in order to provide a complete jurisdiction of the District Court. For example, section 51 of the *Courts (Supplemental Provisions) Act 1961* extends the time within which an application to state a case, pursuant to section 2 of the *Summary Jurisdiction Act 1857*, may be brought by parties. The jurisdiction in section 2 of the *Summary Jurisdiction Act 1857* was originally exercisable by Justices of the Peace and was later transferred to the District Court.³

2.05 In this Chapter, therefore, the Commission traces the historical development of the court system in Ireland prior to 1922. The key objective is to trace the 'family tree' of the current courts in Ireland so that a definitive statement of jurisdiction of the various courts can be made.

2.06 In general terms, the Commission proposes to outline the historical roots of the Court in this jurisdiction, identify pre-1922 legislation which are still of relevance to the courts and to trace the development of the courts since their beginnings in the *Courts of Justice Act 1924*.

2.07 In this section, each Irish court is examined separately. Further, each court has developed differently in its main jurisdictions, both civil and criminal, and for that reason each is discussed separately in Parts B and C of this Chapter.

2.08 The Commission has examined the courts' jurisdiction using the following headings:

- *Supreme Court of Judicature (Ireland) Act 1877/County Officers and Courts (Ireland) Act 1877*
- *Government of Ireland Act 1920*
- Irish Free State Constitution
- Judiciary Committee Report

³ Section 33 of the *Courts (Supplemental Provisions) Act 1961*.

- *Courts of Justice Act 1924*
- Report of the Joint Committee on The Courts of Justice Act 1924
- Constitution of 1937
- *Courts (Establishment and Constitution) Act 1961*
- *Courts (Supplemental Provisions) Act 1961*
- Committee on Court Practice and Procedure
- Constitutional Review Group Report

B Civil Jurisdiction

(1) The Supreme Court

(a) Pre-1922

(i) Introduction and The Act of Union

2.09 In 1719, the Parliament at Westminster legislated that the House of Lords of Ireland was to have no jurisdiction to hear appeals.⁴ Thereafter, appeals from courts in Ireland were heard by the House of Lords of Great Britain and Ireland in Westminster. A 1783 Act did not expressly provide the Irish House of Lords with jurisdiction to hear appeals, but it did exclude English courts from hearing appeals from Ireland.⁵ This had the effect of permitting the Irish House of Lords to hear appeals from Irish courts. This was to remain in place until the *Act of Union 1800* permanently disposed of the Irish House of Lords.

2.10 The *Act of Union 1800*⁶ dismantled the Dublin Parliament and provided that Irish appeals were to be to the House of Lords of the United Kingdom and Ireland. In 1856 an intermediate court of appeal, the Court of Appeal in Chancery was established by the *Chancery Appeal Court (Ireland) Act 1856*⁷ in order to relieve the heavy appeal workload faced by the House of Lords.⁸ The Chancery Court of Appeal was presided over by the Lord Chancellor and one Judge of the Chancery Court of Appeal.⁹ The Court had jurisdiction to hear appeals from the Masters of Rolls, Incumbered Estates

⁴ 6 Geo I c. 5

⁵ 23 Geo III c 28.

⁶ 40 Geo 3 c 38.

⁷ 19&20 Vic c 92.

⁸ Section XIV of the *Chancery Appeal Court (Ireland) Act 1856* 19&20 Vic c 92

⁹ Section IV of the *Chancery Appeal Court Act 1856*.

Court and the jurisdiction in appeals formerly vested in the Lord Chancellor. The decisions of the Court were subject to appeal to the House of Lords as decisions of the Lord Chancellor had previously been.

(ii) *The Supreme Court of Judicature (Ireland) Act 1877*

2.11 The *Supreme Court of Judicature (Ireland) Act 1877* (hereafter referred to as the “Judicature Act”)¹⁰ did not in any way affect the position of the House of Lords as the final court of appeal.¹¹ The Act did, however, make significant changes to the system of intermediate appeals. The Act established a new Court of Appeal¹² to which it transferred the jurisdiction of the former Chancery Court of Appeal sitting as a Court of Appeal and exercising its appellate jurisdiction in appeals from the Court of Probate, the Court for Matrimonial Causes and Matters, the Landed Estates Court, the High Court of Admiralty or the Court of Bankruptcy were transferred to the Court of Appeal established by the Judicature Act.¹³

2.12 The newly-established Court of Appeal could hear appeal cases from the High Court. This created, for first time, a modern form of appeal. Previously, the only form of appeal was a procedural form, such as an appeal by way of a writ of error alleging some form of error on record of the case, that is, in the pleadings, or in the verdict.¹⁴ For example, appeals from the Court of Chancery based on error were heard by the King’s Bench Court in Ireland, with an appeal from this court to the King’s Bench Court in England.¹⁵

2.13 The Court of Appeal appellate jurisdiction in the Judicature Act¹⁶ is clearly the model for the appellate jurisdiction of the Supreme Court. Section 24 of the 1877 Act provided for the Court of Appeal to hear and determine appeals from the High Court, subject to any provisions of the Act. It also stated that the Court of Appeal was to have the same power and

¹⁰ 40&41 Vic c 57.

¹¹ Section 86 of the *Supreme Court of Judicature (Ireland) Act 1877*. There was one exception to the general rule that the House of Lords was the final court of appeal. There was no appeal available to the House of Lords from rulings of Judicial Commissioners on questions of law submitted to Judicial Commissioners by the Estate Commissioners. In such cases, the Court of Appeal was the final court of appeal. This was so declared by Sir Ignatius J in *In re Scott’s Estate* [1916] 1 IR 180 at 194.

¹² The Court of Appeal was one of the divisions of the Supreme Court of Judicature. See section 5 of the *Supreme Court of Judicature (Ireland) Act 1877*.

¹³ Section 23 of the *Supreme Court of Judicature (Ireland) Act 1877*.

¹⁴ Delany *The Administration of Justice in Ireland* (4th ed IPA 1975) at 20.

¹⁵ Newark *Notes on Irish Legal History* (Queen’s University Belfast 1960) at 18.

¹⁶ 40&41 Vic c 57 section 4.

authority as the High Court for the purposes of hearing the appeal and execution and enforcement of any judgment made by the Court of Appeal. The original jurisdiction of the Court of Appeal was limited to that necessary for the determination of the appeal.¹⁷

2.14 The Court of Appeal consisted of the Lord Chancellor, the Master of the Rolls, the Lord Chief Justice of Ireland, the Chief Justice of the Common Pleas, the Chief Baron of the Exchequer and two other judges known as the Lord Justices of Appeal.¹⁸

(iii) *The Government of Ireland Act 1920*

2.15 The *Government of Ireland Act 1920*¹⁹ has been described by one commentator as being “the last of a series of attempts to reconcile the essential unity of the United Kingdom of Great Britain and Ireland, established by the Act of Union 1800, with nationalist aspirations in Ireland.”²⁰ The Act divided the island of Ireland into two distinct political units, each with its own judicial system. It also proposed that the Supreme Court of Judicature in Ireland would cease to exist.²¹ The proposed judicial system was made up of a Supreme Court of Justice of Southern Ireland which consisted of two divisions: the High Court of Justice in Southern Ireland and a Court of Appeal for Southern Ireland, similar to those established under the Judicature Act.²²

2.16 The *Government of Ireland Act 1920*²³ established the Court of Appeal for Southern Ireland. The newly-established Court of Appeal for Southern Ireland was to be presided over by the Chief Justice of Ireland. A High Court of Appeal for the whole of Ireland was to be established as a final court of appeal with jurisdiction to hear appeals from both the Court of Appeal for Northern Ireland and Court of Appeal for Southern Ireland.²⁴ This court sat for the first time on 15 December 1921 and held its last sitting on 5 December 1922. It heard a number of appeals from both Northern Ireland and Southern Ireland, one of which, *Copper v General Accident, Fire*

¹⁷ Wylie *The Judicature Acts (Ireland) and Rules of the Supreme Court (Ireland) 1905* (Sealy Bryers and Walker 1906) at 25.

¹⁸ Section 10 of the *Supreme Court of Judicature (Ireland) Act 1877*.

¹⁹ 10&11 Geo 5 c 67.

²⁰ Delany *The Administration of Justice in Ireland* (4th ed IPA 1975) at 32.

²¹ Section 38 of the *Government of Ireland Act 1920*.

²² Section 39 of the *Government of Ireland Act 1920*.

²³ 10&11 Geo 5 c 67.

²⁴ Section 38 of the *Government of Ireland Act 1920*.

*and Life Assurance Corporation Limited*²⁵ was later upheld by the House of Lords.²⁶ The High Court of Appeal for Ireland was abolished by the *Irish Free State (Consequential Provisions) Act 1922*.²⁷ The Act also repealed the *Government of Ireland Act 1920* insofar as it applied to any part of Ireland other than Northern Ireland.

2.17 The Court of Appeal for Southern Ireland was vested with the jurisdiction formerly vested in the Court of Appeal in Ireland that was established by the Judicature Act.²⁸

2.18 The right of appeal from the High Court of Appeal for Ireland to the House of Lords was retained in certain cases namely:

- in any case where under existing enactments prior to the introduction of the 1920 Act, such an appeal would lie from the existing Court of Appeal in Ireland to the House of Lords;
- in any case where a person was aggrieved by a decision of the High Court of Appeal for Ireland in any proceedings taken by way of certiorari, mandamus, quo warranto or prohibition;
- in any case where the decision of the High Court of Appeal for Ireland involved a decision as to the validity of any law made or having effect of an Act of the Parliament of Southern Ireland or Northern Ireland.²⁹

2.19 The decision of the House of Lords or the Judicial Committee of the Privy Council as the validity of any law made or having effect of an Act of the Parliament of Southern Ireland or Northern Ireland was final and conclusive.³⁰

2.20 The Court of Appeal existing in 1922 was established by the 1920 Act but was modelled on the Judicature Act's Court of Appeal. The development and jurisdiction of the current Supreme Court, excluding its original constitutional jurisdiction, bear close relation to the former Court of Appeal.

²⁵ [1922] 2 IR 214.

²⁶ Donaldson "Legal History and Present-Day Legal Systems" in Donaldson (ed) *Some Comparative Aspects of Irish Law* (Duke University Press 1957) at 19.

²⁷ Schedule I, paragraph 6 of the *Irish Free State (Consequential Provisions) Act 1922*, 13 Geo. V Session 2 c 2. See also Delany *The Administration of Justice in Ireland* (4th ed IPA 1975) at 32.

²⁸ Section 39 of the *Government of Ireland Act 1920*.

²⁹ Section 49 of the *Government of Ireland Act 1920*.

³⁰ Section 53 of the *Government of Ireland Act 1920*.

(iv) Dáil Courts

2.21 Between 1919 and 1921 Dáil Éireann established courts which were very different to the British model of courts which had been in place. These Dáil Courts operated in parallel with the system in place under the *Government of Ireland Act 1920*. The Dáil Courts were organised in a hierarchy of four tiers: Parish Courts were established to deal with petty crime and minor civil business; District Courts were established to hear appeals and more important civil and criminal matters; a ‘Circuit Court’ was established with unlimited civil and criminal jurisdiction and finally a court of appeal called the ‘Supreme Court’ was established to sit in Dublin. It is noteworthy that this was the first reference to courts known as the ‘Supreme Court’, ‘Circuit Court’ and ‘District Court’ in this jurisdiction. These terms were continued after 1922 to apply to the courts established by the *Courts of Justice Act 1924*.

2.22 The governing bodies of the legal profession demonstrated a certain reluctance to participate in, and suspicion towards, these newly established courts. The Bar Council adopted a resolution which forbade its members from appearing in any of the Dáil courts, but did not take action against any of its members who disobeyed its resolution.³¹ The Law Society considered tabling such a resolution but later dropped the idea. In any event, the Dáil Courts flourished and by the establishment of the Irish Free State in 1922, over 900 Parish Courts and 70 District Courts were in existence. At this time the system of superior courts established by the *Government of Ireland Act 1920* was also in existence as were inferior courts such as the Court of Assize, Court of Quarter Sessions, County Courts and Courts of Petty Sessions.

2.23 The provisional Government, which took over the administration of what was to become the Irish Free State, was faced with the choice of consolidating the structure of the Dáil Courts or employing the structure of the former British courts as a basis on which to build its new court structure. The adoption of the Irish Free State Constitution³² required the reorganisation of the judicial system. The provisional government decided to retain the British court structure.³³ The Dáil Courts were abolished in 1923 by the *Dáil Éireann Courts (Winding-Up) Act 1923*.

³¹ Delany *The Administration of Justice in Ireland* (4th ed IPA 1975) at 36.

³² *Constitution of the Irish Free State (Saorstát Eireann) Act 1922*.

³³ The former Chief Justice, Mr Justice Keane, noted that the provisional government officially stated that the Dáil Courts retained their legitimacy and the British Courts could only be resorted to where the only relevant jurisdiction was conferred on ‘British Courts.’ Keane “The Voice of the Gael: Chief Justice Kennedy and the Emergence of the new Irish Court System 1921-36” (1996) 31 *Ir Jur* (ns) 205 at 208.

(b) Post-1922

(i) Irish Free State Constitution 1922

2.24 The appellate jurisdiction of the current Supreme Court and the former Supreme Court (pre *Courts (Establishment and Constitution) Act 1961*) are very similar to that of Court of Appeal of Southern Ireland established by the *Government of Ireland Act 1920*.³⁴ The Irish Constitution of 1937 has provided the Supreme Court with further original constitutional jurisdiction, for example, Article 26 references from the President, and the function of establishing whether the President is permanently incapacitated. The Constitution of the Irish Free State,³⁵ which came into operation on 6 December 1922 by virtue of the *Constitution of the Irish Free State (Saorstát Eireann) Act 1922*, contained a number of provisions regarding the courts. Article 64 of the 1922 Constitution provided as follows:

“The judicial power of the Irish Free State (Saorstát Eireann) shall be exercised and justice administered in the public Courts established by the Oireachtas by judges appointed in a manner hereinafter provided.”

2.25 Article 64 stated that the courts were to be comprised of Courts of First Instance and a Court of Final Appeal to be called the Supreme Court. Further guidance on the jurisdiction of the Supreme Court was provided in Article 66 of the 1922 Constitution. Article 66 provided:

“The Supreme Court of the Irish Free State (Saorstát Eireann) shall, with such exceptions (not including cases which involve questions as to the validity of any law) and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court. The decision of the Supreme Court shall in all cases be final and conclusive, and shall not be reviewed or capable of being reviewed by any other Court, Tribunal or Authority whatsoever: Provided that nothing in this Constitution shall impair the right of any person to petition His Majesty for special leave to appeal from the Supreme Court to His Majesty in Council or the right of His Majesty to grant such leave.”

The right of appeal to the Privy Council was abolished in 1933.³⁶

2.26 The 1922 Constitution contained a saver provision which permitted the existing courts to remain in place until the new courts came

³⁴ Section 38 of the *Government of Ireland Act 1920* 10&11 Geo 5 c 67.

³⁵ *Constitution of the Irish Free State (Saorstát Eireann) Act 1922*.

³⁶ *Constitution (Amendment No 22) Act 1933*.

into existence.³⁷ This also provided that Article 66 of the Constitution was to apply to all decisions of the Irish Court of Appeal which was to continue in being pending the establishment of the Supreme Court.

(ii) Judiciary Committee Report

2.27 The Judiciary Committee recommended that the Supreme Court should consist of a President and two Judges. It further recommended that in all cases where an appeal lies from the High Court, the appeal should be to the Supreme Court.³⁸ This envisaged the retention of the status quo of Article 66 of the 1922 Constitution in relation to its appellate jurisdiction from decisions of the High Court.

2.28 The Committee further recommended that there be one single rule-making authority for the Supreme Court, High Court and Court of Criminal Appeal.³⁹

(iii) Courts of Justice Act 1924

2.29 An Act was required to implement the recommendations of the Judiciary Committee. At the time of the introduction of the *Courts of Justice Bill 1923* which became the *Courts of Justice Act 1924*, President Cosgrave indicated the importance of the Bill. He stated that it was

“a Bill for setting up Courts exactly on the lines of the report of that Commission, so that this Bill may be said to have behind it the unanimous recommendation of an expert Commission, and as far as one has been able to judge by the many expressions of opinion in the Press and elsewhere the hearty approval and endorsement of the public. The Government consider it very important to have National Courts of Justice in existence at the earliest possible moment in order that the people may have the most complete confidence in the administration of the law, and may be thereby led to respect for the law which previously existing circumstances did not inspire.”⁴⁰

2.30 Many of the Judiciary Committee’s recommendations regarding the Supreme Court were enacted in the *Courts of Justice Act 1924*. Section 5 of the Act enacted the Committee’s recommendation on the constitution of

³⁷ Section 75 of the *Constitution of the Irish Free State Act (Saorstát Eireann) 1922*.

³⁸ The *Judiciary Committee Report of the Judiciary Committee* (Stationery Office 1923) at 24. It is of interest to note that the Chief Justice recommended the Supreme Court consist of five judges, but this recommendation was rejected on economic grounds. See Joint Committee on the Courts of Justice Act 1924 *Report of the Joint Committee on the Courts of Justice Act 1924* (Stationery Office 1930) at xxxvii.

³⁹ *Ibid* at 24.

⁴⁰ Dáil Debates Volume 4 31 July 1923.

the Supreme Court, although the President of the Supreme Court was titled the ‘Chief Justice’. Section 18 of the Act provided that Supreme Court would have:

“such appellate jurisdiction as is prescribed by the Constitution, and, subject as in this Act is provided, there shall be transferred to the Supreme Court the jurisdiction which at the commencement of this Act was vested in or capable of being exercised by the existing Court of Appeal of the Supreme Court of Judicature in Ireland or any judges or judge thereof.”

2.31 In this regard, the Supreme Court is a clear successor to the Court of Appeal established by the 1877 Judicature Act. Section 7 of the *Courts (Supplemental Provisions) Act 1961* sets out the jurisdiction of the Supreme Court. It is noteworthy that this section recognises that the Supreme Court inherited the jurisdiction vested in the Court of Appeal in Southern Ireland but omits to refer expressly to the jurisdiction vested in the Court of Appeal of the Supreme Court of Judicature.⁴¹ That said, the same section acknowledges that the Supreme Court established by the *Courts (Establishment and Constitution) Act 1961* is vested with all jurisdiction vested in the former Supreme Court. In that regard, the current Supreme Court is a successor to the Court of Appeal of the Supreme Court of Judicature.

2.32 The problems caused by the establishment of ‘new’ courts in 1961 mirrored those experienced with the establishment the Supreme Court in 1924. In 1930 the Chief Justice, Mr Justice Hugh Kennedy stated that the courts established by the 1924 Act were not the same courts as the pre-1922 Courts.⁴² Instead the courts established by the 1924 Act were ‘new’ courts. This was elucidated by Mr Justice Kennedy in *Quinn and White v Stokes and Quirke*⁴³:

“I venture to repeat once more that the Courts of Justice of the Saorstát are not the old courts of the British regime, amended, extended, divided or otherwise re-dressed, but the new courts, established by the Oireachtas under the authority of the Constitution of the Saorstát (in particular Articles 64 to 69 thereof). The most significant mark distinguishing them from the Courts of the former regime is to be found in the second Article of the Constitution. They were established by *The Courts of Justice Act 1924* (No. 10 of 1924), but the universal original jurisdiction of the High Court was conferred directly by the 64th Article of the

⁴¹ Section 7 of the *Courts (Supplemental Provisions) Act 1961*.

⁴² *Quinn and White v Stokes and Quirke* [1931] IR 558.

⁴³ [1931] IR 558 at 564.

Constitution. The Courts of the former system were brought to an end by divesting them of all their jurisdiction and transferring such jurisdiction (so far as it still had any statutory or other existence) to the newly established Courts of the Saorstát, which, however, were already clothed with jurisdiction and judicial power and authority by the Constitution and the *Courts of Justice Act, 1924*, quite independently of the old Courts.”

(iv) *Report of the Joint Committee on the Courts of Justice Act 1924*

2.33 The main question which the Committee considered with reference to the Supreme Court was its composition, namely whether that court, as final Court of Appeal of the Irish Free State,⁴⁴ should consist of only three members. The Committee recommended that it should consist of more than three members, but fell short of recommending the exact number.⁴⁵

2.34 The finding of the Committee that additional judges were required in the Supreme Court was acted upon in the *Courts of Justice Act 1936*, which provided for an increase in the number of Supreme Court judges from three to five.⁴⁶

(v) *The Constitution of 1937*

2.35 A ‘saver’ analogous to that of Article 75 of the 1922 Constitution was contained in the 1937 Constitution. Article 58 of the 1937 Constitution provided for the temporary continuance of the courts in existence at the time of the coming into operation of the 1937 Constitution.

2.36 Article 34.1 of the Constitution makes provision for the administration of justice in “courts established by law by judges appointed in the manner provided by this Constitution”. The “Court of Final Appeal” is known as the Supreme Court.⁴⁷ The Supreme Court is vested with full 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”.⁴⁸ An example of such jurisdiction may be found in section 29 of the *Courts of Justice Act 1924*⁴⁹ which allows for the Supreme

⁴⁴ The Committee appeared to ignore Article 66 of the 1922 Constitution which provided for the right of appeal to the House of Lords once leave of either the Supreme Court or the House of Lords was obtained.

⁴⁵ Joint Committee on the Courts of Justice Act 1924 *Report of the Joint Committee on the Courts of Justice Act 1924* (Stationery Office 1930) at xxxvii.

⁴⁶ Section 4 of the *Courts of Justice Act 1936*.

⁴⁷ Article 34.4.3° of the Irish Constitution 1937.

⁴⁸ Article 34.3.3° of the Irish Constitution 1937.

⁴⁹ See paragraph 2.196 of this Consultation Paper.

Court, in certain circumstances, to hear appeals from the Court of Criminal Appeal.⁵⁰ Article 34 of the 1937 Constitution is a reiteration of Article 66 of the Irish Free State Constitution, with the exception that it provides for the possibility for the Supreme Court to hear appeals from decisions of other courts, not simply the High Court.

2.37 The Supreme Court is given original jurisdiction in two instances. First, pursuant to Article 12.3.1^o, it is given the sole responsibility for determining any question which may arise as to whether the President of Ireland has become “permanently incapacitated.” This must be “established to the satisfaction of the Supreme Court consisting of not less than five judges”. Secondly, pursuant to Article 26, the President may, after consultation with the Council of State, refer a Bill to the Supreme Court for a decision as to whether the Bill, or any provision of it, is repugnant to the Constitution. This procedure has been used on numerous occasions, the most recent being *In the Matter of Article 26 of the Constitution and In the Matter of the Health (Amendment)(No 2) Bill 2004*.⁵¹ It was recognised in *The State (Browne) v Feran*⁵² that as Articles 12 and 26 confer original jurisdiction on the Supreme Court (as opposed to appellate jurisdiction) “there can be no question of any Act of the Oireachtas either conferring, modifying or withdrawing [such] jurisdiction”.⁵³

2.38 Article 34.3.3^o strengthens Article 26 first by providing that no other Court apart from the Supreme Court has jurisdiction to receive and decide on Article 26 references from the President, and secondly by stating that once the Supreme Court has declared a Bill referred to it by the President to be constitutional, the resulting Act is immune from further constitutional challenge.

2.39 The Supreme Court’s jurisdiction to hear appeals against decisions of the High Court is expressly limited by Article 34.4.3^o of the Constitution to “such exceptions and such regulations as may be prescribed by law”. An example of a statutory exception is section 52 of the *Courts (Supplemental Provisions) Act 1961* which provides that where a District Judge has stated a case to the High Court, leave must be obtained in order to appeal from the determination of the High Court.

⁵⁰ Section 29 of the 1924 Act, as restated by section 22 of the *Criminal Justice Act 2006* has been amended by section 59 of the *Criminal Justice Act 2007*.

⁵¹ [2005] IESC 7.

⁵² [1967] IR 147.

⁵³ *Ibid* at 155 *per* Walsh J.

(vi) Courts (Establishment and Constitution) Act 1961

2.40 The phrase “courts established by law” contained in Article 34.1 of the Irish Constitution was to have far-reaching, and ultimately perhaps unforeseen consequences for the courts in this jurisdiction. This phrase was examined by the Supreme Court in *The State (Killian) v Minister for Justice*.⁵⁴ The prosecutor in this case argued that the judge of the Circuit Court who presided over his criminal trial had been appointed in an illegal manner. This stemmed from the fact that the judge had been appointed after the 1937 Constitution, and that Article 34.1 envisaged courts being established after the 1937 Constitution. Therefore, it was argued that there was no power to appoint judges to the courts that remained in existence pending the establishment of the new courts. The prosecutor also argued that as Article 58 of the Constitution, unlike its predecessor in the 1922 Constitution (Article 75), did not expressly provide or allow for fresh appointments to fill vacancies that may arise in the ‘old’ courts pending the establishment of the new courts as envisaged by Article 34.1, the appointment of the Circuit Court judge who presided over his trial was null and void. The prosecutor failed in his argument, as the Court held that section 45 of *The Courts of Justice Act 1924* allowed for vacancies in the Circuit Court to be filled.

2.41 However, what was of significance was that the Court held that the provision of Article 34.1 that “justice shall be administered in courts established by law” was to be interpreted as referring to courts to be established in the future. The Court found that these new courts were to replace the existing courts, and that Article 58 of the 1937 Constitution allowed for the courts existing at the enactment of the 1937 Constitution to remain as functioning courts, pending the establishment of new courts.

2.42 The need to establish the courts envisaged by Article 34.1 was emphasised in *The State (Killian) v Minister for Justice*,⁵⁵ and this was done by the *Courts (Establishment and Constitution) Act 1961*. This 1961 Act establishes the Supreme, High, Circuit and District Courts as required by Article 34.1. It also disestablishes the counterparts of those courts existing immediately prior to the newly established courts.

2.43 The Supreme Court is established and constituted by section 1 of the Act. The jurisdiction of the Supreme Court is contained in section 7 of the *Courts (Supplemental Provisions) Act 1961*.

2.44 The personnel, courts, rules and jurisdiction of the new courts remained the same as the pre-1961 Act courts. The only tangible difference

⁵⁴ [1954] IR 207.

⁵⁵ [1954] IR 207.

in the courts established and constituted by the *Courts (Establishment and Constitution) Act 1961* was the removal of the phrase ‘of Justice’ from the title of the courts.

2.45 While the courts established by the 1961 Act are identical in jurisdiction to the earlier courts, technically they are new courts and decisions of the pre-1961 courts are not decisions of the new courts.⁵⁶ This was to cause difficulties with precedent, and there are a few instances where the current Supreme Court decided not to follow the jurisprudence of the ‘former’ Supreme Court. In a number of cases, the Supreme Court expressly regarded itself as a ‘new’ court as distinct from the pre-1961 Supreme Court. This was to allow the new ‘Supreme Court’ to vest itself with some extra flexibility with respect to decisions of the ‘former’ Supreme Court, and enabled it to depart from judgments of the ‘former’ Supreme Court.⁵⁷

2.46 In *The State (Quinn) v Ryan*⁵⁸ the ‘new’ Supreme Court declined to follow a decision of the former Supreme Court (*The State (Duggan) v Tapley*)⁵⁹ on the constitutionality of section 29 of the *Petty Sessions (Ireland) Act 1851*. The Supreme Court found section 29 of the 1851 Act to be repugnant to the Constitution. However, Walsh J was conscious of the implications that the decision could have and entered a restriction on the court’s ability to depart from a decision of the ‘former’ Supreme Court:

“This is not to say, however, that the Court would depart from an earlier decision for any but the most compelling reasons. The advantages of *stare decisis* are many and obvious so long as it is remembered that it is a policy and not a binding, unalterable rule.”⁶⁰

2.47 In the same year, the Supreme Court gave judgment in *Attorney General v Ryan’s Car Hire Ltd.*⁶¹ The Supreme Court, took the opportunity to overturn a line of authority including a Supreme Court decision of 1956 on the question of whether the State could sue for loss of services of a State servant injured through another’s negligence.⁶² Mr Justice Kingsmill Moore set out the position of the Supreme Court as follows:

⁵⁶ Byrne and McCutcheon *The Irish Legal System* (4th ed Butterworths 2001) at 359.

⁵⁷ *The State (Quinn) v Ryan* [1965] IR 70 and *Attorney General v Ryan’s Car Hire* [1965] IR 642. See also Walsh “Precedent in Former Irish Superior Courts” [2005] XL Irish Jurist (ns) 160.

⁵⁸ [1965] IR 70

⁵⁹ [1952] IR 62.

⁶⁰ [1965] IR 70 at 127.

⁶¹ [1965] IR 642

⁶² Hogan and Whyte *JM Kelly: The Irish Constitution* (4th ed Lexis Nexis 2003) at 978.

“The law which we have taken over is based on the following of precedents and there can be no question of abandoning the principle of following precedent as the normal, indeed almost universal, procedure. To do so would be to introduce into our law an intolerable uncertainty. But where the Supreme Court is of the opinion that there is a compelling reason why it should not follow an earlier decision of its own, or of the courts of ultimate jurisdiction which preceded it, where it appears to be clearly wrong, is it bound to perpetuate the error?”⁶³

2.48 Mr Justice Kingsmill Moore was patently aware of the uncertainty that would arise if the courts frequently departed from judgments of the pre-1961 courts. However, he was of the view that:

“However desirable certainty, stability and predictability of law may be, they cannot in my view justify a Court of ultimate resort in giving a judgment which they are convinced for compelling reasons, is erroneous.”⁶⁴

2.49 He went on to say that in his opinion:

“the rigid rule of *stare decisis* must in a court of ultimate resort give place to a more elastic formula. Where such a court is clearly of opinion that an earlier decision was erroneous it should be at liberty to refuse to follow it, at all events in exceptional cases”.⁶⁵

2.50 The Court justified its departure from previous jurisprudence of the former Supreme Court on the basis that a number of helpful cases (one American and one Canadian) were not cited to the Court in previous cases. For that reason, the Court held that it would be clearly wrong to follow the previous decisions.⁶⁶

2.51 In 1967 the Supreme Court⁶⁷ departed from the ‘former’ Supreme Court’s decision in *The State (Burke) v Lennon*.⁶⁸ The ‘former’ Supreme Court had held that no appeal lay against the granting of an order of *habeas corpus*. The post-1961 Supreme Court did not conduct any analysis of the doctrine of *stare decisis* or its implications. The main justification for the departure from a previous case was its reliance on an English case, *Cox v*

⁶³ [1965] IR 642 at 653.

⁶⁴ [1965] IR 642 at 654.

⁶⁵ *Ibid.*

⁶⁶ [1965] IR 642 at 667.

⁶⁷ *The State (Browne) v Feran* [1967] IR 147.

⁶⁸ [1940] IR 136

Hakes.⁶⁹ This English case was based on a statute, not the Constitution unlike the instant case which was constitutional in nature given that the Constitution provides for *habeas corpus*. The Court acknowledged that different canons of construction applied when considering a statute as opposed to the Constitution.⁷⁰ The Court concluded by stating that the effect of following *Burke* would be “completely contrary to the ordinance of Article 34.4.4°.”⁷¹

2.52 In 1981, in *Blake v Attorney General*⁷² the Supreme Court was “unable to accept the view”⁷³ of the ‘former’ Supreme Court in *Attorney General v Southern Industrial Trust*⁷⁴ that property rights referred to in Article 40.3 were the same as those contained in Article 43 of the 1937 Constitution.

2.53 It could be inferred from these decisions that clearly there is room for scope to argue that a decision of a ‘former’ court would not be binding on a post-1961 court. Such an assumption would, of course, lead to uncertainty in the judicial system. However, three cases cast doubt on the suggestion that the post-1961 courts will easily abandon the jurisprudence of the ‘former’ courts.

2.54 First, in *Mogul of Ireland v Tipperary (North Riding) County Council*,⁷⁵ the Supreme Court was not prepared to overrule a decision of the ‘former’ Supreme Court.⁷⁶ The main reason cited by the Supreme Court for its decision was that the ‘former’ Supreme Court had considered the issue previously, and the applicants had failed to establish that the decision in the previous case was wrong. The ‘former’ Supreme Court in the previous case had held that consequential loss was not a recoverable loss. Mr Justice Henchy outlined the view of the Court on the status of decisions of the ‘former’ Supreme Court as follows:

“A decision of the full Supreme Court (be it the pre-1961 or the post-1961 Court), given in a fully argued case and on a consideration of all the relevant materials, should not normally be

⁶⁹ 15 App Cas 506.

⁷⁰ [1967] IR 147 at 159.

⁷¹ [1967] IR 147 at 168.

⁷² [1982] IR 117.

⁷³ *Ibid* at 135.

⁷⁴ (1960) 64 ILTR 161.

⁷⁵ [1976] IR 260.

⁷⁶ *Smith v Cavan and Monaghan County Councils* [1949] IR 322.

overruled merely because a later Court inclines to a different conclusion”.⁷⁷

2.55 Secondly, in 1982 the Supreme Court in *The State (Lynch) v Cooney*⁷⁸ emphasised the importance of certainty and stability in the judicial system and adherence to the doctrine of *stare decisis*.⁷⁹ Mr Justice Henchy stated that the doctrine of *stare decisis* applied with equal force to decisions of the previous Supreme Court and such conclusion was supported by the need to maintain “judicial order and continuity”.⁸⁰ However, the Supreme Court still departed from the principle of the former Supreme Court that a ministerial opinion formed for a statutory purpose could not be reviewed.

2.56 Thirdly, in *Hynes-O’Sullivan v O’Driscoll*⁸¹ the Supreme Court again expressed a clear reluctance to overrule previous decisions of the ‘former’ Supreme Court. In this case, the Supreme Court refused to overrule two previous decisions of the ‘former’ Supreme Court⁸² on the subject of qualified privilege.

2.57 Although the cases discussed above emphasise the desirability of following decisions of the ‘former’ Supreme Court and set out reasonably strict guidelines for when such cases can be overruled, the fact remains that a number of decisions of the ‘former’ Supreme Court were overruled. The new Supreme Court stated that there was a need for ‘compelling reasons’ to justify a departure from a decision of the ‘former’ Supreme Court. However, such reasons were found with relative ease in the two cases mentioned at paragraphs 2.46 to 2.52 above. The Supreme Court endowed itself with new found flexibility to depart from principles established by the ‘former’ Supreme Court. It is questionable whether this is within the remit of the courts. In *Hynes-O’Sullivan v O’Driscoll*,⁸³ Mr Justice Henchy opined that “radical change in the hitherto accepted law should more properly be effected by statute”.

2.58 The cases referred to above caused a lack of certainty and predictability in the court system. Sections 1, 2, 3, 4 and 5 of the *Courts (Establishment and Constitution) Act 1961* establish the Supreme Court, High Court, Court of Criminal Appeal, Circuit Court and District Court. If

⁷⁷ [1976] IR 260 at 272.

⁷⁸ [1982] IR 337.

⁷⁹ Translation ‘let the decision stand’.

⁸⁰ [1982] IR 337 at 376.

⁸¹ [1989] ILRM 349.

⁸² *Reilly v Gill* (1951) 85 ILTR 165 and *Kirkwood Hackett v Tierney* [1952] IR 185.

⁸³ [1989] ILRM 349 at 361.

the Commission were to recommend the repeal and re-enactment of these sections, then it is possible that a similar line of jurisprudence to that which occurred after the 1961 Act would emerge.⁸⁴

2.59 It could be open to the Commission to provisionally recommend that these sections remain in force in the 1961 Act and would not form part of the proposed new consolidated and reformed Courts Bill.

2.60 However, there is another option which the Commission feels is worthy of consideration. If sections 1, 2, 3, 4 and 5 of the *Courts (Establishment and Constitution) Act 1961* are repealed and new sections enacted in their place but no equivalent of section 7 of the 1961 Act is included in the new Courts Bill, would the above problems be avoided? Section 7 of the 1961 Act provides that the courts existing prior to the coming into force of the 1961 Act should cease to exercise jurisdiction when the 1961 Act came into force. The section also makes provision for the disestablishment of the courts in existence prior to the Act. The *Interpretation Act 2005* (which came into force in January 2006) contains a number of sections concerning amendments of enactments. Section 26(2)(f) of the 2005 Act provides that where an enactment is repealed and re-enacted with or without modifications by another enactment then a reference in any other enactment to the original enactment is to be read as reference to the provisions of the new enactment. Section 27(1)(a) provides that where an enactment is repealed, the repeal does not revive anything in force or not existing immediately before the repeal. Section 27(2) provides a saver for any legal proceedings taken under the repealed enactment.

2.61 The Commission is of the view that it is possible to enact sections which acknowledge despite the repeal of sections 1, 2, 3, 4 and 5 of the *Courts (Establishment and Constitution) Act 1961*, that the relevant court established by the 1961 continues in being. However, it is the view of the Commission that this is not a sufficiently strong or stable basis on which to ground the establishment of the courts in this jurisdiction.

2.62 It is the opinion of the Commission that it is imperative that the current courts are maintained in a stable fashion. It is for that reason that the first of the above options is adopted in the draft Courts Bill appended to this Consultation Paper. In addition, the Commission was influenced by the fact that the proposal contained in the Department of Justice's 1962 Programme of Law Reform relating to the consolidating of the Courts Acts envisaged the

⁸⁴ Walsh has conducted an examination of the role of precedent in Irish Superior Courts from the end of the 19th century on and has demonstrated that successive Irish superior courts overruled decisions of courts from which they developed. See Walsh "Precedent in former Irish Superior Courts" (2005) 40 *Ir Jur* (ns)160. See also Henchy "Precedent in the Irish Supreme Court" (1962) 25 *MLR* 544.

re-enactment of the provisions of the Courts of Justice Acts apart from the *Courts (Establishment and Constitution) Act 1961*.

2.63 *The Commission provisionally recommends that sections 1,2,3,4 and 5 of the Courts (Establishment and Constitution) Act 1961, which concern the establishment of the existing courts, remain outside the ambit of the proposed consolidated Courts Bill in the interests of certainty.*

2.64 Due to the foregoing recommendation, it is necessary to examine whether a saver-type section providing for the continuation of the courts is required. Consequently, the Commission has examined the position of courts in other jurisdictions.

2.65 During its examination of a suitable scheme for a proposed Courts Act, the Law Commission of New Zealand considered how best to draft a section providing for the continuation of the High Court. It recommended that the continued jurisdiction of the High Court be as follows:

“The High Court of New Zealand continues as a superior court of record to have all the jurisdiction which it had before the commencement of this Act and all jurisdiction which may be necessary for the administration of law and justice in New Zealand [subject to the provisions of this Act and of other enactments].”⁸⁵

2.66 It is the opinion of the Commission that the wording of the statutory provision providing for the constitution of the Court of Appeal of New Zealand is worth considering. It provides as follows:

“There shall continue to be in and for New Zealand a Court of record called, as heretofore, the Court of Appeal:

Provided and it is hereby declared that the Court of Appeal heretofore and now held and henceforth to be held and shall be deemed and taken to be the same Court”.⁸⁶

2.67 The Queensland Law Reform Commission recommended that the following provision be enacted in its consolidating bill on the civil jurisdiction of its Supreme Court of Queensland:

“The Supreme Court of Queensland as by law established as the superior court of record in Queensland is hereby continued and it is hereby declared that the Supreme Court of Queensland

⁸⁵ Law Commission of New Zealand *The Structure of the Courts* (NZLC R7 1989) at 197.

⁸⁶ Section 57 of the *Judicature Act 1908*.

heretofore and now held and henceforth to be held is and shall be deemed and taken to be the same Court.”⁸⁷

2.68 The Queensland Law Reform Commission found that it was necessary for the section to provide for the phrase “by law established as the superior court of record in Queensland is hereby continued” as this would cause all references in Acts and regulations to the Supreme Court to continue to apply. Another consequence of this wording is that the jurisdiction and practice of the Court would not be altered in any manner unless done so by amending legislation. The phrase “heretofore and now held and henceforth to be held” was designed to express the historical continuity of the court.⁸⁸

2.69 The *Supreme Court Act 1981*⁸⁹ provides that:

“The Supreme Court of England and Wales shall consist of the Court of Appeal, the High Court of Justice and the Crown Court, each having jurisdiction as is conferred on it by or under any other Act.”⁹⁰

2.70 The Commission considers it desirable in the interests of clarity to provide a section in the Courts Bill similar in nature to section 57 of the *Judicature Act 1908*, which allows for the continuation of the existing courts.

2.71 *The Commission provisionally recommends that the proposed consolidated Courts Bill expressly provide for the continuation of each of the existing courts.*

(vii) Courts (Supplemental Provisions) Act 1961

2.72 The *Courts (Supplemental Provisions) Act 1961* was introduced as a supplement to the *Courts (Establishment and Constitution) Act 1961*, to provide for the matters specified in Article 36 of the Constitution (organisation of the courts) which are to be regulated by law. These include the number of judges of the courts, terms of appointment of judges and organisation of the courts. The model of the *Courts of Justice Act 1924* was

⁸⁷ Queensland Law Reform Commission *A Bill to Consolidate, Amend and Reform the Supreme Court Acts and Ancillary Acts Regulating Civil Proceedings in the Supreme Court* (Report No 32 1988) at 117.

⁸⁸ Queensland Law Reform Commission *A Bill to Consolidate, Amend and Reform the Supreme Court Acts and Ancillary Acts Regulating Civil Proceedings in the Supreme Court* (Report No 32 1988) at 8.

⁸⁹ 1981 Chapter 54.

⁹⁰ Section 1(1) of the *Supreme Court Act 1981*. This section will be amended on the commencement of section 59 of the *Constitutional Reform Act 2005* (2005 chapter 4). This section provides that the Supreme Court of England and Wales will be renamed as the Senior Court of England and Wales.

maintained, and the newly established courts did not differ in any material respects from their pre-1961 predecessors.

2.73 The Supplemental Provisions Act regulates, amongst other matters, the qualifications required of judges of the Supreme Court, pensions of Supreme Court judges and provides the general jurisdiction of the Supreme Court. The Act also contains a number of sections relating to court procedure.

2.74 The general jurisdiction of the Supreme Court is set out in section 7 of the Supplemental Provisions Act, as amended. Section 7 of the *Courts and Courts Officers Act 1995* amended section 7 of the 1961 Act to allow, for the first time, the option of the Supreme Court to sit in divisions, and to allow these divisions to sit at the same time. The remaining jurisdiction of the Supreme Court (apart from that as contained in the Constitution) is contained in section 7 of the 1961 Act, as amended. Apart from its constitutional jurisdiction and appellate jurisdiction, section 7 vests in the Supreme Court all jurisdiction previously exercised (or capable of being exercised) by the Court of Appeal in Southern Ireland, and by the ‘former’ Supreme Court.

(viii) Committee on Court Practice and Procedure

2.75 In its Eleventh Interim Report, the Committee on Court Practice and Procedure made a number of recommendations concerning the Supreme Court.⁹¹ None of these recommendations have been enacted by the Oireachtas. Nonetheless, they are worth examining.

2.76 The Committee first recommended that section 52 of the *Courts (Supplemental Provisions) Act 1961* be amended to allow for an appeal against the refusal of the High Court to grant leave to appeal its decision to the Supreme Court regarding a case stated from the District Court. The rationale for this recommendation was that important points of law frequently arise in such cases.⁹²

2.77 Further, the Committee recommended that constitutional issues initiated in the High Court that do not involve any disputed question of fact, should be capable of being transferred to the Supreme Court if the parties consent. The Supreme Court’s decision in such cases would be conclusive and final. Clearly, this recommendation was made for pragmatic and

⁹¹ Committee on Court Practice and Procedure *Eleventh Interim Report: The Jurisdiction and Practice of the Supreme Court* (Stationery Office Prl 1835 1970).

⁹² Committee on Court Practice and Procedure *Eleventh Interim Report: The Jurisdiction and Practice of the Supreme Court* (Stationery Office Prl 1835 1970) at 8.

logistical reasons as it would save costs and time. The procedure would mirror that of Article 26 of the Constitution.

2.78 Thirdly, the Committee recommended that, in the interests of uniformity, all consultative cases stated from lower courts go directly to the Supreme Court.⁹³ At present, a consultative case stated from the District Court is transmitted to the High Court,⁹⁴ while consultative cases stated by the Circuit Court or the High Court come before the Supreme Court.⁹⁵

2.79 Fourthly, the Committee recommended that the much-criticised ‘one opinion’ rule that applies to Article 26 references and to Article 34.4.5 constitutional cases be amended by Referendum. The Committee was of the opinion that the rule “inhibits the development of our constitutional case law” and that “valuable individual contributions to the interpretation of the Constitution will not be available for future study by lawyers or by the members of the Oireachtas or of the Government unless they are in their entirety agreed to by the majority of the judges of the Court....”.⁹⁶ All other recommendations made by the Committee relate to procedure.

2.80 One of the recommendations made by the Committee was later rejected by the Oireachtas through the enactment of section 7 of the *Courts and Courts Officers Act 1995*.⁹⁷ This section amended section 7 of the *Courts (Supplemental Provisions) Act 1961* to allow the Supreme Court to sit in two divisions. The Committee on Court Practice and Procedure was against this idea as they believed it would cause uncertainty in the law where the two divisions took different views on the same point of law.⁹⁸ The main reason for the introduction of divisions of the Supreme Court was delay in cases being heard by the Court. At the time of commencement of section 7,

⁹³ Committee on Court Practice and Procedure *Eleventh Interim Report: The Jurisdiction and Practice of the Supreme Court* (Stationery Office Prl 1835 1970) at 11.

⁹⁴ Section 52 of the *Courts (Supplemental Provisions) Act 1961*.

⁹⁵ Section 16 of the *Courts of Justice Act 1947* allows for a consultative case to be stated from the Circuit Court to the Supreme Court. Section 38(3) of the *Courts of Justice Act 1936* provides for a consultative case to be stated in limited circumstances from the High Court to the Supreme Court.

⁹⁶ Committee on Court Practice and Procedure *Eleventh Interim Report: The Jurisdiction and Practice of the Supreme Court* (Stationery Office Prl 1835 1970) at 11.

⁹⁷ See paragraph 2.74 of this Consultation Paper.

⁹⁸ Committee on Court Practice and Procedure *Eleventh Interim Report: The Jurisdiction and Practice of the Supreme Court* (Stationery Office Prl 1835 1970) at 22.

appellants had to wait three years for their cases to be heard by the Supreme Court and there were 250 cases waiting.⁹⁹

(ix) Constitutional Review Group

2.81 The Constitutional Review Group examined whether the Supreme Court should be vested with additional original jurisdiction to hear certain types of constitutional cases. The Review Group relied on *The State (Browne) v Feran*¹⁰⁰ as support for the contention that the vesting of originating jurisdiction by in the Supreme Court would be constitutional. Mr Justice Walsh was of the opinion that:

“the provisions of Article 34, section 4, sub-section 1, that "The Court of Final Appeal shall be called the Supreme Court" means that the only court of final appeal shall be the Supreme Court, not that the Supreme Court shall be only a court of final appeal. The Constitution has itself, as already pointed out with reference to Article 12, section 3, sub-section 1, and to Article 26, expressly provided otherwise.”¹⁰¹

2.82 The Review Group relied on later case law such as *Attorney General v Open Door Counselling Ltd (No. 2)*¹⁰² which suggested a narrower interpretation of Article 34.4. Mr Justice Finlay was of the opinion that the Supreme Court is an appeal court with only three originating jurisdictions: Article 26, Article 12.3 and the determination of a consultative case stated from the Circuit Court and the High Court.¹⁰³ He continued that it was only in the “most exceptional of circumstances, dictated by the necessity of justice” for the Supreme Court to consider an issue not argued and determined in the High Court.¹⁰⁴ On that basis, the Review Group queried whether it would be constitutional for a Bill to be initiated which invested originating jurisdiction on the Supreme Court.¹⁰⁵ It concluded its examination of the issue by determining that cases of exceptional importance

⁹⁹ Kelleher “The Courts and Courts Officers Act 1995: The Main Provisions” (1996) 14(1) ILT 18.

¹⁰⁰ [1967] IR 147.

¹⁰¹ *Ibid* at 157-8:

¹⁰² [1994] 2 IR 333.

¹⁰³ *Ibid* at 341.

¹⁰⁴ *Ibid* at 3

¹⁰⁵ Constitutional Review Group *Report of the Constitutional Review Group* (Pn 2632 1996) at 173.

and urgency in which facts are not in issue did not justify the amendment of Article 34.4 to confer originating jurisdiction on the Supreme Court.¹⁰⁶

2.83 The Review Group also considered whether the possibility of ‘court packing’ could occur because of the provision of Article 36 which provides for certain organisation matters relating to the courts to be regulated by law. ‘Court packing’ is a mechanism where the number of judges in a particular Court are increased to overbear an existing majority of a tendency unwelcome to a Government. The Review Group considered whether the number of Supreme Court judges should be prescribed in the Constitution. They concluded against any such provision for pragmatic reasons as a constitutional amendment would be required each occasion it was necessary to increase the number of Supreme Court Judges.¹⁰⁷

2.84 The Constitutional Review Group considered whether a constitutional court endowed with the jurisdiction of the Supreme and High Courts in matters of judicial review should be established. The Constitutional Review Group noted that such courts are common in other European States. The Group recommended against the establishment of such a court for a number of reasons including the difficulty with mixed questions of constitutional law and other aspects of law.¹⁰⁸

2.85 Finally, in relation to the Supreme Court the Review Group recommended that where the constitutionality of an Act is being challenged, the Supreme Court should sit with not less than 5 judges.¹⁰⁹ The Oireachtas Committee in its Report on the Courts and Judiciary did not agree with this recommendation. Instead, it recommended that the number of judges of the Supreme Court who sit to determine the validity of legislation continue to be regulated by legislation.¹¹⁰

(2) Court of Appeal

2.86 A proposal to create a Court of Appeal which would exercise both criminal and civil jurisdiction was contained in section 3 of the *Courts and*

¹⁰⁶ Constitutional Review Group *Report of the Constitutional Review Group* (Pn 2632 1996) at 174.

¹⁰⁷ Constitutional Review Group *Report of the Constitutional Review Group* (Pn 2632 1996) at 187.

¹⁰⁸ *Ibid* at 143-144.

¹⁰⁹ It has become common practice for the Supreme Court to sit in a division of 7 for important constitutional cases. For example the Supreme Court sat in such a division in *Curtin v Dáil Éireann and other* [2006] 2 IR 556 [2006] 2 ILRM 99. The Supreme Court consisted of Murray CJ, Denham, McGuinness, Hardiman, Geoghegan, Fennelly and McCracken JJ.

¹¹⁰ The All-Party Oireachtas Committee on the Constitution Fourth Progress Report *The Courts and the Judiciary* (Pn 7831 1999) at 46.

*Courts Officers Bill 1994*¹¹¹ which proposed that the Court of Appeal be constituted of:

“ (a) A President who shall be an ordinary judge of the High Court designated by the Government to be President of the Court of Appeal and who shall and who shall be styled “Uachtarán na Cúirte Achomhairc” (“The President of the Court of Appeal”), and

(b) two ordinary judges of the High Court who shall be designated, from time to time, by the Chief Justice to be ordinary judges of the Court of Appeal, each of whom shall be styled “Breitheamh den Chúirt Achomhairc” (“Judge of the Court of Appeal”).

(3)(a) The Chief Justice and the President of the High Court shall be *ex officio* judges of the Court of Appeal.

(b) The President of the Court of Appeal shall be *ex officio* a judge of the Supreme Court”.

2.87 At the time of the introduction of the Bill to the Oireachtas, the view was expressed in the accompanying explanatory memorandum that the *raison d’être* behind the proposed court was to reduce the number of civil appeals from the High Court which were being taken to the Supreme Court.

2.88 This proposal for a unified Court of Appeal although abandoned in 1994 (it was not contained in the subsequent *Courts and Court Officers Act 1995*) has continued to be pursued by a number of commentators most notably the former Chief Justice, Mr Justice Keane and has culminated in the recent establishment of a Committee to examine whether a Court of Appeal exercising a unified jurisdiction is suitable for this jurisdiction.

2.89 The jurisdiction for the proposed Court of Appeal as set out in section 4 of the 1994 Bill would have extended to civil and criminal cases. The proposed Court was to be empowered to deal with appeals from the High Court in personal injury actions and motions, planning cases pursuant to certain statutes, and *ex parte* applications in all proceedings with the exception of judicial review proceedings. The proposed Court of Appeal was expressly prohibited from hearing cases challenging the validity of any law having regard to the provisions of the Constitution. Additionally under section 5 of the Bill, the proposed Court of Appeal would be vested with the jurisdiction exercisable by the Court of Criminal Appeal combined with its civil jurisdiction. Section 5 of the Bill envisaged the jurisdiction of the Court of Criminal Appeal being combined with the Civil Court of Appeal.

¹¹¹ Kelleher “The Courts and Courts Officers Act 1995: The Main Provisions” (1996) 14(1) *ILT* 18.

The decision of the Court of Appeal was to be final, unless it or the Supreme Court certified that the case involved a question of law of exceptional public importance, in which case it would be heard by the Supreme Court.¹¹²

2.90 As already mentioned, the provisions of the 1994 Bill relating to the Court of Appeal were not included in the *Courts and Courts Officers Act 1995*. Instead, the 1995 Act envisaged the abolition of the Court of Criminal Appeal and the transfer of its jurisdiction to the Supreme Court.¹¹³ However, this section has not been brought into force, but remains on the statute book.

2.91 The former Chief Justice, Mr Justice Keane has also advocated a new appeal structure for the Irish Courts. His proposed model involves a permanent and unified Court of Appeal for both criminal and civil matters. The proposed Court could certify cases involving a question of law of public importance, where an appeal would lie to the Supreme Court. This Court would hear appeals based on a transcript of the hearing in the primary court.¹¹⁴

2.92 Recently, a further call for a permanent Court of Appeal vested with both civil and criminal jurisdiction has emerged.¹¹⁵ Mrs Justice Denham, writing extra judicially, has argued that the proposed Court be composed of permanent full time judges appointed to that Court and include a President and ordinary Judges of the Court of Appeal. The proposed Court of Appeal would be vested with jurisdiction to grant leave to appeal to the Supreme Court where there was a matter of public importance. The main argument advanced in favour of such a court is that the number of cases in the judicial system at present means that the Supreme Court is facing an increasingly large, and ultimately burdensome, case load. The fact that the Supreme Court is a constitutional court, a Court of Appeal in civil matters and ultimate Court of Appeal in criminal matters means its case load is immense.¹¹⁶ In furtherance of her argument, Mrs. Justice Denham argued that the vital element of consistency would emerge from the established Court of Appeal.¹¹⁷

¹¹² Section 5 of the *Courts and Courts Officers Bill 1994*.

¹¹³ Section 4 of the *Courts and Courts Officers Act 1994*.

¹¹⁴ Keane “The Irish Courts System in the 21st Century: Planning for the Future” (2001) 6(6) *Bar Review* 321 at 327.

¹¹⁵ Denham “Proposal for a Court of Appeal” [2006] 6 *Judicial Studies Institute Journal* 1 at 4.

¹¹⁶ Denham “Proposal for a Court of Appeal” [2006] 6 *Judicial Studies Institute Journal* 1 at 3.

¹¹⁷ Denham “Proposal for a Court of Appeal” [2006] 6 *Judicial Studies Institute Journal* 1 at 13.

2.93 The Commission welcomes the recent establishment of a Committee to examine the necessity for a Court of Appeal for this jurisdiction.¹¹⁸ The Committee is charged with examining whether a Court of Appeal, incorporating the Court of Criminal Appeal, would be a useful mechanism in this jurisdiction. As this Committee has only been recently established, it is the view of the Commission that it would be inappropriate for it to make any comment on the issues currently before this Committee.

(3) The High Court

(a) Pre-1922

(i) Pre- Supreme Court of Judicature Act (Ireland) 1877

2.94 The origins of the civil jurisdiction of the High Court can be traced to ‘hearings at *nisi prius*’.¹¹⁹ These were civil hearings heard at Westminster and when heard outside Westminster were part of the Court of Assize, which is similar to the High Court on circuit. The *Statute of Westminster 1285* provided for civil hearings to be tried at Westminster unless the justices travelled to other parts.¹²⁰ The current High Court also inherited the jurisdiction of the former King’s/Queen’s Bench of the High Court. This Court originates from the reign of Richard II (1377-1399), and was established in 1395. The Court was formerly known as the Justiciar’s Court, which like the King’s Bench Division moved about the country and dealt mainly with cases concerning claims to freehold land. The Common Pleas Court which was to become part of the High Court of Justice after the 1877 Judicature Act began to hear cases in the thirteenth century as a court travelling the country to hear common pleas.

2.95 Prior to the Judicature Act, the High Court as it is known today consisted of several different individual courts. The courts were divided into common law courts and courts of chancery. Broadly speaking, the common law courts dealt with matters of commercial law such as contract and tort cases, while the chancery courts dealt with issues in relation to land and probate and other related matters. Even within this divide, the number of courts was large. For example, the *Incumbered Estates Act 1849*¹²¹, established the Incumbered Estates Court. This court was later made

¹¹⁸ See Cullen “Moves Under way to create a new court of appeal” Irish Times 9 March 2007 and “Court of Appeal on the way?” (2007) 101(2) Gazette, Law Society of Ireland 7.

¹¹⁹ Translation “unless before”. The action was heard in London (Westminster), and the sheriff was ordered to have the jurors in London for trial on a certain day, unless before (*nisi prius*) that day the justices of assize came to the plaintiff’s county.

¹²⁰ Delany *The Administration of Justice in Ireland* (4th ed IPA 1975) at 14.

¹²¹ 12&13 Vic c 77.

permanent by the *Landed Estates Court (Ireland) Act 1858*.¹²² The Court of Bankruptcy was established by the *Irish Bankrupt and Insolvent Act 1857*.¹²³ This court was established to replace the Court of Insolvent Debtors, and appeals from the Court of Bankruptcy were heard by the Court of Appeal in Chancery. In 1857 the *Probate and Letters of Administration Act 1857*¹²⁴ abolished the testamentary jurisdiction of the ecclesiastical courts and conferred it on a new Court of Probate.

2.96 The jurisdiction of the courts that were to be amalgamated into the High Court of Justice became relatively settled by the 15th century. The jurisdiction of the King's Bench Court prior to the Judicature Act was as follows:

- i) Its civil jurisdiction included common pleas. However, much of the court's civil division was transferred to the Court of Chancery in the 16th century, as it was widely assumed that the presence of juries in common law courts resulted in abuse.
- ii) The court was vested with original jurisdiction in criminal cases.
- iii) The court was the Superior Court in Ireland and as such was an appeal court. It held appellate jurisdiction over all courts and exercised a supervisory jurisdiction over inferior courts.

The Court of Common Pleas was vested with jurisdiction in cases which were mainly tortious in nature. The Court of Exchequer had jurisdiction in revenue cases and was also given an equity jurisdiction. The Court of Chancery had jurisdiction in equity and later in common law cases and the majority of its jurisdiction was concerned with commercial matters. Prior to 1856, the Court of Chancery was the sole court entrusted to grant equitable remedies. The Court of Admiralty mainly dealt with civil cases and the Court for Matrimonial Causes and Matters received the jurisdiction of the former ecclesiastical courts in matrimonial matters.

2.97 Before the *Supreme Court of Judicature Act 1877*, common law and equity were administered separately by the courts.¹²⁵ Equity had developed to permit the adaptation of general legal rules to the particular facts of each individual case. Each of the systems applied different principles, often leading to the emergence of inconsistent and divergent dicta emerging. Both systems were administered in a separate court structure,

¹²² 21&22 Vic c 72.

¹²³ 20&21 Vic c 60.

¹²⁴ 20&21 Vic c 79.

¹²⁵ Brady "Legal developments, 1801-79" in Vaughan (ed) *A New History of Ireland Volume V Ireland Under the Union I 1801-70* (Clarendon Press 1989) at 467.

with equity cases being heard in chancery courts and common law being heard in Queen/King's bench division courts. Prior to the Judicature Act, attempts had been made to reform the inconvenience of two distinct courts systems.

2.98 Before the passing of the *Common Law Procedure Amendment Act (Ireland) 1856*,¹²⁶ a writ of *mandamus* issued only out of the Court of Queen's Bench. These could be granted only to curtail the performance of an official or public duty. A writ of *mandamus* could not be obtained as a private remedy to enforce simple common law rights between individuals, such as to restrain a party from committing a tort. The *Common Law Procedure Amendment Act (Ireland) 1856* was passed in order to vest the power, in limited circumstances, to grant equitable remedies in Common Law Courts. Section 70 of the 1856 Act allowed for a claim of *mandamus* in any action in the Superior Courts, except for replevin and ejectment. Section 81 of the 1856 Act gave the power to the Common Law Courts to issue an injunction against the repetition or continuance of any breach of contract or injury of a like kind arising out of the same contract.¹²⁷

2.99 Two years later, the *Chancery Amendment Act 1858*¹²⁸ granted the Court of Chancery the power to award damages either for or in addition to an injunction or decree of specific performance. Previously, damages were only available in the Common Law Courts.¹²⁹

(ii) *The Supreme Court of Judicature Act (Ireland) 1877 and its aftermath*

2.100 The two major reforms effected by the *Supreme Court of Judicature (Ireland) Act 1877* were first, a change in the organisation of the courts, and second, the establishment of one Supreme Court of Judicature which could exercise common law and equity jurisdiction concurrently. The effect of this latter development was recognised by Palles CB as follows:

“It is a mistake to say that the King's Bench Division is a Common Law Court. “The Court” to use the words of Lord Cairns in *Pugh v Heath*¹³⁰ “is now not a Court of law, or a Court of Equity it is a Court of Complete Jurisdiction, and if there were a variance between what, before the Judicature Act, a Court of law and a Court of Equity would have done, the rule of the Court of

¹²⁶ 19&20 Vic c 102.

¹²⁷ Wylie *The Judicature Acts (Ireland) and Rules of the Supreme Court (Ireland) 1905* (Sealy Bryers and Walker 1906) at 73.

¹²⁸ 21&22 Vic c 27.

¹²⁹ Delany *Equity and the Law of Trusts* (3rd ed Thomson Roundhall 2003) at 6.

¹³⁰ 7 AC 237.

Equity must now prevail.” Where the plaintiff claims to be entitled to any right-such as here, the right of possession of land-by virtue of an equitable estate, the High Court, whatever may be the Division of it in which the suit may happen to be, must, so long as the suit remains in the Division, give the same relief as ought to have been given by the Court of Chancery in a suit properly instituted for the like purposes before the Act.”¹³¹

The practical significance of the ‘fusion’ of law and equity was recognised by Lowry when he wrote:

“No longer will an unfortunate suitor be tossed like a shuttlecock across the hall of the Four Courts, from Equity to Common Law and Common Law back to Equity until his patience and money are exhausted”.¹³²

2.101 This change in the organisation of the Irish Courts resulted in the Courts of Chancery, Queen’s Bench, Common Pleas, Exchequer, Probate, Matrimonial Causes and Matters, and the Landed Estates Courts becoming amalgamated into one court called “The Supreme Court of Judicature in Ireland”.¹³³ The Court had two divisions, the High Court of Justice, which was vested with both original and appellate jurisdiction, and the Court of Appeal, which as its name suggested, exercised purely appellate jurisdiction.¹³⁴ These Courts were permitted to administer law and equity concurrently in every civil cause or matter commenced in the High Court of Justice and Court of Appeal.¹³⁵

2.102 The Court of Admiralty and Court of Bankruptcy were not amalgamated into the High Court of Justice. The Court of Bankruptcy¹³⁶ and Court of Admiralty¹³⁷ continued to operate as they had done prior to the Judicature Act.¹³⁸ Section 9 of the Judicature Act provided that the Court of Admiralty would be abolished on the death or resignation of the Judge of the

¹³¹ *Antrim County Land, Building and Investment Co Ltd v Stewart* [1904] 2 IR 357 at 364.

¹³² Lowry *The Supreme Court of Judicature (Ireland) Act, 1877: And Summary of Practice Under the New Procedure, Together With Rules, Orders, Forms, Explanatory Notes, and a Collection of the Leading Cases Decided Under Analogous Sections of the English Acts* (W. King 1878) at iii.

¹³³ Section 4 of the *Supreme Court of Judicature (Ireland) Act 1877*.

¹³⁴ Section 5 of the *Supreme Court of Judicature (Ireland) Act 1877*.

¹³⁵ Section 27 of the *Supreme Court of Judicature (Ireland) Act 1877*.

¹³⁶ Section 8 of the *Supreme Court of Judicature (Ireland) Act 1877*.

¹³⁷ Section 9 of the *Supreme Court of Judicature (Ireland) Act 1877*.

¹³⁸ Delany *The Administration of Justice in Ireland* (4th ed IPA 1975) at 23.

Court and the functions would be transferred to the Probate and Matrimonial Causes Court. The judge in question died in 1893 and jurisdiction was transferred to the Queen's Bench Division which took over the Probate and Matrimonial Causes court jurisdiction. Section 8 of the Judicature Act provided that the Court of Bankruptcy was to continue as it had before the Judicature Act as no support had been forthcoming for its recommended transfer to the Exchequer Division.¹³⁹

2.103 In order for business to be more effectively dispatched in the High Court of Justice, the court was partitioned into five divisions: Chancery (including the Land Judges),¹⁴⁰ Queen's Bench Division, Common Pleas, Exchequer and Probate and Matrimonial.¹⁴¹ The first ten subsections of section 28 of the Judicature Act provided for a resolution of conflict between the rules of common law and rule of equity in certain specific areas. The last subsection of section 28, subsection (11), instructed the High Court of Justice and the Court of Appeal that if any conflict between law and equity rules should arise, the equitable rule should prevail. This principle was not as novel as it seemed in that it did not create any new equities. It merely enabled the Court to deal with cases in a more efficacious, consistent and logical manner using pre-existing remedies at law and equity.¹⁴²

2.104 The importance and resonance of the Judicature Act cannot be overstated. Many of the legal principles contained in it are found in modern courts legislation and it still stands as a model for a modern Courts Act. For example, section 12 sets out that in order to qualify as a judge of the Supreme Court of Judicature, a person must have practiced at the Bar for 10 years. Further sections deal with salaries of judges,¹⁴³ precedence of judges,¹⁴⁴ and law terms and sitting of the courts.¹⁴⁵

2.105 Another important principle emerging from the Judicature Act was that matters of practice and procedure in civil actions were to be contained in rules of court. For example, section 26 stated that the jurisdiction transferred by the Act to High Court of Justice and Court of Appeal were to be exercised pursuant to the Act or rules of court; section 35 of the Judicature Act provided that rules of court were to provide for the

¹³⁹ Newark *Notes on Irish legal history* (Queen's University 1960) at 28.

¹⁴⁰ Section 7 of the *Supreme Court of Judicature (Ireland) Act 1877*.

¹⁴¹ Section 4 of the *Supreme Court of Judicature (Ireland) Act 1877*.

¹⁴² Wylie *The Judicature Acts (Ireland) and Rules of the Supreme Court (Ireland) 1905* (Sealy Bryers and Walker 1906) at 38.

¹⁴³ Section 17 of the *Supreme Court of Judicature (Ireland) Act 1877*.

¹⁴⁴ Section 14 of the *Supreme Court of Judicature (Ireland) Act 1877*.

¹⁴⁵ Section 29 of the *Supreme Court of Judicature (Ireland) Act 1877*.

distribution of business in the High Court of Justice; section 46 provided that rules of court can be made for dealing with business of divisions of the High Court of Justice; section 79 stated that the rules of court as to pleading, practice and procedure made for Superior Courts applied also to inferior courts. Section 61 of the Act made provision for the making of rules of court for regulating practice and procedure generally under the Act. It is unsurprising that Delany commented:

“Ever since the *Judicature (Ir.) Act 1877*, most matters of practice and procedure connected with the conduct of civil actions in the High Court have been governed by Rules of Court.”¹⁴⁶

2.106 The Act also set out the jurisdiction of the High Court of Justice. Its original jurisdiction was defined as the jurisdiction formerly vested in or capable of being vested in the High Court of Chancery as a Common law Court and Court of Equity, Court of Queen’s Bench, Court of Common Pleas, Court of Exchequer, Court of Probate, Court for Matrimonial Causes and Matters, Landed Estates Court and the Courts of Assize.¹⁴⁷

2.107 Section 22 of the Judicature Act set out the jurisdiction which was not transferred or vested in the High Court. This included:

- i) Any appellate jurisdiction of the Court of Appeal;
- ii) Any jurisdiction usually vested in the Lord Chancellor in relation to the custody of the persons and estates of idiots, lunatics and persons of unsound mind;
- iii) Any jurisdiction vested in the Lord Chancellor in relation to grants of Letter Patent;
- iv) Any jurisdiction exercised by the Lord Chancellor in right of or on behalf of His Majesty as a visitor of any College, or any charitable foundation;
- v) Any jurisdiction of the Master of the Rolls in relation to records in Dublin or elsewhere in Ireland.

2.108 The number of divisions of the High Court of Justice was restructured as time passed. In 1881, pursuant to the *Irish Law (Ireland) Act 1881*,¹⁴⁸ two judicial commissioners were appointed to the Court of the Irish Land Commission. In 1887, the Common Pleas division was amalgamated with the Queen’s Bench Division.¹⁴⁹ In 1897, the Exchequer, Probate,

¹⁴⁶ Delany *The Administration of Justice in Ireland* (4th ed IPA 1975) at 57.

¹⁴⁷ Section 21 of the *Supreme Court of Judicature (Ireland) Act 1877*.

¹⁴⁸ 44&45 Vic c 49.

¹⁴⁹ Section 3 of the *Supreme Court of Judicature Act (Ireland) Act 1887* 50&51 Vic c 6.

Admiralty and Bankruptcy divisions were also merged with the Queens' Bench Division.¹⁵⁰ As Newark commented:

“the century came to an end with the High Court in the position it retained up to 1921—a court of two divisions, the Chancery Division and the Queen's/King's Bench Division.”¹⁵¹

2.109 In 1921, the High Court of Justice comprised the Chancery Division and a King's Bench Division, along with two judicial commissioners of the Court of the Irish Land Commission who were judges of the High Court of Justice.

(iii) *The Government of Ireland Act 1920*

2.110 The High Court of Justice of Southern Ireland envisaged by the 1920 Act inherited the jurisdiction exercised by the High Court of Justice, established by the Judicature Act.

(b) *Post 1922*

(i) *The Irish Free State Constitution*

2.111 Article 64 of the 1922 Constitution created the High Court as a Court of First Instance with “full jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal...”. This jurisdiction clearly reflects the jurisdiction of the High Court of Justice established by the Judicature Act 1877.

2.112 Article 65 of the 1922 Constitution provided the High Court with jurisdiction on the question of whether any laws were repugnant to the Irish Free State Constitution. Section 65 provided as follows:

“The judicial power of the High Court shall extend to the question of the validity of any law having regard to the provisions of the Constitution. In all cases in which such matters shall come into question, the High Court alone shall exercise original jurisdiction.”

(ii) *Judiciary Committee Report*

2.113 William T. Cosgrave, President of the Executive Council urged the Judiciary Committee to “approach the matters referred to them untrammelled by any regard to any of the existing systems of judicature in

¹⁵⁰ Section 2 and 5, 6 and 4 of the *Supreme Court of Judicature Act (Ireland) (No 2) Act 1897* 60&61 Vic c 66.

¹⁵¹ Newark *Notes on Irish legal history* (Queen's University 1960) at 28-9. Cited in Osborough “The Irish Legal System” in Costello (ed) *The Four Courts: 200 years: Essays to commemorate the Bicentenary of the Four Courts* (Incorporated Council of Law Reporting for Ireland 1996) at 75.

this country”.¹⁵² Nevertheless, the Committee recommended that the civil jurisdiction of the High Court be the same as exercised by the former High Court, the High Court of Justice of Southern Ireland.¹⁵³ However, the Committee could not radically alter the structure of the courts as they were prevented from so doing by the structure in place by virtue of Article 64 of the Irish Free State Constitution. Article 64 envisaged a High Court of Justice and Supreme Court of Justice, together with courts of local and limited jurisdiction. In this way, the Committee’s apparently broad discretion was almost completely fettered leaving it with limited areas in which to contribute.

2.114 The Committee suggested that the High Court be vested with virtually an unlimited civil jurisdiction, subject to the civil jurisdiction of the District and Circuit Courts. The Committee also set out a list of the applications which, in its opinion, should be heard and determined by the Chief Official or Master of the Central Office.¹⁵⁴

(iii) Courts of Justice Act 1924

2.115 The recommendations of the Judiciary Committee were enacted in the *Courts of Justice Act 1924*. Section 4 of that Act established the High Court.¹⁵⁵ The jurisdiction of the High Court was set out in section 17 of the 1924 Act as follows:

“The High Court shall be a superior court of record with such original jurisdiction as is prescribed by the Constitution, and, subject as in this Act is provided, there shall be transferred to the High Court the jurisdiction which at the commencement of this Act was vested in or capable of being exercised by the existing High Court of the Supreme Court of Judicature in Ireland or any division or judge thereof.”

2.116 Unlike the pre-1922 position, the High Court was not divided into formal divisions. Section 24 of the 1924 Act allows for each High Court Judge to hear and determine any case, be it civil or criminal, in equity or at common law. This position has remained to date, although informal

¹⁵² The Judiciary Committee *Report of the Judiciary Committee* (Stationery Office 1923) at 5.

¹⁵³ The Judiciary Committee *Report of the Judiciary Committee* (Stationery Office 1923) at 20.

¹⁵⁴ The Judiciary Committee *Report of the Judiciary Committee* (Stationery Office 1923) at 20-21. This recommendation was largely followed, and carried out by the Rules of Court made under the 1924 Act.

¹⁵⁵ This section was repealed by section 3 and Schedule 1 of the *Courts (Supplemental Provisions) Act 1961*. The High Court was reconstituted by section 2(1) of the *Courts (Establishment and Constitution) Act 1961*. See later discussion.

divisions in the business of the High Court has occurred. The recently established Commercial List of the High Court constitutes a form of the old division, on an administrative basis, of the business of the High Court.¹⁵⁶

2.117 The 1924 Act also contained provision for matters such as the number of High Court Judges,¹⁵⁷ pensions of Judges, precedence of judges¹⁵⁸ and judicial remuneration.¹⁵⁹

(iv) Report of the Joint Committee on the Courts of Justice Act 1924

2.118 A Joint Oireachtas Committee was established in 1930 to examine how the 1924 Act was working in practice and to make recommendations on any changes or reforms required.¹⁶⁰ They found that on the whole, the 1924 Act was operating in a satisfactory manner. This can be seen from the relatively few amendments recommended by the Committee.

2.119 The main recommendation of the Committee affecting the jurisdiction of the High Court concerned civil appeals from the Circuit Court. Section 61 of the 1924 Act provided that in civil cases an appeal from an order or judgment of the Circuit Court was heard by two judges of the High Court sitting in Dublin and that this appeal “shall be on law and fact, or upon either”. This resulted from a recommendation of the Judiciary Committee. In 1923, the Judiciary Committee had recommended that civil appeals from the Circuit Court should be before two Judges of the High Court and if the two Judges could not agree on one opinion, the appeal should be reheard by the same two judges with a Supreme Court judge presiding¹⁶¹ Section 61 of the *Courts of Justice Act 1924* contained only one variation on this recommendation; it provided that if the High Court Judges could not agree on one opinion then an appeal lay to the Supreme Court.

2.120 The Committee of 1930 considered whether civil appeals from the Circuit Court should be confined to hearing appeals as to findings of law and as to inferences from facts. Section 61 allowed for such appeals to be on law and fact or upon either. The Committee’s Report of 1930 recommended that in order for such appeals to be effective, they needed to be on both fact

¹⁵⁶ Order 63A of the Rules of the Superior Court 1986, as inserted by the Rules of the Superior Courts (Commercial Proceedings) 2004 (SI No 2 of 2004) established the commercial court of the High Court.

¹⁵⁷ Section 4 of the *Courts of Justice Act 1924*.

¹⁵⁸ Section 9 of the the *Courts of Justice Act 1924*.

¹⁵⁹ Section 13 of the the *Courts of Justice Act 1924*.

¹⁶⁰ Joint Committee on the Courts of Justice Act 1924 *Report of the Joint Committee on the Courts of Justice Act 1924* (Stationery Office 1930).

¹⁶¹ Judiciary Committee *Report of the Judiciary Committee* (Stationery Office 1923) at 16.

and law. The main rationale provided by the Committee for its decision was the reality that often new facts and evidence came to light between the initial hearing and the appeal.¹⁶²

2.121 The Committee then moved on to consider whether the mode of appeal provided for in section 62 of the 1924 Act was satisfactory.¹⁶³ They considered the mode of appeal to be unsuitable as, *inter alia*, it made it difficult for the appeal court to go behind the facts of the case as found by the trial judge. Once they had expressed their dissatisfaction with the mode of appeal, the Committee considered the type of appeal which should be substituted for section 62.¹⁶⁴ The Committee believed that rehearing of appeals was the only chance of ultimate justice being done. To this end, the Committee recommended that appeals from the Circuit Court should be by way of a rehearing, and heard locally in convenient centres at least twice a year. They also recommended that the appeal continue to be heard by two judges, as section 61 provided.¹⁶⁵

2.122 Section 38 of the *Courts of Justice Act 1936* largely followed the recommendations of the Joint Committee. It allows for civil appeals to be heard *de novo* by the High Court travelling on circuit. However, the appeal is heard by one High Court judge alone. The opinion expressed by the Joint Committee that appeals be on both law and fact was legislated for when section 61 of the 1924 Act was repealed.¹⁶⁶

2.123 The Committee also recommended that additional judges be appointed to the High Court to allow for the High Court to perform all its work without any accumulated arrears.¹⁶⁷ This recommendation was not

¹⁶² Joint Committee on the Courts of Justice Act 1924 *Report of the Joint Committee on the Courts of Justice Act 1924* (Stationery Office 1930) at xxi.

¹⁶³ It appears that the Joint Committee was unaware that section 62 of the *Courts of Justice Act 1924* was repealed by section 22 and the Schedule of the *Courts of Justice Act 1928*. Section 11 of the 1928 Act mainly restated section 62 of the 1924 Act but it did allow in limited circumstances for an appeal *de novo* from the Circuit Court. Section 11 of the 1928 was repealed by section 3 and Part 2 of the First Schedule of the *Courts of Justice Act 1936*.

¹⁶⁴ Joint Committee on the Courts of Justice Act 1924 *Report of the Joint Committee on the Courts of Justice Act 1924* (Stationery Office 1930) at xxiii.

¹⁶⁵ Joint Committee on the Courts of Justice Act 1924 *Report of the Joint Committee on the Courts of Justice Act 1924* (Stationery Office 1930) at xxv.

¹⁶⁶ Section 61 was repealed by section 3 and the Schedule to the *Courts of Justice Act 1936*.

¹⁶⁷ Joint Committee on the Courts of Justice Act 1924 *Report of the Joint Committee on the Courts of Justice Act 1924* (Stationery Office 1930) at xxix.

acted upon until 1953, when the *Courts of Justice Act 1953* provided for an extra judge to be appointed to the High Court.¹⁶⁸

2.124 The Committee additionally recommended that the jurisdiction vested in the Chief Justice over wards of court, be transferred to the President of the High Court. This duly occurred, when section 9 of the *Courts of Justice Act 1936* was enacted.¹⁶⁹

2.125 Finally, the Committee recommended that the Master of the High Court should be given jurisdiction over procedural as opposed to liability matters. Further the Committee was also of the opinion that applications to remit or transfer an action from the High Court to the Circuit Court should be excluded from the jurisdiction of the Master.¹⁷⁰

(v) *The Constitution of 1937*

2.126 Article 34.3.1° of the Constitution cloaks the High Court with “full jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal”. This largely re-enacts the first sentence of Article 65 of the Irish Free State Constitution. The Constitutional Review Group recommended no change to this provision.¹⁷¹ Article 34.3.4 provides that the Courts of First Instance shall also include courts of local and limited jurisdiction with a right of appeal as determined by law.

2.127 Article 34.3.2 provides as follows:

“Save as otherwise provided by the Article¹⁷², 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 questions shall be raised (whether by pleading, argument or otherwise) in any Court established under this or any other Article

¹⁶⁸ Section 11 of the *Courts of Justice Act 1953*.

¹⁶⁹ This jurisdiction has a long history, and the jurisdiction was transferred to the Chief Justice by section 19 of *The Courts of Justice Act 1924*. The jurisdiction was previously vested in the Lord Chancellor of Ireland and at the time of the 1924 Act was exercised by the Lord Chief Justice of Ireland. The Commission’s *Report on Vulnerable Adults and the Law* (LRC 83-2006) recommended the replacement of the wardship jurisdiction. At the time of writing (July 2007), the Government has indicated that it proposes to implement this recommendation. See also *In re Dolan* [2007] IESC 26 Supreme Court 4 July 2007.

¹⁷⁰ Joint Committee on the Courts of Justice Act 1924 *Report of the Joint Committee on the Courts of Justice Act 1924* (Stationery Office 1930) at xxxii.

¹⁷¹ Constitutional Review Group *Report of the Constitutional Review Group* (Stationery Office 1996) at 159.

¹⁷² This refers to Article 34.3.3. of the Constitution which provides that the Supreme Court alone which has jurisdiction over Article 26 references from the President.

of the Constitution other than the High Court or the Supreme Court”.

This Article vests in the High Court the jurisdiction to judicially review legislation, a jurisdiction which has become increasingly important in the Irish judicial system.

2.128 It is of interest to note that the Draft 1937 Constitution envisaged that the Supreme Court alone would have jurisdiction to pronounce on the constitutionality of any law.¹⁷³

(vi) Courts (Establishment and Constitution) Act 1961

2.129 Section 2 of the 1961 Act provides for the establishment and constitution of the current High Court. It provides for a President of the High Court and “such number of ordinary judges as may from time to time be fixed by Act of the Oireachtas.”¹⁷⁴

(vii) Courts (Supplemental Provisions) Act 1961

2.130 The Supplemental Provisions 1961 Act contains two primary provisions regulating the jurisdiction of the High Court. Section 8 provides the general jurisdiction of the High Court by acknowledging that the jurisdiction vested on the High Court by the Constitution and transferring all jurisdiction of the ‘former’ High Court and the High Court of Justice of Southern Ireland to the current High Court. Secondly, section 9 vests the High Court with jurisdiction in lunacy and minor matters.¹⁷⁵ Section 14 of the Act follows the trend set by the 1924 Act by stating that the jurisdiction of the courts is to be exercised pursuant to Rules of Court.

(viii) Constitutional Review Group

2.131 Article 34.2 provides that the courts “shall comprise Courts of First Instance and a Court of Appeal”. The Constitutional Review Group considered this Article with a view to determining whether it was unduly restrictive. The Review Group found that the word “comprise” in the Article could denote the totality of the Superior Courts. They found a result of such a restrictive term could prevent the establishment of a Court of Appeal or the altering of court structures in the future. For that reason the Review Group recommended that the word ‘comprise’ be replaced by ‘include’ and add the

¹⁷³ Hogan and Whyte *JM Kelly: The Irish Constitution* (4th ed Lexis Nexis 2003) at 772 footnote 84.

¹⁷⁴ At present, this is provided for in section 9 of the *Courts and Courts Officers Act 1995* as inserted by section 56(b) of the *Civil Liability and Courts Act 2004*, as amended by section 1 of the *Courts and Court Officers (Amendment) Act 2007* which states that the number of ordinary judges of the High Court shall not exceed 35.

¹⁷⁵ See paragraph 2.124 of this Consultation Paper.

words ‘and such other courts as may be prescribed by law’ to the sentence in order that a Court of Appeal be established or other courts as the court structure changes in accordance with the volume of litigation.¹⁷⁶ The Oireachtas Committee were in agreement with this recommendation.¹⁷⁷

(4) The Circuit Court

(a) Pre 1922

(i) Introduction

2.132 The jurisdiction of the Circuit Court, in both criminal and civil matters can be traced back to the Courts of Assize. Although most of the jurisdiction at Assize is now vested in the High Court, an Act of 1796 transferred the jurisdiction of the civil bill at Assize to the newly created assistant barristers.¹⁷⁸

2.133 The Act of 1796 for the first time provided for ‘assistant barristers’, who were to be barristers of at least six years standing, to act as assistants to the justices at Quarter Sessions. The prime function of these ‘assistant barristers’ was to preside over cases initiated by civil bills and to determine the cases. The *Civil Bill Court (Ireland) Act 1851* made the assistant barristers Chairmen of Quarter Sessions.¹⁷⁹ The *Civil Bill Court (Ireland) Act 1851* consolidated and made amendments to the law relating to civil bills and assistant barristers who presided at cases involving a civil bill.

2.134 In 1877, the Civil Bill courts were replaced by county courts in accordance with the *County Officers and Court (Ireland) Act 1877*¹⁸⁰ This Act is the equivalent for the lower courts of the *Supreme Court of Judicature (Ireland) Act 1877* in that it codified a great deal of existing principles and provided a clear basis for the Oireachtas to model its lower courts after independence.

(ii) Civil Bill Courts (Ireland) Act 1851

2.135 The purpose of this Act was to consolidate and amend the laws relating to civil bills and the Courts of Quarter Sessions in Ireland. Section 2 of the Act transferred the powers of Chairman of Quarter Sessions to assistant barristers. A barrister of at least 6 years standing was appointed to

¹⁷⁶ Constitutional Review Group *Report of the Constitutional Review Group* (Stationery Office 1996) at 158.

¹⁷⁷ The All-Party Oireachtas Committee on the Constitution Fourth Progress Report *The Courts and the Judiciary* (Pn 7831 1999) at 43.

¹⁷⁸ 36 Geo. III c.25 (Ir) (1795-6)

¹⁷⁹ Section 2 of the *Civil Bills Act 1851*.

¹⁸⁰ 40&41 Vic c 56.

each county in Ireland to act as Chairman of to the Justices at general Quarter Sessions. They were empowered to hear civil bills as sole and exclusive judges.

2.136 The jurisdiction of civil bill courts in civil matters was provided for in section 35 of the Act, and permitted an assistant barrister to hear and determine by civil bill all disputes and differences between parties for any sum, damages or penalty not exceeding £40. Certain causes of action were excluded including slander, libel, breach of promise of marriage and criminal conversation with a man's wife. The courts were also empowered to deal with unpaid balances of a partnership and all actions by civil bill under any Act of Parliament. Sections 37 and 41 of the 1851 Act extended the jurisdiction of assistant barristers into landlord and tenant and replevin cases. Sections 49 to 57 conferred jurisdiction on the civil bill courts in the area of probate and administration of estates.

2.137 Section 31 of the Act gave to the Lord Lieutenant or other Chief Governor of Ireland the power to alter existing divisions and appoint additional places for the holding of sessions. The *Civil Bill Courts (Ireland) Act 1851 (Adaptation) (No. 1)*¹⁸¹ and *(No. 2)*¹⁸² *Orders 1992* enable the Government to exercise the functions formerly exercisable by the Lord Lieutenant under section 31 of the 1851 Act. With these adaptations, the government is now empowered to alter existing divisions and districts in any county and to divide counties into divisions and districts for the purposes of hearing and determining causes by civil bill, now the Circuit Court.¹⁸³ This is a significant power vested in the Government; as the 1937 Constitution recognises "courts of local and limited jurisdiction" and both the Circuit and District Courts depend on circuits for their jurisdiction.¹⁸⁴

2.138 Section 127 of the 1851 Act provided that appeals from any decree or order made by an assistant barrister were to be heard by a Judge of Assize. The appeal was by way of a rehearing of the case.

2.139 Section 82 of the Act provided that in cases of ejectment at will or permissive occupants, the owner of the land was permitted to take action and

¹⁸¹ SI Number 193 of 1992.

¹⁸² SI Number 174 of 1992.

¹⁸³ The civil bill courts were replaced by county courts by the *County Officers and Courts (Ireland) Act 1877*. The 1877 Act also abolished assistant barristers, who were replaced by a county court judge. Section 3 of the 1877 Act provided that the chairmen of quarter sessions were to be called County Court Judges and Chairmen of Quarter Sessions.

¹⁸⁴ See the comments of Mr Justice Geoghegan in *Creavan v CAB and anor* [2004] IESC 92 Supreme Court 29 October 2004.

attempt to receive a remedy. Such cases were initiated by landowners by way of civil bill for ejectment for the recovery of possession. Section 17 of *Courts of Justice Act 1928* confers the jurisdiction under section 82 of the 1877 Act on both the District Court and the Circuit Court. Additionally the Fourth Schedule of the *Courts (Supplemental Provisions) Act 1961* provides that section 82 of the 1877 Act is to be exercised by the Judge of the Circuit Court in the circuit in which the land is situated.

(iii) County Officers and Courts (Ireland) Act 1877

2.140 Section 3 of the 1877 Act changed the title of Chairmen of the Quarter Sessions to County Court Judges and Chairmen of Quarter Sessions. The Act also made provisions for officers of the county courts.

2.141 Section 38 of the Act established the important principle that any sum of money paid into court to which an infant is entitled to can be ordered to be paid to the Court of Chancery (now part of the High Court), and the High Court can take steps to obtain payment in such cases.

2.142 The Act also made provision for the type of proceedings which could be instituted in the Civil Bill Court. These proceedings included proceedings relating to the sale, redemption or partition of any land, proceedings in partnership cases within the jurisdiction of the Civil Bill Court where the partnership business was carried on and proceedings relating to infants within the jurisdiction of the Civil Bill Court where the infant resided.¹⁸⁵ In addition the Act provided that the Civil Bill Court was to have the jurisdiction of the Court of Chancery in certain matters such as specific performance.

2.143 The 1877 Act extended the jurisdiction of the county courts to claims not exceeding £50 by extending section 35 of the 1851 Act. The Act also increased the monetary limits in a number of other sections involving the jurisdiction of the county courts.

(iv) History of the Civil Bill

2.144 In this section, the Commission traces the history of the Civil Bill. The civil bill is used as an originating document for cases in the Circuit Court. In the past, a civil bill was the originating document in civil bill courts and county courts. As successor to these courts, the Circuit Court continues this tradition.

2.145 According to Newark, the civil bill originated from the Justiciar Courts.¹⁸⁶ These local courts were not permitted to hear cases by writ and

¹⁸⁵ Section 33 of the *County Officers and Court (Ireland) Act 1877*.

¹⁸⁶ These were royal courts which travelled around Ireland using itinerant judges sent out by the King. These were established in 1207 and began to hear cases out of Dublin in local court.

the practice emerged of using bills.¹⁸⁷ The Justiciar Courts later became the King's Bench Courts¹⁸⁸ and civil bills were heard by the judges of Assize.

2.146 The legislative origins of the Civil Bill can be traced to a 1703 Act entitled "An Act for the Recovery of Small Debts in a Summary Way before the Judges of the Assize."¹⁸⁹ The summary way was stated by "an English bill,¹⁹⁰ paper petition in English", but in popular usage this was shortened to the description of "civil bill".¹⁹¹ The term "civil bill" was used for the first time in a later statute.¹⁹² The 1715 Act repealed the 1703 Act, and in turn the *Civil Bill Court (Ireland) Act 1851*¹⁹³ repealed most of the 1715 Act. All that remains of the 1715 Act are sections 16 and 17 which relate to the amount of costs in actions of trespass and actions for battery and actions for assault and slander where damages are under 40 shillings. A later statute of 1795-6 vested the power to determine matters using a civil bill to assistant barristers.¹⁹⁴ By so doing, the Act relieved judges of assize of their jurisdiction to hear civil bill cases. The 1795-6 Act was entitled "for the reviving and amending an Act, entitled "An Act for Recovery of Small Debts in a summary Way before the Judges of Assize."" The civil bill procedure was less complex than civil procedure at the Court of Assize, so it is unsurprising that it was given more jurisdiction as time passed. The *Civil Bill Court (Ireland) Act 1851* expanded the jurisdiction of the civil court bill in two ways: first by transferring the powers of Chairman of Quarter Sessions to assistant barristers and secondly by expanding the range of cases which could be heard in the civil bill court.

2.147 According to Greer

"Three steps only are required to validate the line of descent [of the civil bill]. In 1796, the jurisdiction given by the Act of 1703 (as amended) was largely transferred from the Judges of the

¹⁸⁷ Newark *Notes on Irish Legal History* (Queen's University Belfast 1960) at 21-23.

¹⁸⁸ The Justiciar Courts became the King's Bench after the visit of Richard II to Ireland in 1345-6. See Donaldson "Legal History and Present-Day Legal Systems" in Donaldson (ed) *Some Comparative Aspects of Irish Law* (Duke University Press 1957) at 9.

¹⁸⁹ 2 Anne c 18 (Ir)

¹⁹⁰ The reason for the use of the name "English bill" was because the bills were informal documents in English language at a time when pleadings on a writ were still in Latin. Newark *Notes on Irish Legal History* (Queen's University Belfast 1960) at 22.

¹⁹¹ The earliest official use of this term appears to be in the House of Commons Journals for 5 September 1695. See 2 H.c. Jo (Ir) 1662-1698 at 507.

¹⁹² 2 Geo. I, c. 11(Ir.) (1715) sections 8 and 11.

¹⁹³ 14&15 Vic. c. 57.

¹⁹⁴ McDowell *The Irish Administration 1801-1914* (Greenwood Press 1964) at 113.

Assize to the newly created Assistant Barristers at Quarter Sessions.¹⁹⁵ In 1877, the Assistant Barristers, when hearing and determining civil cases, were translated into County Court Judges.¹⁹⁶ When in 1920 partition of the island led to separate legal systems, the civil bill remained the basis of practice and procedure both in the county courts of Northern Ireland and in the circuit courts of the Republic.”¹⁹⁷

2.148 The success of the civil bill and its enduring benefit is due to its simplicity of form and its relative inexpensiveness.

(v) *The Government of Ireland Act 1920*

2.149 While the 1920 Act was mainly concerned with the superior courts, it did have one provision relating to the county courts. Section 48 simply provided that any judge of the county court appointed after the Government of Ireland Act 1920 would have the same tenure as county court judges had before the enactment of the 1920 Act. The section also provided that the rearrangement of the jurisdiction of the county courts would be by order of the Lord Lieutenant and that the jurisdiction of county courts judges extended to either Northern Ireland or Southern Ireland, but not both jurisdictions.

(b) *Post 1922*

(i) *The Irish Free State Constitution*

2.150 Although both the Circuit and District Courts are creatures of statute, there was reference to both of these courts in the 1922 Constitution as “Courts of local and limited jurisdiction”. Article 64 of the 1922 Constitution that the “Courts of First Instance shall include ... Courts of local and limited jurisdiction, with right of appeal as determined by law”.

(ii) *Judiciary Committee Report*

2.151 The main recommendation by the Judiciary Committee was that the County Court be abolished and replaced by “Circuit Courts” located in

¹⁹⁵ 36 Geo. III c.25 (Ir) (1795-6). This Act was entitled “An Act for the Better and more Convenient Administration of Justice and for the Recovery of Small Debts in a summary Way at the Sessions of the Peace of the Several Counties at large within the Kingdom, and for the continuing and amending an act entitled “An Act for the Better Execution of the Law and Preservation of the Peace for the Counties at Large”. The 1795-6 Act was repealed in its entirety by the *Civil Bill Court (Ireland) Act 1851*.

¹⁹⁶ *County Officers and Courts (Ireland) Act 1877*, 40&41 Vic. C. 56, section 8.

¹⁹⁷ Greer “The Development of a civil bill procedure in Ireland” in (ed) McEldowney and O’Higgins *Common Law Tradition: Essays in Legal Tradition* (Irish Academic Press 1990) at 30.

eight circuits.¹⁹⁸ This recommendation was adopted in the *Court of Justice Act 1924*. It has been commented that the Committee's recommendation on the use of Circuits based on a population basis and its subsequent adoption in the *Courts of Justice Act 1924*, was "the greatest change that [has] been made".¹⁹⁹ Formerly, each County Court area provided the territorial limit for each county court judge.

2.152 It also recommended that the Circuit Court hear appeals from the District Court.

2.153 The Judiciary Committee recommended that the following civil jurisdiction be vested in the newly established Circuit Court:

- i) Unlimited jurisdiction where all the parties consent in writing before the hearing;
- ii) In contract and tort, cases which do not exceed £300 in value;
- iii) In land law matters such as title to lands, cases which do not exceed £60;
- iv) In probate and administration matters, cases where the value of the personal property does not exceed £1000 and the land value does not exceed £60;
- v) Applications for rectification of registration of title, where the valuation of the lands does not exceed £60;
- vi) In equity matters including the winding up of companies, where the value of personal property does not exceed £1,000 and the land does not exceed £60 and in the case of companies, where the issued capital does not exceed £10,000 in value;
- vii) In bankruptcy matters, the committee recommended that the Executive to have the power on application from local bodies to apply the Local Bankruptcy Act. The Committee recommended a similar position in admiralty matters.

(iii) *Courts of Justice Act 1924*

2.154 During Dáil Debates on what became the *Courts of Justice Act 1924* it was acknowledged that the Circuit Court established as part of the Dáil Courts greatly influenced the Circuit Court established by the 1924 Act. It was stated that the local nature of the Circuit Court would allow for the

¹⁹⁸ Judiciary Committee *Report of the Judiciary Committee* (Stationery Office 1923) at 16.

¹⁹⁹ Hanna *The Statute Law of the Irish Free State 1922-1928* (Alex Thom and Co 1929) at 17. This quote is quoted in Working Group on the Jurisdiction of the Courts *The Criminal Jurisdiction of the Courts* (Stationery Office 2003) at 4.

provision of local hearings for ordinary business without the necessity to travel to Dublin. This was seen as a primary advantage of District Courts.²⁰⁰ Section 37 of the 1924 Act established the Circuit Court of Justice and it was provided with 8 Judges, each sitting in one circuit. The Circuit Court was also vested with all jurisdiction capable of being exercised by Recorders, County Court Judges and Chairmen and Courts of Quarter Sessions.²⁰¹

2.155 During Dáil Debates on what became the 1924 Act, the view was expressed by the President of the Executive Council, William T Cosgrave that it would be beneficial if the Circuit Court could “take over so much of the High Court jurisdiction as related to the everyday legal business of the country which ought to be disposed of locally.”²⁰² The jurisdiction recommended by the judiciary committee was conferred on the Circuit Court of Justice by section 48 of the 1924 Act. An additional jurisdiction to that recommended by the Judiciary Committee was vested in the Circuit court by section 48(vii):

“in proceedings at the suit of the State or any Minister or Government Department or any officer thereof to recover any sum not exceeding £300 due to or recoverable by or on behalf of the State, whether by way of penalty, debt, or otherwise, and notwithstanding any enactment now in force requiring such sum to be sued for in any other court”

Section 48 also made provision for the transfer of cases from the Circuit Court to the High Court and from one circuit to another. The Circuit Court was also provided with jurisdiction to hear appeals from the District Court.²⁰³ Appeals in civil cases went to two judges of the High Court.²⁰⁴ Section 51 of the 1924 Act transferred all jurisdiction to the Circuit Court formerly vested in Recorders, County Court Judges, and Chairmen and Courts of Quarter Sessions, apart from such jurisdiction of the Courts of Quarter Sessions as was transferred to the District Court.

2.156 Like the Court of Quarter Sessions, section 50 of the 1924 Act vested the Circuit Court with exclusive jurisdiction in applications for new liquor licences.²⁰⁵ The Circuit Court also has exclusive and unlimited

²⁰⁰ Dáil Debates volume 4 31 July 1923.

²⁰¹ Section 51 of the *Courts Act 1924*.

²⁰² Dáil Debates Volume 5 23 September 1923

²⁰³ Section 84 of the *Courts of Justice Act 1924*.

²⁰⁴ Section 61 of the *Courts of Justice Act 1924*. See also paragraphs 2.118, 2.120, 2.120 and 2.122 of this Consultation Paper.

²⁰⁵ O'Connor *The Irish Justice of the Peace* (E. Ponsonby Limited 1911) at 119

jurisdiction under the *Landlord and Tenant (Amendment) Act 1980* to deal with claims for a new tenancy.²⁰⁶

2.157 The Supreme Court in *Sligo Corporation v Gilbride*²⁰⁷ expressly rejected the contention that the Circuit Court established by the 1924 Act was merely a continuation of the former County Courts albeit with additional jurisdiction. Mr Justice Kennedy stated:

“The suggestion that the Circuit Court has merely the jurisdiction of the former County Courts, extended as to quantum... is entirely erroneous”.²⁰⁸

Mr Justice Fitzgibbon recognised the practical implications of the Chief Justice’s view when he remarked:

“In my opinion the new Courts of local and limited jurisdiction established by the Courts of Justice Act under the powers conferred by Article 64 of the Constitution are not subject to the restrictions imposed by the Civil Bill Act or the County Officers and Courts Act upon the County Courts whose jurisdiction has been transferred to them. The only limitations upon the jurisdiction of the Circuit Court are those expressed or implied in the provisions of the Courts of Justice Act, and subject to those limitations, the Circuit Court has within its locality all the jurisdiction of the High Court.”²⁰⁹

(iv) *Report of the Joint Committee on the Courts of Justice Act 1924*

2.158 The main difficulty identified by the Joint Committee was that in 1930, the Circuit Court was working without the benefit of rules of court. Despite this, the Committee reported that the Circuit Court was operating to the satisfaction of both litigants and the public.²¹⁰ The committee was satisfied that the jurisdiction vested in the Circuit Court in tort and contract matters was adequate and should not be altered.²¹¹

²⁰⁶ See Wylie *Landlord and Tenant Law* (2nd ed Butterworths 1998) at 601. This is because “the Court” as defined in section 3 of the Act is the Circuit Court. There is a suggestion in *Grimes v Owners of the SS Bangor Bay* [1948] IR 350 that it would not be appropriate, from a constitutional point of view, for the Circuit Court to be vested with exclusive and unlimited jurisdiction in Admiralty matters.

²⁰⁷ [1929] IR 351.

²⁰⁸ *Ibid* at 363.

²⁰⁹ *Ibid* at 367-368.

²¹⁰ Joint Committee on the Courts of Justice Act 1924 *Report of the Joint Committee on the Courts of Justice Act 1924* (Stationery Office 1930) at ix.

²¹¹ Joint Committee on the Courts of Justice Act 1924 *Report of the Joint Committee on the Courts of Justice Act 1924* (Stationery Office 1930) at xiii.

2.159 The Committee also examined the issue of transfer of actions from the High Court to the Circuit Court. Section 25 of the Act of 1924 allowed for a party to an action which had commenced in the High Court, but which might have been commenced in the Circuit Court to apply to the High Court to have the case transferred to the Circuit Court. The Committee recommended that section 25 be amended to provide that if an application under that section is brought in the High Court, then that court should be obliged to consider whether in all the circumstances of the case it was reasonable that the action should have been commenced in the High Court. Section 11(2)(a) of the *Courts of Justice Act 1936* implemented this recommendation of the Joint Oireachtas Committee. The Committee also considered the issue of appeals from the Circuit Court. This has already been discussed in this Consultation Paper.²¹²

(v) *The Irish Constitution 1937*

2.160 Article 34.3.4° of the Constitution expressly endows the Oireachtas with the power to create courts of local and limited jurisdiction. This was recognised by Mr Justice Walsh in *The State (Boyle) v Neylon*²¹³ when he stated:

“The Oireachtas is free to set up as many courts of first instance as it sees fit, but it is not free to bestow on them, or any statutory appellate court, the constitutional review functions of the High Court or the Supreme Court ... Therefore, the Circuit Court as an institution can be set up without breaching any provision of Article 34 ...”²¹⁴

Article 34.3.4° is a restatement of Article 64 of the 1922 Constitution.

(vi) *Courts (Establishment and Constitution) Act 1961*

2.161 Unlike the Supreme and High Courts, the Circuit Court is not provided with any express jurisdiction by the Constitution. Instead, the Constitution provides its origin as a court of local and limited jurisdiction.²¹⁵ The jurisdictional basis of the Circuit Court is established by legislation.

2.162 Section 4 of the 1961 Act provides for the establishment and constitution of the Circuit Court. It provides that the Court is to be constituted by the President of the Circuit Court and that “such number of ordinary judges as may from time to time be fixed by Act of the Oireachtas.”

²¹² See also paragraphs 2.118, 2.120, 2.120 and 2.122.

²¹³ [1986] IR 551; [1987] ILRM 537.

²¹⁴ *Ibid* at 555.

²¹⁵ Article 34.3.4°.

2.163 The number of ordinary judges of the Circuit Court is currently set at 37 ordinary judges.²¹⁶

(vii) Courts (Supplemental Provisions) Act 1961

2.164 The main importance of the *Supplemental Provisions Act 1961* is that it provides the Circuit Court with its jurisdiction. The Third Schedule of the 1961 Act (as amended by section 2 of the *Courts Act 1991*) provides that the Circuit Court is limited to making awards of damages not exceeding €38,092.14. Section 13 and the Second Schedule of the *Courts and Courts Officers Act 2002* contain provision to increase the jurisdiction of the Circuit Court in civil matters to €100,000. This provision has not been brought into force, so the jurisdiction of the Circuit Court remains unchanged from its 1991 position. Section 16 of the *Courts Act 1991* allows the Government to make variations by way of statutory instruments to the monetary limits of the courts because of “changes in the value of money generally in the State.” However as the increase in the monetary jurisdiction of the Circuit Court was being significantly increased in the 2002 Act, the Government was of the opinion that section 16 was not applicable. It was for that reason that the provisions for increase in monetary jurisdiction were instead contained in primary legislation. Section 45 of the *Civil Liability and Courts Act 2004*, when it is commenced by Order, will change the basis of the jurisdiction of the courts in land and equity matters from the current archaic concept of ‘rateable value’ to the more modern and pragmatic ‘market value’.²¹⁷

2.165 The Circuit Court cannot exercise jurisdiction over matters that are within the exclusive jurisdiction of other courts. For example, the Circuit Court cannot hear cases involving questions relating to the constitutionality of any law as this is within the exclusive jurisdiction of the High Court²¹⁸ and cannot hear applications for the renewal of intoxicating liquor licences as this is within the exclusive jurisdiction of the District Court.²¹⁹

2.166 Section 22 of the *Supplemental Provisions Act 1961* provides the Circuit Court with jurisdiction in 20 areas.²²⁰ The Circuit Court is given concurrent jurisdiction with the High Court in tortious matters such as libel,

²¹⁶ Section 10 of the *Courts and Courts Officers Act 1995* as inserted by section 56(b) of the *Civil Liability and Courts Acts 2004* as amended by section 2 of the *Courts and Courts Officers (Amendment) Act 2007*.

²¹⁷ Section 45 of the *Civil Liability and Courts Act 2004*.

²¹⁸ Article 34.3.2° of the Constitution.

²¹⁹ Section 77A of the *Courts of Justice Act 1924*. See Byrne and McCutcheon *The Irish Legal System* (2nd ed Butterworths 2001) at 175-6.

²²⁰ These are contained in the Third Schedule of the *Courts (Supplemental Provisions) Act 1961*.

slander, malicious prosecution and false imprisonment, which are excluded from the District Court, and in contractual matters. It is also given exclusive jurisdiction to grant applications for new intoxicating liquor ‘on licences’.²²¹ Aside from the above, the civil jurisdiction of the Circuit Court encompasses proceedings for the recovery of land, equity proceedings and family proceedings (including both judicial separation and divorce).

(viii) The Constitutional Review Group Report

2.167 The Constitutional Review Group considered whether the phrase “local and limited” contained in Article 34.3.4° of the Constitution should be relaxed. A number of provisions were cited by the Review Group to demonstrate that there are exceptions to the local and limited nature of the Circuit and District Courts. For example, section 32 of the *Courts and Courts Officers Act 1995* allows for the Dublin Circuit Court to hear cases from outside Dublin. Further, the Circuit Court is vested with exclusive and unlimited jurisdiction in applications for new tenancies.²²² The members of the Group were divided on the issue as to whether the phrase should remain or be altered to read “local or limited.” The Oireachtas Committee later determined that as the phrase had caused no difficulties in practice, there was no requirement for any change.²²³

(5) The District Court

(a) Pre 1922

2.168 The District Court’s jurisdictional antecedent was the Court of Petty Sessions, which developed out of the Courts of Quarter Sessions when Justices of the Peace (who mainly dealt with less serious criminal matters than those at Assize Courts) were required to hold preliminary hearings for the Assize Courts. These preliminary hearings were held outside of Quarter Sessions and became known as ‘Petty Sessions’. They were presided over by Justices of the Peace. In the mid 19th century, it became common practice to appoint lay magistrates known as ‘resident magistrates’ to sit alongside the Justices of the Peace at Petty Sessions.²²⁴ Justices of the Peace were not given jurisdiction to act in equity matters. This principle continues to this day in the District Court which has no equitable jurisdiction.

2.169 The justices at Petty Sessions were given jurisdiction in applications for liquor licences, transfer of licences and registration of

²²¹ Section 24 of the *Courts (Supplemental Provisions) Act 1961*.

²²² *The Landlord and Tenant (Amendment) Act 1980*.

²²³ The All-Party Oireachtas Committee on the Constitution Fourth Progress Report *The Courts and the Judiciary* (Pn 7831 1999) at 44.

²²⁴ 6&7 Will IV c 13.

clubs.²²⁵ They were also given jurisdiction to determine certain other civil matters such as claims under the Small Debts Act. Section 5 of the *Manor Courts Abolition (Ir) Act 1859*²²⁶ gave jurisdiction to a justice at Petty Sessions to hear and determine causes for the recovery of debts between party and party “under the value of £2” where the right to recover accrued within the preceding 12 months.

(b) Post 1922

2.170 The *Government of Ireland Act 1920* made no provision for District Courts or courts of a summary nature. The 1922 Constitution made provision for courts of a “local and limited jurisdiction” in Article 64. One of the courts of “local and limited” jurisdiction was the District Court which was to sit in local venues and hear relatively less serious cases than the Circuit Court.

2.171 District Court judges were first provided for in the *District Court (Temporary Provisions) Act 1923*, section 1(1) of which provided that it was

“lawful for the Governor-General of the Irish Free State on the advice of the Executive Council from time to time to appoint fit and proper persons being Barristers-at-Law in Saorstát Eireann of at least two years' standing or Solicitors of the Supreme Court in Saorstát Eireann to be Magistrates with the title of "District Justices" and to perform the duties and have the powers prescribed by this Act.”

The newly appointed District justices were given the powers previously vested in Justices of the Peace sitting at Petty Sessions and when not sitting at Petty Sessions.²²⁷ The non-judicial functions previously exercised by Justices of the Peace were transferred to the newly established non-judicial individuals known as ‘Peace Commissioners’.²²⁸

(i) Judiciary Committee Report

2.172 The Judiciary Committee recommended that the District Courts “should become permanent with a definitely constituted and recognised jurisdiction”.²²⁹ In civil matters, the Committee recommended that the new District Court be given jurisdiction in the follow matters:

²²⁵ O'Connor *The Irish Justice of the Peace* (E Ponsonby Limited 1911) at 119.

²²⁶ 22 Vic c 14.

²²⁷ Section 2(2) and (4) of the *District Justices (Temporary Provisions) Act 1923*.

²²⁸ Section 4 of the *District Justices (Temporary Provisions) Act 1923*.

²²⁹ Judiciary Committee *Report of the Judiciary Committee* (Stationery Office 1923) at 10.

- i) Contract and breach of contract, where the amount claimed did not exceed £25;
- ii) Torts and damages where the amount claimed did not exceed £10, but jurisdiction in respect of the torts of slander, libel, criminal conversation, seduction, malicious prosecution and false imprisonment was not to be given to the Court. The Committee also recommended that the District Court should not be given jurisdiction in matters relating to title in land;
- iii) In ejectment proceedings for non-payment of rent, where the rent does not exceed £20 a year;
- iv) All licensing jurisdiction previously vested in Justices of the Peace at Quarter Sessions or Petty Sessions, save that the power to grant new licences which should be vested in the Circuit Court

2.173 The Committee recommended that appeals from the District Court should go to the Circuit Court and be by way of a complete rehearing. The Committee further recommended that all proceedings initiated in civil cases before the District Court should be initiated by way of a standard form of procedure called a Summons. They recommended that the requirements for the qualifications of District Court judges be strengthened from that specified in the 1923 Act, to require practice as a solicitor or barrister for 6 years, or previous appointment as a District justice.

(ii) *The Courts of Justice Act 1924*

2.174 The recommendations of the Judiciary Committee were followed by the Oireachtas and the District Courts were vested with jurisdiction in contractual matters up to a value of £25 and in tortious matters (subject to those torts which were excluded from the jurisdiction of the District Court) up to a limit of £10.²³⁰

2.175 The jurisdiction of the present District Court is still that contained in section 77 of the 1924 Act, as amended. Currently, the District Court has jurisdiction to hear contract, breach of contract and tort cases where the claim does not exceed the sum of €6,348.69. Those torts which the Judiciary Committee recommended to be excluded from the jurisdiction of the newly established District Court remain excluded. The tort of criminal conversation, which was originally excluded, no longer exists as a tort and was removed by section 4 of the *Courts Act 1991*. The District Court has jurisdiction to deal with matters of ejectment for the non-payment of rent where the rent does not exceed €6,348.69. The jurisdiction of the District Court in cases involving proceedings at the suit of a Minister or Government to recover debts has also increased from the level of £25 set in 1924, to

²³⁰ Section 77 of the *Courts of Justice Act 1924* (as originally enacted).

€6,348.69. Further jurisdiction was vested in the District Court by virtue of section 4(a) of the *Courts Act 1991*, which provides that particular public bodies may initiate proceedings under the *Drainage Improvement of Land (Ireland) Acts 1863-1892*²³¹ for the recovery of a sum not exceeding €6,348.69.

2.176 Section 4(c) of the *Courts Act 1991* inserted a new proviso into section 77 of the 1924 Act. This has the effect of allowing cases upon which the District Court has power to adjudicate, with a higher value than the current maximum jurisdiction of the District Court (€6,348.69), to be heard in the District Court once both of the parties to the action so consent. This change was recommended by the Committee on Court Practice and Procedure in its Fifth Interim Report.²³²

2.177 The recommendation of the Judiciary Committee that the District Court be vested with the jurisdiction of the Court of Petty Sessions and the Court of Quarter Session in licensing matters was legislated for in the 1924 Act.²³³

2.178 The *Courts and Courts Officers Act 2002* makes provision for an increase in the monetary jurisdiction of the District Court from its current level of €6,348.89 to €20,000. This provision has not yet been commenced. This means that the last increase in the monetary jurisdiction of both the District Court and Circuit Court occurred in 1991.

2.179 Section 79 of *The Courts of Justice Act 1924* establishes the Court's territorial jurisdiction by reference to districts. The jurisdiction vested in the District Court has to be exercised in particular districts connected with the particular litigation. Another practical significance of the local geographical jurisdiction of the District Court was recognised by Mr Justice Geoghegan wherein he stated:

“...the District Court is intended to be a local court and, therefore, there is always a limited territorial jurisdiction in relation to any orders that can be made by that court.”²³⁴

²³¹ 26&27 Vic c 88.

²³² Committee on Court Practice and Procedure *Fifth Interim Report: Increase of Jurisdiction of the District Court and Circuit Court* (Stationery Office Pr 8936 1966) at 19. It is worth noting that one member of the Committee, Mr Justice Kenny, dissented on this recommendation. He was of the opinion that to vest a consent jurisdiction on both the District and Circuit Courts would be unconstitutional as the parties to the litigation cannot by their consent confer jurisdiction on the District or Circuit Courts as these are courts of “local and limited jurisdiction”. On this basis, he recommended that the consent jurisdiction of the Circuit Court be repealed. *Ibid* at 19.

²³³ Section 77C of *The Courts of Justice Act 1924*.

²³⁴ *Creaven v CAB and anor* [2004] IESC 92 Supreme Court 29 October 2004.

(iii) *Report of the Joint Committee on The Courts of Justice Act 1924*

2.180 The Committee made no recommendations for changes to the jurisdiction of the District Court. It merely stated that the evidence provided to the Committee was that the Court was operating in a satisfactory manner. On that basis, the Committee recommended that the jurisdiction of the District Court remain as it was in the 1924 Act.

(iv) *The Irish Constitution 1937*

2.181 Article 34.3.4^o reiterated Article 64 of the 1922 Constitution by stating that “The Courts of First Instance shall include courts of limited and local jurisdiction”. From this, the District Court has developed as a creature of statute and its jurisdiction comes from statute.

(v) *Courts (Establishment and Constitution) Act 1961*

2.182 Section 5 of the 1961 Act established the District Court as a Court of First Instance. Its membership consists of a President of the District Court and such number of other judges (formerly justices)²³⁵ as is from time to time fixed by the Oireachtas. Currently, there are 60 ordinary judges of the District Court.²³⁶

(vi) *Courts (Supplemental Provisions) Act 1961*

2.183 This Act made additional provision in respect of the jurisdiction of the District Court. Section 33 of the Act states that the District Court is empowered to hear cases relating to music and dancing licences, and actions for wrongful detention where the claim does not exceed €6,348.89. The District Court was also given jurisdiction to adjudicate on claims under credit sale agreements pursuant to the *Hire Purchase Act 1946* and *Hire Purchase (Amendment) Act 1960*. Both of these Acts were repealed by the *Consumer Credit Act 1995*.

2.184 The jurisdiction of the District Court provides an ideal example of the difficulties caused by the number of Courts Acts since 1924. In order to get a complete picture, it is necessary to examine five Acts.²³⁷ The consolidated Courts Bill published by the Commission in conjunction with

²³⁵ Section 5(2)(b) of the *Courts (Supplemental Provisions) Act 1961* amended by section 21 of the *Courts Act 1991*.

²³⁶ Section 11 of the *Courts and Courts Officers Act 1995*, as inserted by section 56 of the *Civil Liability and Courts Act 2004* as amended by section 3 of the *Courts and Court Officers (Amendment) Act 2007*.

²³⁷ *The Courts of Justice Act 1924*, the *Courts of Justice Act 1928*, the *Courts of Justice Act 1953*, the *Courts (Supplemental Provisions) Act 1961* and the *Family Law (Maintenance of Spouses and Children) Act 1976*.

this Consultation Paper has the benefit of consolidating a number of such sections.

2.185 The 1961 Act provides for a President of the District Court who is permanently assigned to the Dublin Metropolitan District.²³⁸ The Act also provides for powers of the President of the District Court. One of the more noteworthy of these is the power of the President to investigate the conduct of a District Judge where “it appears ... that the conduct of a justice of the District Court is prejudicial to the prompt and efficient discharge of the business of that Court”.²³⁹

C Criminal Jurisdiction

(1) Supreme Court

(a) Pre-1922

2.186 The concept of appeals in criminal cases was not introduced in Ireland until 1924, so there is nothing in pre-1922 legislation of relevance.

(b) Post-1922

(i) The Irish Free State Constitution 1922

2.187 Article 66 of the 1922 Constitution provided that the Supreme Court was to have appellate jurisdiction “with such exceptions (not including cases which involve questions as to the validity of any law) and subject to such regulations as may be prescribed by law, have appellant jurisdiction from all decisions of the High Court”. In 1923, the Judiciary Committee recommended the establishment of the Court of Criminal Appeal, which would divest the Supreme Court of its jurisdiction in hearing criminal appeals from the High Court. The Court of Criminal Appeal was established by *The Courts of Justice Act 1924*, which removed criminal appeals from the sphere of the Supreme Court. As a result, only appeals from the Court of Criminal Appeal are heard by the Supreme Court, and even then, only in limited circumstances.

(ii) The Courts of Justice Act 1924

2.188 Section 29 of the 1924 Act sets out the circumstances in which appeals from the Court of Criminal Appeal may reach the Supreme Court. This is discussed in further detail at paragraph 2.196.

²³⁸ Section 35 of the *Courts (Supplemental Provisions) Act 1961*.

²³⁹ Section 36 of the *Courts (Supplemental Provisions) Act 1961*.

(iii) The Irish Constitution 1937

2.189 The main point of note in relation to the criminal jurisdiction given to the Supreme Court by the 1937 Constitution is the addition of the words “shall have appellate jurisdiction from such decisions of other courts as may be prescribed by law” by Article 34.3.3° to the provisions of Article 66 of the Irish Free State Constitution 1922. Section 29 of *The Courts of Justice Act 1924* provides an express example of another court (apart from the High Court) from which the Supreme Court can hear appeals; in this case it is the Court of Criminal Appeal.²⁴⁰

2.190 In *The People (Attorney General) v Conmey*²⁴¹ an issue arose as to whether there was an automatic right of appeal to the Supreme Court from the High Court exercising its criminal jurisdiction as the Central Criminal Court.²⁴² The Supreme Court held that the Constitution conferred a right on the accused to appeal to the Supreme Court against a conviction in the Central Criminal Court. A later case determined that such a right of appeal also applied to the prosecution.²⁴³ However, as Article 34.4.3° only applies to appeals from the High Court, no such right of appeal to the Supreme Court exists from the Circuit Court. Section 11(1) of the *Criminal Procedure Act 1993* abolished the right of the accused and prosecution to apply directly from the Central Criminal Court to the Supreme Court. Such appeals now lie to the Court of Criminal Appeal, as is the case with appeals from the Central Criminal Court.

(iv) Criminal appeals in the Supreme Court

2.191 There are three avenues by which an appeal in a criminal matter can come before the Supreme Court.²⁴⁴ First, section 34 of the *Criminal Procedure Act 1967*, as amended, provides that the Attorney General or the Director of Public Prosecutions may, on a without prejudice basis, refer a question of law arising during a trial on indictment to the Supreme Court for determination.²⁴⁵ Secondly, a Central Criminal or Circuit Court judge can

²⁴⁰ Note the amendments of section 29 by section 22 of the *Criminal Justice Act 2006* have been amended by section 59 of the *Criminal Justice Act 2007*.

²⁴¹ [1975] IR 341.

²⁴² Section 11(1) of the *Courts (Supplemental Provisions) Act 1961* states that when the High Court is exercising its criminal jurisdiction it shall be known as the ‘Central Criminal Court’.

²⁴³ *People v O’Shea* [1982] IR 384.

²⁴⁴ Walsh *Criminal Procedure* (Thomson Roundhall 2002) at 1201-2.

²⁴⁵ Section 34 of the *Criminal Procedure Act 1967* as amended by section 21 of the *Criminal Justice Act 2006*.

refer a question of law to the Supreme Court.²⁴⁶ Thirdly, section 29 of *The Courts of Justice Act 1924* provides for the possibility of criminal appeals to go before the Supreme Court. Section 29 of the 1924 Act has been amended by section 22 of the *Criminal Justice Act 2006*.²⁴⁷ The section now permits an appeal to the Supreme Court from the Court of Criminal Appeal where the Court or the Attorney General certifies that the decision involves a point of law of exceptional public importance and that it is desirable in the public interest that the appeal be taken. As with section 34 of the 1967 Act as amended, this appeal is on a without prejudice basis.

(2) *The Court of Criminal Appeal*

(a) *Pre-1922*

2.192 The concept of appeal from conviction or sentence in criminal cases is unknown to the common law.²⁴⁸ It was not until legislative developments in the 18th century that the possibility of an appeal became available to convicted persons.²⁴⁹ Until 1907, England and Wales had no Court of Criminal Appeal. The Court of Appeal (Criminal Division) was established in England by the *Criminal Appeal Act 1907*.²⁵⁰

2.193 The Court of Criminal Appeal is purely a statutory invention and was not established in Ireland until 1924.

(b) *Post-1922*

(i) *Judiciary Committee Report*

2.194 The Committee recommended that a criminal appeals court be established in Ireland.²⁵¹ The Committee was of the opinion that such a court should hear appeals of cases heard on indictment (that is heard by the Central Criminal Court or the Circuit Criminal Court) and should consist of one member of the Supreme Court, who would be presiding judge, and two Judges of the High Court. The Committee also proposed the following arrangements in relation to such appeals:

²⁴⁶ Section 16 of the *Court of Justice Act 1947*. See also the chapter on appeals in this Consultation Paper.

²⁴⁷ Section 29 of the 1924 Act, as restated by section 22 of the *Criminal Justice Act 2006* has been amended by section 59 of the *Criminal Justice Act 2007*.

²⁴⁸ Law Reform Commission *Consultation Paper on Prosecution Appeals in Cases brought on Indictment* (LRC CP 19-2002) at 6.

²⁴⁹ *Ibid.*

²⁵⁰ 7 Edw 7 c 23.

²⁵¹ *Judiciary Committee Report of the Judiciary Committee* (Stationery Office 1923) at 23.

- i) The appellant must obtain a certificate from the Judge who tried the case that it was a fit case for appeal;
- ii) If the certificate is refused, then the appellante can appeal to the Criminal Appeal Court from the refusal. Leave may be granted by the Criminal Appeal Court if it is of the opinion that a question of law is involved, or where it appears that the trial was unsatisfactory.
- iii) The appeal is to be determined on the report of the official stenographer, although the Court may hear new or additional evidence and may refer any matter for a report by the Judge before whom the case was tried.
- iv) The Court should have the power to affirm or reverse the conviction in whole or in part, to remit, reduce, or increase the sentence, and to make such order as the costs of all or any of the parties to the appeal as shall seem to it to be just.

(ii) *Courts of Justice Act 1924*

2.195 In 1924, the Oireachtas implemented the Judiciary Committee’s recommendation that there was a need for a Criminal Appeal Court. Section 8 of *The Courts of Justice Act 1924* established a ‘Court of Criminal Appeal’. The Court of Criminal Appeal has jurisdiction to hear appeals from the Central Criminal Court²⁵² and from the Circuit Court²⁵³ in all cases tried on indictment. Section 8 of the Act provided for rather informal arrangements for the newly established Court of Criminal Appeal, stating that

“The Chief Justice may, from time to time, request any two ordinary judges of the High Court to sit with himself, or with a judge of the Supreme Court, as a Court of Criminal Appeal...”

2.196 Sections 28 to 24 of the 1924 Act also provided for procedure for the newly established Court. Most of these sections continue to apply.²⁵⁴ One of the more important of these is section 29, which provides that a decision of the Court of Criminal Appeal is final, and that no appeal to the Supreme Court is possible unless the Court of Criminal Appeal or the Attorney General certifies that that a point of law of exceptional public importance arises in the case. Section 22 of the *Criminal Justice Act 2006* restates and amends section 29 of the 1924 Act, so as to address the effect of

²⁵² Section 31 of the *Courts of Justice Act 1924*.

²⁵³ Section 63 of the *Courts of Justice Act 1924*.

²⁵⁴ Working Group on the Jurisdiction of the Courts *The Criminal Jurisdiction of the Courts* (Stationery Office 2003) at 148.

the decision in *People (Attorney General) v Kennedy*²⁵⁵. In that case, the Supreme Court held that a prosecution appeal against an acquittal did not lie under section 29 of the 1924 Act. The Supreme Court held that the terms of section 29 were not sufficiently clear or equivocal to confer such a right on the prosecution:

“The giving of an appeal even to a convicted party, as in the English Act of 1907 and our Act of 1924, was a fundamental innovation. The giving of an appeal against an acquittal would be an even more fundamental innovation. It would mean what Lord Halsbury, in *Cox v Hakes* said affected the right of personal freedom and a reversal of the policy of centuries. I could not believe that our Legislature intended to introduce such a revolutionary reversal of the policy of centuries and one gravely affecting personal freedom, by a section expressed in such terms as section 29 and subject to such an ambiguity”²⁵⁶.

The amendment to section 29 of the 1924 Act, by the *Criminal Justice Act 2006*, provides to the prosecution a without prejudice right of appeal to the Supreme Court in relation to a point of law arising in respect of a decision by the Court of Criminal Appeal. In accordance with section 29(3) of the 1924 Act, as amended by section 22 of the *Criminal Justice Act 2006*, the Court or the Attorney General must certify that the decision involves a question of law of exceptional public importance and that it is desirable in the public interest that the Attorney General or the Director of Public Prosecutions should take the appeal.

2.197 All of the conditions precedent to an appeal being heard in the Court of Criminal Appeal, contained in the Judiciary Committee’s Report, were enacted in the 1924 Act. The Court of Criminal Appeal is entirely a creature of statute; there is no reference to it in the Constitution. It is for this reason that the Court can be abolished by mere legislation.²⁵⁷

(iii) Courts (Establishment and Constitution) Act 1961

2.198 The Court of Criminal Appeal is purely a statutory invention and is not mentioned in the Constitution. Its root of title is section 3(1) of the *Courts (Establishment and Constitution) Act 1961*, which formally establishes the Court and makes provision for its constitution.

²⁵⁵ [1946] IR 517. Section 29 of the 1924 Act, as amended by section 22 of the *Criminal Justice Act 2006* has been amended further by section 59 of the *Criminal Justice Act 2007*.

²⁵⁶ *Ibid* at 538.

²⁵⁷ See paragraph 2.200

2.199 In the *People (Attorney General) v Conmy*²⁵⁸ the Supreme Court was asked to consider whether the establishment of the Court of Criminal Appeal was constitutional. The Supreme Court held that the establishment of the Court by virtue of section 3 of the 1961 Act was constitutional as section 3 of Article 34 of the Constitution contemplates the establishment of courts of first instance other than the High Court and courts with appellate jurisdiction from decisions of such courts of first instance.²⁵⁹

(iv) Abolition of the Court of Criminal Appeal

2.200 The Committee on Court Practice and Procedure recommended that the Court of Criminal Appeal should be abolished and its jurisdiction be transferred to the Supreme Court.²⁶⁰ One of the main concerns about the Court of Criminal Appeal expressed by the Committee was that the informal way in which the Court was convened resulted in a lack of continuity in the sitting of the Court as compared with a more permanent Court. This argument could equally be made of the Civil Court of Appeal proposed by the *Courts and Courts Officers Bill 1994*.²⁶¹ Secondly, the Committee was of the opinion that the composition of the Court of Criminal Appeal unduly interferes with the working of other courts. Thirdly, the Committee expressed dissatisfaction with the fact that two of the judges on the Court of Criminal Appeal are of the same type and level as the judge who presided over the case that is being appealed. They felt that this undermines the status of the Court of Criminal Appeal. Finally, the Committee felt that the lack of jurisdiction of the Court of Criminal Appeal in constitutional cases causes delay and expense for appellants who wished to raise constitutional issues and appeal a decision in a criminal case. Such appellants must take their constitutional question to the High Court, and the criminal appeal to the Court of Criminal Appeal.

2.201 Following on from the recommendations of the Committee on Court Practice and Procedure, provision was made in the *Courts and Court Officers Act 1995* to abolish the Court of Criminal Appeal and for its jurisdiction to be transferred to the Supreme Court.²⁶² This provision awaits a commencement order.

²⁵⁸ [1975] IR 341.

²⁵⁹ [1975] IR 341 at 349 *per* O'Higgins CJ.

²⁶⁰ Committee on Court Practice and Procedure Seventh Interim Report: *Appeals from Convictions on Indictment* (Stationery Office Pr 9196 1966) at 11.

²⁶¹ See paragraph 2.86- 2.202 of this Consultation Paper.

²⁶² Section 3(2) and Schedule of the *Courts and Courts Officers Act 1995* (No 31 of 1995).

2.202 It is over 10 years since the 1995 Act was enacted. The Working Group on the Jurisdiction of the Courts ('the Fennelly Group') considered whether it was desirable for the provisions of the 1995 Act to be brought into force. They concluded that there was no pressing need for the Court of Criminal Appeal to be abolished. They acknowledged that there was no current intention to implement the provisions of the 1995 Act and that the continued presence on the statute book of the provisions creates confusion. On this basis, they recommended that if the provisions are not going to be implemented, they should be repealed.²⁶³ The Commission is of the opinion that it is unlikely that these provisions will be commenced. As discussed above, section 22 of the *Criminal Justice Act 2006* has amended section 29 of *The Courts of Justice Act 1924* to provide for appeal from the Court of Criminal Appeal to the Supreme Court in limited circumstances.²⁶⁴ It is the view of the Commission that such an amendment would not be required, or indeed legislated for, should the abolition of the Court of Criminal Appeal be likely to occur in the near future.

2.203 The Commission believes that if there is no intention to commence section 3(2) of the *Courts and Courts Officers Act 1995*, it is arguable that its retention on the statute book is unnecessary. The Commission has not expressed any opinion on whether or not it is desirable to abolish the Court of Criminal Appeal.

2.204 The Commission considered whether the section should be repealed, following this recommendation by the Fennelly Group. However, given the recent establishment of a Working Group on a Court of Appeal, the Commission has concluded that it would not be appropriate to make any recommendation on whether section 3(2) of the *Courts and Courts Officers Act 1995* be repealed.

(v) Court (Supplemental Provisions) Act 1961

2.205 Section 12(2) of the *Supplemental Provisions Act 1961* sets out the jurisdiction of the Court of Criminal Appeal. In this respect, the Court of Criminal Appeal established by the *Courts (Establishment and Constitution) Act 1961* is the successor to the Court of Criminal Appeal established by *The*

²⁶³ Working Group on the Jurisdiction of the Courts *The Criminal Jurisdiction of the Courts* (Stationery Office 2003) at 159.

²⁶⁴ Section 29 of the 1924 Act, as restated by section 22 of the *Criminal Justice Act 2006* has been amended by section 59 of the *Criminal Justice Act 2007*. The purpose of this amendment is to clarify two aspects of section 29. First, section 5A is inserted into section 29 to make it clear that points other than the certified point can be argued before the Supreme Court. Section 9A is inserted to clarify that section 29 of the 1924 does not affect the operation of section 3 of the *Criminal Justice Act 1993* which is concerned with the power of the Director of Public Prosecutions to seek a review of unduly lenient sentences.

Courts of Justice Act 1924. It can entertain appeals against conviction or sentence from the Circuit Court, the Central Criminal Court and the Special Criminal Court.

(3) *The Special Criminal Court*

2.206 Not all indictable criminal cases are heard in the Central Criminal Court and the Circuit Criminal Court. Certain indictable cases are heard in the Special Criminal Court when Article 38.3 of the Constitution concerning the inability of the ordinary courts to secure the effective administration of justice have been invoked.

2.207 Although there was no explicit reference to special courts in the Irish Free State Constitution, it provided for military tribunals to be established by law, in which the constitutional right of trial by jury would not apply.²⁶⁵ The 1937 Constitution allows for the establishment of military tribunals during times of war or rebellion pursuant to Article 38.4.1°, but these are reserved for extreme circumstances. The military tribunals established pursuant to the 1922 Constitution are closer in nature to the present Special Criminal Court than the military tribunals provided for under the 1937 Constitution.

2.208 Article 38.3 of the 1937 Constitution allows for the establishment of special courts for the trial of offences where the ordinary courts are deemed inadequate to secure the effective administration of justice and the preservation of peace and order. It also provides that such courts are to be established by law. Article 38.5 permits trial without jury in such courts. The *Offences against the State Act 1939* establishes a Special Criminal Court, and in Part V of the Act provides for matters such as the composition of the courts and the procedure under which they are to operate. In order for the courts to be established, the precondition set out in section 35 of the 1939 Act must be fulfilled. Section 35 provides as follows:

“If and whenever and so often as the Government is satisfied that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order and that it is necessary that this Part of this Act should come into force, the Government may make and publish a proclamation declaring that the Government is satisfied as aforesaid and ordering that this Part of this Act shall come into force”.

When the Government has issued a proclamation bringing Part V into force, it will remain in force until annulled by a resolution of the Dáil, or if the

²⁶⁵ Article 72 of the Irish Free State Constitution 1922.

government publishes a proclamation declaring that Part V of the 1939 is no longer in force.²⁶⁶

2.209 The Special Criminal Court sits without a jury. Although Article 38.5 contains a general right to a jury trial, this right is subject to Article 38.3 which allows for the establishment of Special Criminal Courts. Each special criminal court must consist of an uneven number of members, but must consist of at least 3 members.²⁶⁷ Each of the members must be a judge of the High Court, Circuit Court, District Court, a barrister or solicitor of at least seven years standing or an officer of the Defence Forces not below the rank of commandant.²⁶⁸ The current Special Criminal Court was established by proclamation of the Government in 1972 primarily in response to the situation in Northern Ireland. This Court still exists, and is the first Special Criminal Court since the foundation of the State that consists of serving judges. Former Special Criminal Courts had military officers as members.²⁶⁹

2.210 The jurisdiction of the Special Criminal Court comes entirely from statute, and there are two strands to its jurisdiction. The first strand is section 36 of the 1939 Act, which provides a list of offences that may be specified by the Government by statutory order as offences with which the ordinary courts are deemed inadequate to deal. These offences are listed as 'scheduled offences' and are automatically transferred from the ordinary criminal courts to the Special Criminal Court. Examples of scheduled offences are any offence under the *Explosive Substances Act 1883*²⁷⁰ an offence under the *Offences against the State Act 1939* (for example obstruction of the Government or possession of incriminating documents) or any offence under sections 6 to 9 and section 12 of the *Offences Against the State (Amendment) Act 1998* (for example directing an unlawful organisation or withholding information relating to a serious offence). The second strand of the jurisdiction allows for an offence to be tried in the Special Criminal Court in certain circumstances where it is not contained in the schedule to the 1939 Act. Section 46 of the 1939 Act permits an individual to be tried in the Special Criminal Court where the Attorney General certifies that it is his opinion that the ordinary courts are inadequate to secure the effective administration of justice.

²⁶⁶ Section 35(4) and (5) of the *Offences Against the State Act 1939*.

²⁶⁷ Section 39(1) of the *Offences against the State Act 1939*.

²⁶⁸ Section 39(3) of the *Offences against the State Act 1939*.

²⁶⁹ Committee to Review the Offences Against the State Acts 1939-1998 and Related Matters *Report of the Committee to Review the Offences Against the State Acts 1939-1998 and Related Matters* (Stationery Office 2002) at 215.

²⁷⁰ 47&47 Vic c 3.

2.211 There are three ways in which an accused can be brought before the Special Criminal Court: the accused may be charged directly by the court; he or she may be returned for trial to the Special Criminal Court from the District Court in a scheduled case which the District Court has jurisdiction to try summarily;²⁷¹ or the High Court may order that a case awaiting trial before either the Circuit Court or the Central Criminal Court be transferred to the Special Criminal Court.²⁷² Finally, an accused may be brought before the Special Criminal Court on the application of the Attorney-General, where he or she certifies that the ordinary Courts are, in his or her opinion, inadequate to secure the effective administration of justice and preservation of public peace and order in relation to the trial of such person on such charge.

2.212 In 2002, the Committee to Review the Offences against the State Acts 1939-1998 and Related Matters published their report.²⁷³ Their main task was to consider whether there was a continued need for the Special Criminal Court in light of the 1998 Good Friday Agreement. A majority of the Committee recommended its retention, with minor modifications, as they were of the view that the continued threat posed by terrorism and organised crime justified this conclusion.²⁷⁴ In addition, they recommended that a resolution establishing the Court should lapse automatically after three years unless some positive form of affirmation occurs by the Oireachtas. They also recommended the amendment of the 1939 Act so that it would no longer be possible to have members of the Defence Forces to sit as judges in the Court.

2.213 The Special Criminal Court continues to exist in this jurisdiction. The recommendations of the Committee for amendment of the relevant legislation have not so far been implemented.

(4) The High Court

(a) Pre 1922

(i) Introduction

2.214 The Courts of Assize were used in the 18th and 19th Centuries in Ireland to deal with criminal cases of a serious nature. These Courts heard criminal cases away from Westminster. As Byrne and McCutcheon state, “[t]he judges of the Assize Courts were, in effect, travelling judges of what ultimately became the High Court of Justice. This finds a modern echo in the

²⁷¹ Section 45 of the *Offences against the State Act 1939*.

²⁷² Section 48 of the *Offences against the State Act 1939*.

²⁷³ Committee to Review the Offences Against the State Acts 1939-1998 and Related Matters *Report of the Committee to Review the Offences Against the State Acts 1939-1998 and Related Matters* (Stationery Office 2002)

²⁷⁴ *Ibid* at 226.

twice-yearly sittings of the High Court on Circuit.”²⁷⁵ In Dublin, the Courts sat as a permanent Commission to try serious cases that had occurred in the Dublin Area. The judges who sat on the Court of Assize were Queen’s Bench judges. It became the practice for offences carrying the death penalty to be tried by the Courts of Assize exclusively; such cases could not go before the lower Courts of Quarter Sessions or Petty Sessions.²⁷⁶ Judicial Commissions, similar to courts, were also used to decide on criminal cases within a defined area. These were similar to the Courts of Assize, and were known as the ‘Commission of Oyer and Terminer’ and the ‘Commission of Gaol Delivery’. The Courts of Assize tried the more serious offences, while the less serious offences went before the Court of Quarter Sessions and summary offences were heard by the Courts of Petty Sessions.

2.215 In 1848, an Act²⁷⁷ was passed in order to establish ‘The Court of Crown Cases Reserved’ which would decide on questions of law that could be reserved at a criminal trial. The judges who sat on this Court were High Court judges. It was the judge of the lower court who was required to ‘state a case’. The Court of Crown Cases Reserved was given the power to reverse, affirm or amend any judgment of the lower court.

2.216 However, the High Court and the Circuit Court were given original criminal jurisdiction in respect of specified offences by *The Courts of Justice Act 1924*, so the jurisdiction of their predecessors is not worth examining in detail.

(ii) *Supreme Court of Judicature Act 1877*

2.217 The High Court of Justice created by the 1877 Act was vested with the criminal jurisdiction previously vested in the Courts of Assize, the Courts of Oyer and Terminer and the Courts of Goal Delivery.²⁷⁸ The Court of Appeal established under the 1877 Act was given the power to hear and determine appeals from any judgment of the High Court of Justice.

(iii) *The Government of Ireland Act 1920*

2.218 The *Government of Ireland Act 1920* provided for the establishment of the High Court of Justice for Southern Ireland as a

²⁷⁵ Byrne and McCutcheon *The Irish Legal System* (2nd ed Butterworths 2001) at 41. On the jurisdiction of the High Court on circuit see section 34 of the *Courts of Justice Act 1936* as amended by section 42 of the *Courts and Courts Officers Act 1995*.

²⁷⁶ The Courts of Assize and Quarter Sessions remained the main criminal courts in England and Wales until the *Courts Act 1971* abolished these courts and replaced them with a single Crown Court.

²⁷⁷ ‘An Act for the further Amendment of the Administration of the Criminal Law’ (1848) 11&12 Vic c 78.

²⁷⁸ Section 21 of the *Supreme Court of Judicature Act 1877*.

successor to the High Court of Justice established by the 1877 Act. This Court had both civil and criminal jurisdiction, in accordance with the jurisdiction of its predecessor, the High Court of Justice. Appeals from the new Court were heard by the Court of Appeal for Southern Ireland.

(b) Post 1922

(i) The Irish Free State Constitution 1922

2.219 The jurisdiction given to the High Court in criminal matters by the 1877 and 1920 Acts was maintained in the Irish Free State Constitution 1922. Article 64 gave the High Court, as a Court of First Instance, “full jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal...”.

(ii) The Judiciary Committee 1923

2.220 The Judiciary Committee recommended that there be a Central Criminal Court for Dublin City and the Home Counties. They stated that the former system of Commissions of Assizes (now the High Court on Circuit) should be sent to sit outside Dublin City and the Home Counties as the need arises. As for the jurisdiction of the new ‘Central Criminal Court’, the Committee was of the opinion that it should be given jurisdiction over all crimes that were excepted from the jurisdiction of the Circuit Court.

(iii) The Courts of Justice Act 1924

2.221 *The Courts of Justice Act 1924* defined the Central Criminal Court as “the judge of the High Court, to whom is assigned the duty of acting as such Court for the time being”.²⁷⁹ The High Court was given the same criminal jurisdiction as was vested in its predecessor, the High Court of Judicature.²⁸⁰ Section 8 of the *Courts of Justice Act 1926* provides that the Central Criminal Court can dispose of cases in relation to which the accused is in custody.²⁸¹ This is very similar to the jurisdiction exercised by the Commission for Gaol Delivery.

2.222 The jurisdiction of the Central Criminal Court under *The Courts of Justice Act 1924* was shaped by the jurisdiction that was excluded from the Circuit Court. Section 49 of the 1924 Act excluded the offences “of persons charged with murder, attempt to murder, or conspiracy to murder, high treason, treason felony, or treasonable conspiracy, or piracy, including accessories before or after the fact” from the jurisdiction of the Circuit Court in criminal matters.

²⁷⁹ Section 3 of the *Courts of Justice Act 1924*.

²⁸⁰ Section 17 of the *Courts of Justice Act 1924*.

²⁸¹ Section 8 of the *Courts of Justice Act 1926*.

2.223 Section 4 of the *Courts of Justice Act 1926* provided further detail on the jurisdiction of the Central Criminal Court. It provided that the Court “shall have, and may exercise every jurisdiction in criminal matters for the time being vested in the High Court”. Further, section 8 of the 1926 Act allows for the Central Criminal Court to dispose of cases awaiting trial in the Circuit Court.

2.224 Section 3 of the 1924 Act envisaged the establishment, as recommended by the Judiciary Committee, of a ‘Court of the High Court Circuit’ that would be similar to the old Court of Assize, which travelled through the country hearing criminal cases outside the capital city. This Court and provisions relating to it were repealed by the *Courts of Justice Act 1926*.²⁸² During Dáil Debates on the 1926 Act, it was commented by the Minister for Justice, Kevin O’Higgins, that the establishment of such a Court would result in “an inconvenience and expense out of all proportion to the number of cases that stand for trial”.²⁸³ He concluded as follows:

“I think there is justification for the course we are now taking in asking the Dáil to share the view that this Court of the High Court Circuit is an unnecessary portion of our judicial machinery and that cases outside the ambit of the criminal jurisdiction may well be tried by the central criminal court in the city of Dublin”.

2.225 Section 4 of the Act transferred the jurisdiction of the High Court Circuit to the Central Criminal Court in Dublin.

(iv) *The Joint Committee on The Courts of Justice Act 1924*

2.226 The Committee did not consider the criminal jurisdiction of the High Court in its Report and accordingly did not make any recommendations.

(v) *The Constitution of 1937*

2.227 Article 34.3.1° of the Irish Constitution restated Article 66 of the Irish Free State Constitution by cloaking the High Court with “full original jurisdiction in and power to determine all matters, whether of law or fact, civil or criminal”.

2.228 In *Tormey v Ireland*²⁸⁴ the applicant argued that the provisions of the *Courts Act 1981* that abolished the right to transfer actions to the Central Criminal Court were unconstitutional given the reference to the “full original jurisdiction” of the High Court in Article 34.3.1° of the Constitution. The Supreme Court rejected this argument.

²⁸² Section 2 of the *Courts of Justice Act 1926*.

²⁸³ Dáil Debates Volume 13 17 November 1925.

²⁸⁴ [1985] IR 289.

2.229 The Supreme Court recognised that despite the constitutional reference to “full original jurisdiction”, the High Court is not the only court of first instance. Article 34.3.4° provides “that the Courts of First Instance shall include Courts of local and limited jurisdiction”. The Supreme Court came to the following conclusion:

“The jurisdiction to try thus vested by the Constitution in courts, tribunals, persons or bodies other than the High Court must be taken to be capable of being exercised, at least in certain instances, to the exclusion of the High Court, for the allocation of jurisdiction would otherwise be overlapping and unworkable.

Article 34, s.3, sub-s.4 amounts to a recognition of the fact that the High Court is not expected to be a suitable forum for hearing and determining at first instances all justiciable matters. Apart from practical considerations, it would not seem to be in accordance with the due administration of justice underlying the Constitution that every justiciable matter or question could, at the instance of one of the parties, be diverted into the High Court for trial.”²⁸⁵

2.230 The Supreme Court acknowledged that even if the Oireachtas accords jurisdiction in certain matters to the District or Circuit Courts, this does not prevent the High Court from exercising its full original jurisdiction. The High Court can invoke its full jurisdiction to ensure that justice is done in such cases, for example by invoking its jurisdiction in *habeas corpus* or judicial review proceedings.²⁸⁶

(vi) Courts (Establishment and Constitution) Act 1961

2.231 As already discussed, section 2 of the 1961 Act establishes the new High Court.

(vii) Courts (Supplemental Provisions) Act 1961

2.232 Section 11 of the *Supplemental Provisions Act 1961* provides that when the High Court is exercising criminal jurisdiction, it is to be referred to as the ‘Central Criminal Court’.

2.233 Although the High Court in criminal matters sits as the Central Criminal Court, its civil jurisdiction can involve sitting in matters which relate to criminal matters. For example, when the High Court is exercising its constitutional jurisdiction in *habeas corpus* applications, it sits as the High Court.²⁸⁷

²⁸⁵ [1985] IR 289 at 295.

²⁸⁶ *Ibid* at 296-7.

²⁸⁷ Walsh *Criminal Procedure* (Thomson Roundhall 2002) at 58.

2.234 The Supplemental Provisions Act 1961, like *The Courts of Justice Act 1924*, sets out the jurisdiction of the Central Criminal Court. The exact offences that fall within the exclusive jurisdiction of the Central Criminal Court are expressly contained in the Supplemental 1961 Act. Similar to the offences listed in the 1924 Act, these are offences that are excluded from the jurisdiction of the Circuit Court, and by implication fall within the exclusive jurisdiction of the Central Criminal Court. Section 25(2) is as follows:

“The jurisdiction conferred on the Circuit Court by subsection (1) of this section shall not extend to treason, an offence under section 2 of the Treason Act, 1939, an offence under section 6 of the Offences Against the State Act, 1939, murder, attempt to murder, conspiracy to murder, or piracy, including an offence by an accessory before or after the fact.”

(viii) *Later additions to the jurisdiction of the Central Criminal Court*

2.235 A number of offences have subsequently been added to the jurisdiction of the Central Criminal Court. The most significant of these are rape, aggravated sexual assault and attempted aggravated sexual assault, which were transferred to the exclusive jurisdiction of the Central Criminal Court in 1990.²⁸⁸ Further, offences under section 6 and 7 of the *Competition Act 2002* which involve anti-competitive agreements, decisions and concerted practices, and the abuse of a dominant position, are within the exclusive jurisdiction of the Central Criminal Court.²⁸⁹

(ix) *Committee on Court Practice and Procedure*

2.236 In its Sixth Interim Report, the Committee on Court Practice and Procedure recommended that the title Central Criminal Court be abolished when the High Court is exercising its criminal jurisdiction. In such instances, the Committee recommended that the High Court be known simply as the High Court.²⁹⁰ The Committee was of the opinion that as the Commissions of Assize, which it had been envisaged would sit in provincial centres, had not come into existence, the word ‘Central’ in the title was superfluous. It is arguable given the increasing instances of the Central Criminal Court sitting on circuit, that this argument no longer carries as much credence as it did at the time of the Sixth Interim Report. The

²⁸⁸ Section 10 of the *Criminal Law (Rape)(Amendment) Act 1990*.

²⁸⁹ Section 11 of the *Competition Act 2002*. This follows recommendations made by the Competition and Merger Review Group *Final Report of the Competition and Mergers Review Group* (Department for Trade Industry and Employment Pn 8487 2000). See Working Group on the Jurisdiction of the Courts *The Criminal Jurisdiction of the Courts* (Stationery Office 2003) at 106.

²⁹⁰ Committee on Court Practice and Procedure *Sixth Interim Report: The Criminal Jurisdiction of the High Court* (Stationery Office Pr 9168 1966) at 9.

Committee also recommended the retention of the mechanism for transfer of cases on indictment between the Central Criminal Court and the Circuit Court, contained in section 6 of the *Courts Act 1964*.

(x) *Transfer of cases between the Central Criminal Court and the Circuit Court*

2.237 The rules concerning the transfer of cases between the Central Criminal Court and the Circuit Court have been altered significantly over the years. Under section 54 of *The Courts of Justice Act 1924*, either the Attorney General or the accused was entitled, on application, to have cases regarding serious offences sent forward to the High Court Circuit (soon after abolished) or the Central Criminal Court. This provision was abolished in 1964.²⁹¹

2.238 Section 6 of the *Courts Act 1964* introduced a flexible mechanism for transfer from the Circuit Court to Central Criminal Court. It repealed section 54 of the 1924 Act but in its place provided that the Circuit Court Judge was bound to make such a transfer where either the prosecutor or the accused gave 7 days notice. This mechanism was widely abused as a delaying mechanism. It was common for the relatively minor offence of larceny to be tried in the Central Criminal Court.²⁹²

2.239 Section 31 of the *Courts Act 1981* repealed section 6 of the 1964 Act, and following this change it was no longer possible in any circumstances to transfer a Circuit Court trial to the Central Criminal Court. Section 31 of the 1981 Act was replaced by section 32 of the *Court and Courts Officers Act 1995*, which set down far more exacting standards for transferring a case from a Circuit Court outside Dublin to the Dublin Circuit Court.²⁹³ As a result of these changes, there is no legal means for the transfer of trials between the Circuit Court and Central Criminal Court,²⁹⁴ and none

²⁹¹ Section 6 of the *Courts Act 1964*.

²⁹² Mr Justice Carney has remarked extra-judicially:

“This process [transfer of cases from Circuit Court to Central Criminal Court] was being abused for the purpose of delay so that cases involving the theft of a chocolate bar came before the Central Criminal Court with some degree of regularity.”

²⁹³ This section follows a recommendation from the Committee on Court Practice and Procedure in its 6th Interim Report that transfers of Circuit Court cases from outside Dublin should be to Dublin Circuit Court only. Committee on Court Practice and Procedure *Sixth Interim Report: The Criminal Jurisdiction of the High Court* (Pr 9168 1966) at 12.

²⁹⁴ Section 4P of the *Criminal Procedure Act 1967* as inserted by section 9 of the *Criminal Justice Act 1999* provides for joining an offence returned for trial to the Circuit Court with a connected case already returned to the Central Criminal Court. Section 26 of the *Courts (Supplemental Provisions) Act 1961* allows for a Circuit

for transfer between circuits except an extremely restricted basis for transfer to Dublin. Even if a case is particularly complex or raises important principles of law, it cannot be transferred to the Central Criminal Court.

2.240 The Working Group on the Jurisdiction of the Courts (‘the Fennelly Group’) considered that the jurisdiction of the Circuit Court and Central Criminal Court should remain unchanged, but with new arrangements permitting the transfer of cases between the two Courts. These recommendations are considered in more detail in Chapter 3 of this Consultation Paper.

(5) The Circuit Court

(a) Pre 1922

(i) Introduction

2.241 The predecessor of the current Circuit Court exercising criminal jurisdiction was the Court of Quarter Sessions.²⁹⁵ These Courts were carved out of the Court of Assize, which tried serious criminal offences. The Courts of Quarter Sessions received their name from the fact that they were held four times a year. These sessions became known as ‘quarter sessions’. Justices of the Peace at the Courts of Quarter Sessions dealt with less serious criminal offences than those at Assizes.²⁹⁶ With the passage of time, it was decided that crimes that were subject to the death penalty could not be heard by the Courts of Quarter Sessions. Appeals from the Courts of Quarter Sessions were heard by the Court of Assize.

2.242 Although the *Petty Sessions (Ireland) Act 1851* primarily made provision for the Courts of Petty Sessions, the predecessor to the modern day District Court in criminal matters, it also dealt briefly with matters in the Court of Quarter Sessions. Section 34 of the 1851 Act deals with the procedure for entering recognisances in certain circumstances, such as where a person is bound to appear or to keep the peace or to give evidence as a witness. This section has been adapted by section 22(4)(a) and Schedule 5 of the *Courts (Supplemental Provisions) Act 1961* so that the reference in section 34 of the 1851 Act to the Quarter Sessions is to be construed as a reference to the Circuit Court.

(ii) Civil Bill Court (Ireland) Act 1851

2.243 The significance of this Act is that it transferred the civil jurisdiction of the Courts of Quarter Sessions to newly established assistant

Court judge to transfer a case from one part of his or her circuit to another venue in the same circuit.

²⁹⁵ *Quarter Sessions (Ireland) Act 1845* 8& 9 Vic c 80.

²⁹⁶ Delany *The Administration of Justice in Ireland* (4th ed IPA 1975) at 43.

barristers who would hear such cases at the Civil Bill Court.²⁹⁷ The criminal jurisdiction of the Courts of Quarter Sessions continued as before the Act.

(iii) County Officers and Courts (Ireland) Act 1877

2.244 On the whole, the Judicature Act relates to the civil jurisdiction of the Courts of Quarter Sessions. Of note is section 3, which changed the title of Chairmen of Quarter Sessions to ‘County Court Judges and Chairmen of Quarter Sessions’.

(b) Post 1922

(i) The Irish Free State Constitution 1922

2.245 The 1922 Constitution allowed for the creation of courts of first instance other than the Supreme and High Court, with a statutory basis for their jurisdiction. Article 64 of the 1922 Constitution that the “Courts of First Instance shall include ... Courts of local and limited jurisdiction, with right of appeal as determined by law”.

(ii) Judiciary Committee 1923

2.246 The Judiciary Committee recommended the establishment of a new court called the Circuit Court, vested with both civil and criminal jurisdiction. They recommended that it be given jurisdiction in all felonies and misdemeanours²⁹⁸ apart from cases where a person is charged with murder, attempt to murder, high treason, treason felony, treasonable conspiracy and piracy, including accessories before and after the fact.²⁹⁹ They also recommended that the accused or the Attorney General should be given the right to apply to have the case sent forward to the Central Criminal Court if the maximum penalty that could be imposed in respect of the offence exceeded one year’s imprisonment. The Committee recommended that the jurisdiction of the Circuit Court should apply if the crime was committed, or if the accused person resided or had been arrested within the Circuit in which the Court was situated. This stems from the view of the Committee that less serious crimes should be tried in local and convenient centres.

2.247 On criminal appeals from the Circuit Court, the Committee recommended that there be a right of appeal in all cases on indictment once

²⁹⁷ Section 2 of the *Civil Bill Court (Ireland) Act 1851*.

²⁹⁸ The distinction between felonies and misdemeanours was abolished by section 3 of the *Criminal Law Act 1997*. As a result, in all matters on which a distinction had previously been made between felony and misdemeanour, the applicable law is the law relating to misdemeanours.

²⁹⁹ The Judiciary Committee *Report of the Judiciary Committee* (Stationery Office 1923) at 15.

the appellant received a certificate from the trial judge that the case was fit for appeal or where the Criminal Appeal Court issued a certificate.³⁰⁰

(iii) *The Courts of Justice Act 1924*

2.248 The predecessor to the current Circuit Court was established by section 37 of the 1924 Act, which provided that a “Circuit Court of Justice shall be constituted under this Act...”. Section 37 provided that the Court “shall discharge within the several groups of counties specified in the Schedule...termed circuits...such duties as are by this Act imposed...”. The geographical area of the circuits established under the 1924 Act was far larger than those of the former County Courts.³⁰¹

2.249 The Circuit Court was vested with the criminal jurisdiction that was recommended by the Judiciary Committee.³⁰² Section 54 of the Act enacted the Committee’s recommendation that either the accused or the Attorney General should be able to apply to have a case transferred to the Central Criminal Court. This section was repealed in 1964.³⁰³

2.250 Section 51 of the 1924 Act recognised the roots of the Circuit Court, by transferring to it the jurisdiction formerly vested in the County Court judges and Chairmen of Quarter Sessions.

(iv) *The Irish Constitution 1937*

2.251 Article 34.3.4 reiterates Article 64 of the 1922 Constitution by allowing for “courts of local and limited jurisdiction as established by law”.

2.252 The local nature of the Circuit Court’s jurisdiction was recognised in *The State (Boyle) v Neylon*³⁰⁴ when Mr Justice Walsh opined that:

“The Circuit Court is a single court for the whole State but its jurisdiction is exercised in accordance with statute on a local basis... it provided local and cheaper venues for litigants than would be the case if they had to go to the High Court. They would also in most cases be more convenient. It was left to the statute to decide how this would be achieved”.

³⁰⁰ The Judiciary Committee *Report of the Judiciary Committee* (Stationery Office 1923) at 17.

³⁰¹ Donaldson “Legal History and Present-Day Legal Systems” in Donaldson (ed) *Some Comparative Aspects of Irish Law* (Duke University Press 1957) at 24.

³⁰² Section 49 of *The Courts of Justice Act 1924*.

³⁰³ Section 6 of the *Courts Act 1964*. See paragraphs 2.237, 2.238, and 2.239 of this Consultation Paper.

³⁰⁴ [1986] IR 551 at 556. This case considered and upheld an earlier version of section 32 of the *Courts and Courts Officers Act 1995* which allows for the Dublin Circuit Court to hear criminal cases from all over the State.

(v) *The Courts (Supplemental Provisions) Act 1961*

2.253 Section 25(3) of the 1961 Act specified the basis of the Circuit Court's territorial jurisdiction in criminal matters, providing that such jurisdiction is "exercisable by the judge of the circuit in which the offence charged has been committed or in which the accused has been arrested or resides". Section 179 of the *Criminal Justice Act 2006* inserts a new section 25A into the 1961 Act. The current basis for the Circuit Court to exercise its jurisdiction in indictable matters can prove to be inadequate in a small number of cases. Section 25A(1) regulates the exceptional circumstance where the accused does not reside in the State, where he or she was not arrested for and charged with an offence in the State, where the offence was committed in more than one place or was known to have been committed in one of not more than three circuits but where the particular circuit is not known. In such circumstances, the offence is deemed to have been committed in each of the circuits concerned and the Circuit Court judge in each of these circuits is vested with jurisdiction to deal with the case. Section 25A(2) provides that if an offence is committed in the State but it is not possible to ascertain in which circuit it was committed, then the offence is deemed to have been committed in the Dublin Circuit.

2.254 Section 25(1) of the 1961 Act, as amended, provides that subject to section 25(2) of that Act the Circuit Court is vested with the same criminal jurisdiction as the Central Criminal Court in relation to indictable offences. However, section 25(2) of the 1961 Act considerably weakens this apparent concurrent jurisdiction by providing a list of offences that fall within the exclusive jurisdiction of the Central Criminal Court. This has the effect of vesting the Circuit Court with jurisdiction in all indictable offences save those within the exclusive jurisdiction of the Central Criminal Court.

2.255 The former Chief Justice, Mr Justice Keane, has put forward the argument that there is no reason why the High Court (Central Criminal Court) could not deal with major crimes such as manslaughter, fraud, robbery, import of drugs, kidnapping, which are currently tried in the Circuit Court. He was also of the view that there is no reason why murder and rape should not be heard before the Circuit Court.³⁰⁵ This view is echoed by the Law Commission of New Zealand. It recommended that the criterion for deciding where a case should be heard should be the significance of the offence, and not the complexity of the offence (not all murder trials are complex).³⁰⁶ Mr Justice Carney noted the apparent lack of logic in the

³⁰⁵ Keane "The Irish Courts System in the 21st Century: Planning for the Future" (2001) 6(6) Bar Review 321 at 326.

³⁰⁶ Law Commission of New Zealand *Seeking Solutions Options for Change to the New Zealand Court System* (Preliminary Paper 52 December 2002) at 165.

current system of allocating cases between the Central Criminal Court and the Circuit Court, when he stated as follows:

“As a matter of practical reality, the Central Criminal Court at the present time is exclusively trying murder and rape. This has the consequence that as a High Court Judge I cannot try a billion euro fraud case, not because it is above my jurisdiction, but because it is beneath it.”³⁰⁷

2.256 The Working Group on the Criminal Jurisdiction of the Courts examined this area in detail. This will be discussed chapter 3 of this Consultation Paper.

(6) The District Court

(a) Pre 1922

(i) Introduction

2.257 As discussed above,³⁰⁸ the District Court is a successor to the Courts of Petty Sessions, the jurisdiction of which was carved out of the Courts of Quarter Sessions. Justices at Petty Sessions had jurisdiction to try summary cases. Summary cases are entirely creatures of statute. The jurisdiction of the courts of petty sessions to hear summary cases was invoked when a particular statute created an offence and expressly made it subject to the summary jurisdiction of the justices.³⁰⁹

2.258 During the 19th century, the summary jurisdiction exercisable by the Courts at Petty Sessions was consolidated by the enactment of the *Summary Jurisdiction (Ireland) Act 1851*³¹⁰ and the *Petty Sessions (Ireland) Act 1851*.³¹¹ The *Petty Sessions Act 1851* consolidated the law in relation to summary offences and proceedings at petty sessions. Both of the Acts still apply to particular aspects of the jurisdiction of the current District Court. Undoubtedly the most important remaining provision is section 10 of the *Petty Sessions Act 1851* which provides the District Court (as successor to the Court of Petty Sessions) with the power to exercise jurisdiction on the basis of information laid before it.

2.259 Subsection (4) of section 10 provides that a complaint alleging a summary offence must be laid before the District Court within six months or otherwise it lapses. As a result of a recent amendment, the six month time

³⁰⁷ Carney “What is coming down the tracks in Ireland” (2004) 8(2) *Bar Review* 76 at 76.

³⁰⁸ See paragraph 2.168 of the Consultation Paper.

³⁰⁹ O’Connor *The Irish Justice of the Peace* (E Ponsonby Limited 1911) at 40.

³¹⁰ 14&15 Vic c 92.

³¹¹ 14&15 Vic c 93.

limit only applies to offences that can be tried summarily as summary offences, and not to indictable offences that can be tried summarily.³¹² This provision can operate to exclude cases from the jurisdiction of the District Court. It is frequently excluded by Acts regulating summary offences. The summons is the legal document which obliges a person to appear before the court; if the document is excluded, there is no other basis on which they can be tried by the District Court. Section 177 of the *Criminal Justice Act 2006* amends section 10(4) of the *Petty Sessions (Ireland) Act 1851* so that the six month time limit will apply only to those offences that can be tried summarily, as summary offences. Section 11 of the 1851 Act gives a District Court judge the power to issue a warrant in lieu of a summons in an indictable case. Further the provisions of the *Towns Improvement (Ireland) Act 1854*³¹³ were applied by Justices of the Peace at Petty Sessions when dealing with matters within the scope of the Act. This Act only applied to towns with a population of 1,500 or more. This Act dealt with the better regulation of towns in Ireland.

2.260 Section 24 of the *Petty Sessions Act 1851* provided that appeals from cases of summary jurisdiction were to be heard by the Court of Quarter Sessions. This section was amended in 1914 so that appeals lay to the Court of Quarter Sessions irrespective of the amount of the fine or the term of imprisonment.³¹⁴ Only the party “against whom the order was made” in criminal cases was permitted to take such appeals. In contrast, either party was entitled to take an appeal from a case of summary jurisdiction in civil cases. The *Petty Sessions Act 1851* did not apply to the Dublin Metropolitan Police District,³¹⁵ so the provisions of the *Dublin Police Act 1842*³¹⁶ continued to apply to the justices sitting at Petty Sessions in that area. Section 21(2) of the *Courts of Justice Act 1928* provides that section 10(4) of the *Petty Sessions Act 1851* applies to cases of summary jurisdiction in the same manner in which it applies to cases of summary jurisdiction outside the

³¹² Section 177 of the *Criminal Justice Act 2006* amends section 7 of the *Criminal Justice Act 1951* by inserting a new paragraph into the section which states that the time limit contained in section 10(4) of the *Petty Sessions (Ireland) Act 1851* does not apply to a complaint in respect of a scheduled offence or indictable cases which are tried summarily.

³¹³ 17&18 Vic c 103.

³¹⁴ Section 43(11) of the *Criminal Justice Administration Act 1924* 4&5 Geo 5 c 58. Prior to this amendment, appeals could only be entertained by the Court of Quarter Sessions where the fine imposed in the case exceeded twenty shillings or the term of imprisonment exceeded one month, or the case involved doing an action which cost in excess of 40 shillings.

³¹⁵ Section 41 of the *Petty Sessions Act 1851*.

³¹⁶ 5&6 Vic c 24.

Dublin Metropolitan Area. The *Dublin Police Act 1842*³¹⁷ provides for wide ranging police power of arrest and search, and for the issue of summonses and the trial of offences by divisional justices. Although the provisions of the 1842 Act are only applicable to summary cases within the Dublin Metropolis, a number of the provisions in the Act still have resonance today. For example, section 70 of the 1842 Act lays out the procedure for bringing a case to the District Court in the Dublin Metropolitan area. Sections 49 and 51 of the Act deal with the issuing of summonses.³¹⁸ Section 77 of *The Courts of Justice Act 1924* transferred to the District Court, among other things, the jurisdiction which at the commencement of the 1924 Act was vested in, or capable of being exercised by the Divisional Justice of the Police District of the Dublin Metropolis.

2.261 The *Summary Jurisdiction Act 1851* was introduced to amend the law relating to the recovery of small debts and the law governing summary jurisdiction. Section 21 of the Act permitted justices of the peace to discharge the sentence of a first offender. The *Summary Jurisdiction Act 1857*³¹⁹ further improved the administration of justice in those courts that exercised summary jurisdiction. Section 2 of the Act, which regulates appeals by way of case stated, is still the main basis for such appeals from the District Court to the High Court in this jurisdiction.

2.262 The jurisdiction of a District Court judge to issue a summons under section 10 of the *Petty Sessions (Ireland) Act 1851* was extended to Peace Commissioners by section 88 of *The Courts of Justice Act 1924*. Summonses in relation to summary offences could also be issued by District Court Clerks in accordance with Rule 30 of the District Court Rules 1948. In the *The State (Clarke) v Roche*,³²⁰ the Supreme Court gave an indication that the issuing of a summons under section 10 of the 1851 Act is a judicial, as opposed to an administrative, act. If this were the case, it would be entirely improper for Peace Commissioners or clerks of the District Court to issue a summons. The Supreme Court also had to consider whether the wording of section 10 of the 1851 Act required that each individual complaint had to be considered before the summons was issued. In practice at the time of the case, the volume of complaints was such that it was not feasible for each to be considered personally by a District Court judge, clerk

³¹⁷ See Law Reform Commission *Report on Offences under the Police Acts and Related Offences* (LRC 14-1985).

³¹⁸ Mr Justice Herbert stated that a District Court judge sitting in the Dublin Metropolis must exercise his or her discretion in relation to the issuing of warrant within the limits on his or her jurisdiction conferred on him or her by sections 49 and 51 of the *Dublin Police Act 1842*. See *Judge v Scally* [2006] 1 IR 491 at 499.

³¹⁹ 20&21 Vic c 43.

³²⁰ [1987] ILRM 309.

or even peace commissioner. Accordingly, a practice emerged particularly in Dublin for the vast bulk of cases to be processed by the staff in the office of the District Court by way of a rubber-stamping exercise. The Supreme Court held that this administrative procedure was contrary to the specific requirements of the 1851 Act which demanded that each complaint should be considered personally by the person authorised to receive it.

2.263 Cognisant of the difficulties that the judgment would cause, Mr Justice Finlay suggested that sections 10 and 11 of the 1851 Act be replaced with statutory provisions more suitable for use in the modern District Court, which could include an administrative procedure for the issuing of a summons. The Oireachtas acted quickly by enacting the *Courts (No. 3) Act 1986* which allows for a summons to be issued as an administrative procedure in the office of the District Court.

(ii) Justices of the Peace and Resident Magistrates

2.264 Justices of the Peace were first appointed to Ireland in 1351, albeit under the title of “guardians of the peace”.³²¹ They were formally named ‘justices of the peace’ under a statute of 1410, and given jurisdiction to hear cases at petty sessions.³²² Prior to this their main duty was to bring offenders before the Courts of Assize and to keep the peace, which allowed them to take such actions as were required to prevent affrays and riots. In addition to their jurisdiction to hear cases in petty sessions, they were given the duty of conducting the preliminary examination of accused persons who were to be tried at Assize to ensure that there was sufficient evidence against the accused to justify a trial. The same duty in respect of indictable offences was later vested in the current District Court but later abolished.³²³ Before an accused could be sent forward for trial on indictment, the District Court Judge was required to conduct a preliminary examination of the case against

³²¹ 25 Edw 3 (Ir) c 1. Newark *Notes on Irish Legal History* (Queen’s University Belfast 1960) at 24.

³²² 11 Hen 4 (Ir).

³²³ The preliminary examination procedure was provided for by section 5 of the Criminal Procedure Act 1967. It was abolished by the *Criminal Justice Act 1999*. The Committee on Court Practice and Procedure twice examined the preliminary investigation of indictable offences and came to the conclusion that the procedure should no longer be compulsory; instead it should be for the accused to elect to have such examination completed by the District Court. See Committee on Court Practice and Procedure *First Interim Report of the Committee on Court Practice and Procedure : The Preliminary Examination of Indictable Offences* (Stationery Office Pn 7164 1963). The Committee came to a similar conclusion in 1997. They concluded that the preliminary examination should not be abolished as they were of the opinion that the procedure still had an important function in the judicial system. Committee on Court Practice and Procedure *Twenty Fourth Interim Report of the Committee on Court Practice and Procedure: Preliminary Examination of Indictable Offences* (Stationery Office 1997)

the accused.³²⁴ The function of the District Judge was to consider the documents and exhibits in the case and to decide if there was a sufficient case against the accused.

2.265 Justices of the peace were also empowered to exercise their criminal jurisdiction in cases on indictment, where they presided over cases decided by a jury.³²⁵

2.266 In 1795, provision was made for magistrates in Dublin to preside over the newly formed constabulary and to exercise the powers of justices of the peace.³²⁶ This was later extended to those parts of the country which the Lord Lieutenant declared to be in a state of disturbance. The *Constabulary (Ireland) Act 1836*³²⁷ provided for the appointment of resident magistrates who like the magistrates appointed for Dublin, were mainly involved with the maintenance of law and order, and worked closely with the constabulary. In 1882 the Lord Lieutenant was vested with the power to appoint salaried magistrates who would reside permanently in their jurisdictions.³²⁸ By the beginning of the twentieth century, there were resident magistrates in each of the counties in Ireland, who were empowered to exercise the same jurisdiction as justices of the peace.³²⁹ The resident magistrates and the justices of the peace often had no legal background and were from the landed classes. This raised the suspicion of those appearing before them who feared that the justices of the peace or the resident magistrates were making their decisions in cases with a political mandate rather than being entirely independent in their decisions. By contrast, the District Court judiciary established by the 1924 Act were composed of full time judges who are required to have 10 years' practice as a solicitor or barrister. The same applies to the District Court established by the *Courts (Establishment and Constitution) Act 1961*. The magistrates' courts in England and Wales have lay representatives who sit on their courts.

(b) Post 1922

(i) The Irish Free State Constitution 1922

2.267 Article 64 of the 1922 Constitution made provision for courts of a "local and limited jurisdiction". One such court was the District Court.³³⁰

³²⁴ Section 5 of the *Criminal Procedure Act 1967*.

³²⁵ Working Group on the Jurisdiction of the Courts *The Criminal Jurisdiction of the Courts* (Stationery Office 2003) at 28.

³²⁶ 35 Geo 3 c 36 (Ir).

³²⁷ 6&7 Will 4 c13.

³²⁸ 3 Geo. 4 c 103.

³²⁹ Newark *Notes on Irish Legal History* (Queen's University Belfast 1960) at 24.

³³⁰ Section 67 of *The Courts of Justice Act 1924*.

The 1922 Constitution also prescribed trial by jury “save in the case of charges in respect of minor offences triable by law before a Court of Summary Jurisdiction.” This allowed for criminal cases in the District Court to be tried without a jury, a fundamental concept which remains today.

2.268 At the time of the establishment of the Irish Free State in 1922, the provisional government was required to deal with the difficulty and lacuna caused by the breakdown of the courts of Petty Sessions.³³¹ It was clear that many of those operating as Resident Magistrates’ would no longer be acceptable in the Irish Free State. As a result, the provisional Government appointed persons called ‘District Justices’ to the magistrates courts in place of the resident magistrates.³³² This was effected by a decree of the Minister of Home Affairs dated 26 November 1922 and was put on a statutory footing by the *Adaptation of Enactments Act 1922*. Section 6 of this Act provided that all powers of the Justices of the Peace or Resident Magistrates conferred by any statute were to be exercised by District Justices. The *District Justices (Temporary Provisions) Act 1923* conferred authority on the Governor General of Ireland to appoint District Justices and also set out the justices’ duties. These justices were professionally qualified lawyers and in that respect differed from the lay magistrates in place before independence.³³³ District Justices continued to function under this Act until the enactment of *The Courts of Justice Act 1924*.

(ii) The Judiciary Committee 1923

2.269 The Committee recommended that the criminal jurisdiction of the District Justices’ Courts be as follows:

- i) Larceny and receiving property up to a value of £10;
- ii) Embezzlement up to value of £10;
- iii) False pretences up a value of £10;
- iv) Assault occasioning actual bodily harm;
- v) Indecent assault to a child or adult subject to the limitation that the sentence shall not exceed six months imprisonment with or without hard labour;

³³¹ Delany *The Administration of Justice in Ireland* (4th ed IPA 1975) at 38.

³³² The provisional Government did so pursuant to section 31 of the *Constabulary (Ireland) Act 1836*, which allowed for the appointment of Resident Magistrates.

³³³ Section 1 of the *District Justices (Temporary Provisions) Act 1923* provided that persons who were barristers of at least 2 years standing or solicitors of the Supreme Court were “fit and proper” person to be appointed as District Justices.

- vi) Malicious damage to property not exceeding £20 in damage to property and unlimited jurisdiction when the accused consents to the case being tried summarily;
- vii) Burglary and housebreaking or attempts of either of these where the District court justice was of the opinion that it would be adequately punished by a sentence not exceeding 6 months with or without hard labour;
- viii) Riot and unlawful assembly, where the justice was of the opinion that the crime was not serious and not in furtherance of an organised conspiracy and the offence would be adequately punished by a term of imprisonment not exceeding 2 months with or without hard labour.

2.270 The Committee was of the view that the District Court should be presided over by a single judge, and retain the jurisdiction formerly exercised by the courts of petty sessions. The Committee recommended that an appeal should lie to the Circuit Court in all cases where a penalty or conviction was imposed, but not where a case was dismissed. The Committee further recommended that all District Court judges be permitted to state case on a point of law to the High Court, and that the decision of the High Court should be final. They also recommended that the criminal jurisdiction of the District Justices' Court under the *District Judges Temporary Provisions Act 1923* should be vested in the District Court. This Act vested the jurisdiction formerly exercised by justices of the peace at the Courts of Petty Sessions but not at Quarter in the newly established District Courts.

(iii) *The Courts of Justice Act 1924*

2.271 The new District Court established by the 1924 Act³³⁴ inherited the jurisdiction of its predecessor, the Court of Petty Sessions, and the jurisdiction of the justices of the peace and resident magistrates at petty sessions.³³⁵ Section 77 of the 1924 Act vested in the District Court the criminal jurisdiction that had been recommended by the Judiciary Committee. In so doing, the District Court continued the tradition of the courts of petty sessions. The District Court established under the 1924 Act became the court of summary jurisdiction in relation to criminal matters in this jurisdiction. In particular, the District Court expressly received the jurisdiction vested in District Justices under the provisions of the *District Court (Temporary Provisions) Act 1923* and all jurisdiction of the Divisional

³³⁴ Section 67 of *The Courts of Justice Act 1924*.

³³⁵ Section 78 of the *Courts of Justice Act 1924*

Justices of the Police District of the Dublin Metropolis and persons acting as justices of the peace under the *Town Improvement (Ireland) Act 1854*.³³⁶

2.272 Section 6 of the *Adaptation of Enactments Act 1922* gave each District Court judge all authority, duties and power conferred by any British Statute either on a Justice or on two or more Justices acting together or on a Resident Magistrate.³³⁷ Section 79 of the 1924 Act provides three bases for the allocation of criminal cases to a District Court: where the crime was committed, where the accused was arrested or where the accused resides. Occasionally, in extraordinary circumstances, these three bases will not apply to an offence. Section 178 of the *Criminal Justice Act 2006* amends section 79 of the 1924 Act in the same manner as section 179 of the 2006 Act amends section 25(3) of the 1961 Act with respect to the jurisdiction of the Circuit Court in indictable cases.³³⁸

2.273 Appeals from criminal cases decided upon by the District Court can be taken by the defendant (“the person against whom the order shall have been made”) to the Circuit Court.³³⁹ This is an automatic right of appeal to the Circuit Court against conviction and/or sentence and unless it is an appeal only against sentence,³⁴⁰ it takes the form a complete rehearing. Section 33 of the *Courts of Justice Act 1953* provides for a right of appeal against an order of the District Court dismissing the case under the *Probation of Offenders Act 1907*.³⁴¹ This differs from the recommendation of the Judiciary Committee. The decision of the Circuit Court on appeal is “final and conclusive and not appealable.”³⁴² The Working Group on the Jurisdiction of the Courts (the Fennelly Group) examined criminal appeals from the District Court in great detail. They concluded that the process is running satisfactorily and on that basis did not recommend any change to the current appeals system.³⁴³

³³⁶ Section 78 of the *Courts of Justice Act 1924*.

³³⁷ The *Adaptation of Enactments Act 1922* provides that the District Court shall be presided over by one Judge.

³³⁸ See paragraph 2.253 of this Consultation Paper.

³³⁹ Section 18 of the *Courts of Justice Act 1928*.

³⁴⁰ Section 50 of the *Courts (Supplemental Provisions) Act 1961*.

³⁴¹ 7 Edw 7 c 17.

³⁴² Section 18 of the *Courts of Justice Act 1928*.

³⁴³ Working Group on the Jurisdiction of the Courts *The Criminal Jurisdiction of the Courts* (Stationery Office 2003) at 84.

(iv) The Constitution of 1937

2.274 The 1937 Constitution allows for the establishment of “courts of local and limited jurisdiction”. Article 38 provides the fundamental right of accused to have their criminal case tried by a jury. However, this principle does not apply to cases heard in the District Court. Article 38.2 of the Constitution allows for minor cases to be tried in courts of summary jurisdiction. Article 38.4.5^o provides that cases tried under Article 38.2 are an exception to general right of trial by jury in criminal cases, with the practical effect that minor offences triable in the District Court are heard by judge alone.³⁴⁴

2.275 These provisions of the Constitution were examined by Mr Justice Walsh in *Conroy v Attorney General*³⁴⁵ when he remarked:

“The Constitution does not give an accused person a right to trial by jury for a minor offence or a right to trial in a court of summary jurisdiction for a minor offence. The provisions of section 2 in relation to minor offences are permissive. The Oireachtas may determine that minor offences may be tried with a jury or without a jury.”³⁴⁶

(v) Courts (Establishment and Constitution) Act 1961

2.276 The present District Court was brought into existence by virtue of section 5 of the *Courts (Establishment and Constitution) Act 1961*.

(vi) Courts (Supplemental Provisions) Act 1961

2.277 The *Courts (Supplemental Provisions) Act 1961* provides that all jurisdiction previously vested in the former District Court became vested in and was transferred to the new District Court on its establishment.³⁴⁷ The Act also provides that the District Court is a court of summary jurisdiction.³⁴⁸

2.278 Section 32 of the 1961 Act provides that the pre-existing district court areas and districts should continue as the basis on which the new District Court are organised and the basis for the assignment of District Court Judges to districts. Section 180 of the *Criminal Justice Act 2006*

³⁴⁴ On minor offences generally, see Law Reform Commission *Consultation Paper on Penalties for Minor Offences* (LRC CP 18 2002) and *Report on Penalties for Minor Offences* (LRC 69 2003).

³⁴⁵ [1965] IR 411.

³⁴⁶ *Ibid* at 434-5.

³⁴⁷ Sections 33 and 48 of the *Courts (Supplemental Provisions) Act 1961*.

³⁴⁸ Section 33 of the *Courts (Supplemental Provisions) Act 1961*.

inserts a new section 32A into the 1961 Act. This provision was enacted as a consequence of the Supreme Court decision in *Creavan v CAB and anor*³⁴⁹ which held that it was not permissible for a District Court Judge to issue search warrants in respect of districts in which he or she was not physically present. The Judge in this case had been temporarily appointed by the President of the District Court as a Judge of two districts. The Judge in question issued search warrants in respect of properties situated in three districts. The search warrant issued in respect of premises situated in Dublin Metropolitan District was held to be legal as the District Court Judge was physically present there and appointed correctly to that District. The other two search warrants, which had been issued for premises in a district in which the Judge was not physically present, although to which he had been temporarily assigned, were declared to be null and void. Mr Justice Fennelly stated that the actions taken in this case offended:

“against the basic principle that the District Court exercises jurisdiction by reference to districts”.

He noted that the “extreme result of combining the power of the President of the Court to assign a District Judge to several circuits at the same time is that entire jurisdiction of District Court might be exercised from Dublin.” Fennelly J believed that “Judge Anderson would have had to sit in each of the respective districts and the fact that he did not do so rendered the warrants (except for one relating to Dublin Metropolitan District) invalid.”

2.279 The new section 32A of the 1961 Act makes provision for a judge of the District Court to exercise certain powers with respect of a district court district when he is not assigned. District Court Judges may exercise their powers outside their districts so long as they have jurisdiction to exercise such powers in the district to which they are assigned.

(vii) Jurisdiction of the District Court

2.280 The current criminal jurisdiction of the District Court is to dispose of all summary criminal offences. The District Court also has jurisdiction in respect of certain indictable offences that are minor in nature. Section 2(2) of the *Criminal Justice Act 1951* confers on the District Court jurisdiction in relation to specified offences that are triable on indictment, where the District Court Judge is of the opinion that the offence is minor and where the accused does not object to it being so tried in the District Court. Further, ‘hybrid offences’ which can be tried either summarily or on indictment can be heard in the District Court if the Director of Public Prosecution so decides. Finally, the District Court is given jurisdiction to send an accused

³⁴⁹ [2004] IESC 92 Supreme Court 29 October 2004.

forward for trial on indictment to the Circuit Court or the Central Criminal Court.³⁵⁰

D The Courts Service

(i) Background to the establishment of the Courts Service

2.281 When the courts in this jurisdiction were established after 1922, their management and administration came within the responsibility of the Department of Home Affairs, which was the predecessor of the present Department of Justice, Equality and Law Reform. The role of management of the courts later passed on to the Department of Justice, Equality and Law Reform. This remained the case until 1999 when the Courts Service was established. In the intervening years the number civil and criminal cases that were heard by the courts expanded hugely. The Working Group on a Courts Commission in its first Report found that the administrative infrastructure of the courts had not developed sufficiently to meet the demands placed on the modern Courts. They found that this resulted in:

- i) Unacceptable delays in the determination of cases
- ii) Unnecessary stress and anxiety to litigants and, at worst, grave injustice;
- iii) Overworked and poorly organised Court staff
- iv) Overburdened judges who are routinely required to work long hours outside of Court sitting times
- v) A lack of adequate back-up and support services to judge
- vi) Inadequate court buildings.

The Working Group was of the view that the situation was such that a re-appraisal of the administrative structures of the Courts system was required. They recommended that a State agency known as the Courts Service be established as an independent and permanent body to manage the unified courts system.

(ii) Establishment and role of Courts Service

2.282 The Courts Service was established by the *Courts Service Act 1998* which came into force in 1999.³⁵¹ The Courts Service was entrusted with the following functions:

- management of the courts;

³⁵⁰ Section 26 of the *Courts of Justice Act 1926*.

³⁵¹ Courts Service Act 1998 (Establishment Order) 1999 SI 349 of 1999.

- provision of support for the judiciary;
- provision of information on the courts service to the public;
- management and maintenance of court building, and
- provision of facilities for users of the courts.³⁵²

2.283 Section 6 of the 1998 Act also vested the Courts Service with significant powers such as:

- the establishment of arrangements for consultation with users of the courts;³⁵³
- at the request of the Minister for Justice, Equality and Law Reform or on its own initiative, the Courts Service is permitted to recommend to the Minister appropriate scales of court fees and charges;³⁵⁴
- the designation of court venues.³⁵⁵

2.284 The establishment of a courts service for the Irish courts heralded a new era in the Irish courts system. The new agency introduced a unified staffing structure across jurisdictions, specialised support directorates and a formal planning process. It suggested a move to a more customer oriented approach to the Irish courts system.

E Conclusion

2.285 It is clear that the current courts in this jurisdiction have historical roots in pre-1922 courts and have carried over many of the functions of these courts under pre-1922 legislation. Accordingly, there are a number of provisions contained in pre-1922 legislation that still apply to these courts. In summary the main courts in this jurisdiction and their historical roots are as follows:

- The Supreme Court. Although the jurisdiction of this court has developed and been expanded considerably by the Constitution, this Court can trace the origins of its appellate jurisdiction to the Court of Appeal in Chancery and its successor, the Court of Appeal of the Supreme Court of Judicature.³⁵⁶ The pre-1961 Supreme Court

³⁵² Section 5 of the *Courts Service Act 1998*.

³⁵³ Section 6(e) of the *Courts Service Act 1998*.

³⁵⁴ Section 6(f) of the *Courts Service Act 1998*

³⁵⁵ Section 6(j) of the *Courts Service Act 1998*.

³⁵⁶ Section 23 of the *Supreme Court of Judicature (Ireland) Act 1877*.

inherited the jurisdiction vested in or capable of being exercised by the Court of Appeal of the Supreme Court of Judicature³⁵⁷ and the current (post-1961) Supreme Court is vested with the jurisdiction of the Court of Appeal in Southern Ireland.³⁵⁸

- The High Court: On the criminal side, the jurisdiction of the High Court (the Central Criminal Court) was vested with original jurisdiction by *The Courts of Justice Act 1924*. In that regard it did not inherit any jurisdiction from its predecessor courts. The High Court (Central Criminal Court) can trace its roots to the Court of Assize, the Commission of Oyer and Terminer, the Commission of Gaol Delivery, the High Court of the Supreme Court of Judicature³⁵⁹ and the High Court of Justice for Southern Ireland.³⁶⁰

On the civil side, the jurisdiction of the current High Court has been devised and developed from a number of pre-1922 courts. These include the following common law courts: the Incumbered Estates Court, Court of Bankruptcy, Court of Probate, the Court of Matrimonial Matters and the Court of Admiralty and the King's Bench Court and the following chancery courts: the Court of Common Pleas, the Court of Exchequer and the Court of Chancery. These were later amalgamated into the High Court of Justice of the Supreme Court of Judicature and the jurisdiction of this court was transferred to the High Court of Justice for Southern Ireland.

- The Circuit Court. In the criminal sphere the Circuit Court can clearly trace its origin from the Court of Quarter Sessions. However, this is not to say that the jurisdiction of this court is identical to that of the Court of Quarter Sessions given the vesting of original jurisdiction in the Circuit Court by *The Courts of Justice Act 1924*. It is noteworthy that a number of the features of the Court of Quarter Sessions are carried on by the Circuit Court, for example, the Circuit Court is vested with jurisdiction to deal with less serious matters than the High Court, much like the jurisdiction Court of Quarter Session as compared with that of the Court of Assize. Despite original and specific criminal jurisdiction being

³⁵⁷ Section 18 of *The Courts of Justice Act 1924*.

³⁵⁸ Section 7 of the *Courts (Supplemental Provisions) Act 1961*.

³⁵⁹ As section 21 of the *Supreme Court of Judicature (Ireland) Act 1877* provides that the High Court of Justice established by that Act was vested with the criminal jurisdiction of Courts created by the Commissions of Assize, of Oyer and Terminer and of Gaol Delivery. Section 17 of *The Courts of Justice Act 1924* provided that the 'former' High Court was vested with the jurisdiction of the High Court of the Supreme Court of Judicature in Ireland.

³⁶⁰ Section 8 of the *Courts (Supplemental Provisions) Act 1961*.

vested in the Circuit Court by *The Courts of Justice Act 1924*, the Act did acknowledge the predecessor of the Circuit Court, by transferring the jurisdiction of the Court of Quarter Sessions to the Circuit Court.³⁶¹

In its civil guise, and in particular because of its reliance on the civil bill as an initiating document, the Circuit Court has more dependence on its pre-1922 predecessors for its civil jurisdiction than it does in respect of criminal matters. The two main pre-1922 Acts from which the Circuit Court gains jurisdiction are the *Civil Bill Courts (Ireland) Act 1851* and the *County Officers and Court (Ireland) Act 1877*.³⁶²

- The District Court. In both civil and criminal matters the jurisdictional antecedent to the District Court was the Court of Petty Sessions.³⁶³ The criminal jurisdiction of the District Court is still regulated in certain respects by the *Petty Sessions (Ireland) Act 1851* and the *Summary Jurisdiction Act 1851* as it is the successor to the Court of Petty Sessions. Certain provisions of the *Dublin Police Act 1842* are still applicable to the District Court in the Dublin Metropolis as are provisions of the *Town Improvement (Ireland) Act 1854*.

2.286 From the discussion above, it is clear that the current courts have demonstrable roots in a number of pre-1922 courts. For this reason, it is necessary to set out provisions in pre-1922 legislation that are still of relevance to the current courts. A number of pre-1922 provisions have been incorporated into the draft Courts Bill appended to this Consultation Paper. These are as follows:

- Section 26 of the *Debtors (Ireland) Act 1840*, as amended by section 19 of the *Courts Act 1981*. This section is included because section 47(1) of the *Courts (Supplemental Provisions) Act 1961* provides that every judgment debt due upon a judgment of the Circuit Court or District Court is deemed a judgment debt for the purposes of section 26 of the 1840 Act. This allows an interest rate of 8% per year to be carried by judgment debts between the time of

³⁶¹ Section 51 of the *Courts of Justice Act 1924*.

³⁶² See *Sligo Corporation v Gilbride* [1929] IR 351 at 368 wherein it was acknowledged by Mr Justice Fitzgibbon that the jurisdiction of the Civil Bill Courts and County Courts were transferred to the Circuit Court. This is discussed in more detail at paragraph 2.157.

³⁶³ See section 1(1) of the *District Court (Temporary Provisions) Act 1923*.

entering the judgment until such time as the judgment is satisfied.³⁶⁴ In addition section 26 of the 1840 Act (as amended by section 19 of the 1981 Act) applies to orders for costs, to which the interest rate of 8% applies from the date of the order to its satisfaction.

- Section 27 of the *Debtors (Ireland) Act 1840*. This provides that decrees and orders of the Court of Equity (now the High Court as the section refers to the Court of Chancery) have effect as judgments. Section 27 was extended by section 21 of the *Courts Act 1981* to decrees of the Circuit Court which provide for payment of costs, charges and expenses
- Section 70 of the *Dublin Police Act 1840*³⁶⁵ which provides for the procedure in bringing a case to the Dublin District Court in Dublin Metropolis.
- Section 31 of the *Civil Bills Courts (Ireland) Act 1851* which permits the Government (as a result of the *Civil Bill Courts (Ireland) Act 1851 Adaptation (No.1) and (No. 2) Orders 1992*) to alter existing divisions and districts in any county, and to divide counties into divisions and districts for the purposes of hearing and determining causes by civil bill and such criminal and other business as may be determined at Circuit Court.
- Section 35 of the *Civil Bill Courts (Ireland) Act 1851*, which sets out the matters which can be determined by civil bill.
- Section 10(4) of the *Petty Sessions (Ireland) Act 1851*, which sets out the procedure and principle for laying of information and complaints before a District judge about a summary or indictable case within their jurisdiction in order for them to grant a summons or warrant.
- Section 2 of the *Summary Jurisdiction Act 1857*, which establishes that a case may be stated by a District Court judge to the High Court. This section was extended to the District Court by section 2 of the *Courts (Supplemental Provisions) Act 1961*.
- Section 3 of the *Summary Jurisdiction Act 1857* which deals with the security to be given and notice to be provided by the appellant to a case stated.

³⁶⁴ Section 26 of the *Debtors (Ireland) Act 1840* was amended by section 19 of the *Courts Act 1981* so that “11” was substituted for “four pounds”. This was further amended by SI No 12 of 1989, article 3 which substituted “8” for the “11” inserted by the 1981 Act. As a result an interest rate of 8% applies to orders to which section 26 applies.

³⁶⁵ 5&6 Vic c 24.

- Section 4 of the *Summary Jurisdiction Act 1857* which sets out that a District Court Judge must state a case to the High Court unless he or she is of the opinion that the request is frivolous.
- Section 6 of the *Summary Jurisdiction Act 1857* which provides how the Superior Court may determine the question of law stated to it from the District Court;
- Section 7 of the *Summary Jurisdiction Act 1857* which allows the case to be transmitted back to the District Court for amendment;
- Section 8 of the *Summary Jurisdiction Act 1857* which provides that the powers of a judge of the Superior Courts under the Act may be exercised in Chambers;
- Section 9 of the *Summary Jurisdiction Act 1857* which provides that after a decision on a question of law has been made, a District Judge can issue warrants;
- Section 10 of the *Summary Jurisdiction Act 1857* which provides that no Writ of *Certiorari* is required for a case stated under the 1857 Act;
- Section 14 of the *Summary Jurisdiction Act 1857*, as amended, which provides that the ordinary right of appeal from the District Court to the Circuit Court is not available once an appeal by way of case stated is taken;
- Section 27 of the *Supreme Court of Judicature Act (Ireland) 1877*. which provides that law and equity be concurrently administered in every civil matter or cause in the High Court of Justice and Court of Appeal established by this Act. The section also allows for equitable relief to be available in the High Court of Justice.
- Section 28 (8) and (11) of the *Supreme Court of Judicature Act (Ireland) 1877*. Section 28(8) provides for the High Court of Justice to have power to grant injunctions in relation to apprehended or threatened waste or trespass. Section 28(11) provides that in matters not provided for in section 28 of the Act, the rules of equity prevail.
- Section 79 of the *Supreme Court of Judicature Act (Ireland) 1877* which provides that rules of equity apply to inferior courts.
- Section 39 of the *County Officers and Courts (Ireland) Act 1877* which provides for the deposit of money in court in equitable proceedings. As the Circuit Court is a successor to the County Courts this section applies to the Circuit Court and the function

exercised under this section by the Lord Chancellor would now be within the remit of the Government or Minister for Justice.

- Section 40 of the *County Officers and Courts (Ireland) Act 1877* which sets out the matters that can be dealt with in the civil bill courts.

2.287 The Commission is conscious that these provisions do not represent a comprehensive treatment of pre-1922 legislation of relevance to the courts. For example, three sections of the *Supreme Court of Judicature (Ireland) Act 1877* are included in the Working Draft of the Bill, but 68 sections of that Act remain unrepealed. During its examination of pre-1922 enactments relating to the jurisdiction of the Courts, the Commission identified a number of Acts, including those already referred to, relating to the jurisdiction of the Courts that still contain unrepealed sections.³⁶⁶ This exercise was completed using the Chronological Table and Index of the Statutes pre-1922³⁶⁷ and the Chronological Tables of Statutes available on the Irish Statute Book website.³⁶⁸ These Acts are as follows:

- *Constabulary Act 1836* 6&7 Will 4 c 13 as enacted contained 58 sections of which 3 sections remain unrepealed.
- *Dublin Police Act 1842* 5&6 Vic c 24 as enacted contained 79 sections of which 4 sections remain unrepealed;
- *Civil Bill Courts (Ireland) Act 1851* 14&15 Vic c 57 as enacted contained 165 sections of which 97 sections remain unrepealed;
- *Summary Jurisdiction (Ireland) Act 1851* 14&15 Vic c 92 as enacted contained 29 sections of which 20 sections remain unrepealed;
- *Petty Sessions (Ireland) Act 1851* 14&15 Vic c 93 as enacted contained 48 sections, of which 37 sections remain unrepealed;
- *Common Law Procedure Amendment Ireland Act 1856* 19&20 Vic c 102 as enacted contained 103 sections. Seven sections remain unrepealed.
- *Common Law Procedure Amendment Ireland Act 1853* 15&16 Vic c 113 as enacted contained 243 sections, of which 21 remain unrepealed;

³⁶⁶ The Commission has developed a working document based on this analysis. This document will be available for the next phase of this project.

³⁶⁷ Chronological Table and Index of the Statutes (37th ed Stationery Office 1921).

³⁶⁸ www.irishstatutebook.ie

- *Summary Jurisdiction 1857 20&21 Vic c 43* as enacted contained 15 sections, all of which remain unrepealed;
- *Civil Bill Court Procedure Amendment (Ireland) Act 1864 27&28 Vic c 99* as enacted contained 67 sections, of which 58 remain unrepealed;
- *Common Law Procedure Amendment Ireland Act 1870 33&34 Vic c. 109* as enacted contained 7 sections. Five of these sections remain unrepealed;
- *Supreme Court of Judicature (Ireland) Act 1877 40&41 Vic c 57* as enacted contained 86 sections, of which 68 remain unrepealed;
- *The County Officers and Courts (Ireland) Act 1877 40&41 Vic c 56* as enacted contained 92 sections. 84 sections remain unrepealed;
- *Supreme Court of Judicature (Amendment) Act 1882 45&46 Vic c 70* as enacted contained three sections, all of which remain unrepealed;
- *Supreme Court of Judicature (Amendment) Act 1887 50&51 Vic c 6* as enacted contained 6 sections. Five sections remain unrepealed;
- *Supreme Court of Judicature (Ireland) (No. 2) Act 1897 60&61 Vic c 66* as enacted contained 16 sections. 13 sections remain unrepealed;
- *Criminal Justice Administration Act 1914 4&5 Geo 5 c 58* as enacted contained 44 sections, of which 13 remain unrepealed.

2.288 The Commission is conscious that these Acts will require further examination in terms of assessing whether their remaining provisions should be incorporated into the final consolidated and reformed Courts Bill which will emerge from the later phases of this project. These later phases will also determine whether some of these provisions are obsolete and are therefore suitable for repeal without replacement.

CHAPTER 3 SUBSTANTIVE AREAS OF REFORM

A Introduction

3.01 This Chapter focuses on eight issues that are relevant to the jurisdiction of the courts and the Courts Acts in general. The eight areas selected are those which, in the view of the Commission, are worthy of further analysis and consideration. The Commission acknowledges that these areas are clearly selective and limited but the Commission has concluded that a complete consideration of all areas connected with the Courts Acts would postpone indefinitely the completion of this phase of the project. It is for this reason that a selection of issues are discussed in this Chapter. The Commission welcomes views on any further areas in need of consideration within the parameters of this project.

3.02 The eight areas discussed in Part B of the Chapter are: the case stated procedure; the circumstances in which certain cases are not heard in public (the *in camera* rule); fixed charge penalties and the removal of court jurisdiction in some areas; appeals in civil and criminal matters; increase in general monetary limits in the civil jurisdiction of the District Court and Circuit Court; the rules of courts committees; the right to choose a specific court of trial in a trial on indictment (the “right of election”); and the allocation of cases between the Circuit Criminal Court and the Central Criminal Court in criminal matters.

3.03 Each of these eight areas is examined separately and the Commission has made provisional recommendations where appropriate. For the reasons given in the detailed discussion of some of these areas, the Commission has refrained from making recommendations in all instances.

B Specific Issues

(1) *Case Stated Procedure*

(a) *Introduction*

3.04 This section considers the case stated procedure, analyses the two forms of such procedure, highlights a number of inherent differences in the two procedures and indeed within the consultative case stated procedure in the three levels of courts in which it is available. After a comparative

discussion of the procedure in England and Wales, the Commission considers whether two forms of case stated are required in this jurisdiction.

3.05 The case stated procedure is considered by the Commission for two primary reasons. First, a particular aspect of the appeal by case stated was considered by the Committee on Court Practice and Procedure. Secondly, it became apparent upon an examination of the type of case stated available in England and Wales, that the provision of two forms of case stated in this jurisdiction requires detailed examination.

3.06 In general terms, the case stated procedure allows for a judge of a lower court to acquire an opinion from a higher court on a question of law arising in a case before the judge. The main advantage offered by the case stated procedure is that clarification on a point of law may be obtained from a higher court which has specific expertise. The clarified law is then applied by the lower court which has heard evidence and made the findings of fact.¹

3.07 There are two forms of case stated in this jurisdiction: an appeal by way of case stated and a consultative case stated. An appeal by way of case can only be invoked after a decision has been given in the matter by the lower court. Such appeals can only be taken after the District Court has “heard and determined” the case. The appeals are determined by the High Court.² By contrast, a consultative case stated can be made at any time during proceedings before a final determination has been made. In addition, it is available in the District Court, the Circuit Court and, in limited circumstances, the High Court.³ However, a caveat must be noted in the procedure. It is essential that the District judge has made the necessary

¹ Delany and McGrath *Civil Proceedings in the Superior Courts* (2nd ed Thomson Round Hall 2005) at 753. The benefit of the mechanism of consultative case stated was stated by the former Chief Justice Finlay as follows: "the purpose and effect of a consultative case stated by a Circuit Court judge to the Supreme Court is to enable him to obtain the advice and opinion of the Supreme Court so as to assist him in reaching a correct legal decision." *Dublin Corporation v Ashley* [1986] IR 781 at 785.

² Section 2 of the *Summary Jurisdiction Act 1857* as extended by section 51 of the *Courts (Supplemental Provisions) Act 1961*. An appeal by way of case stated is not available in proceedings relating to an indictable offence not dealt with summarily by the District Court. It was held in *DPP v Delaney* [1995] 2 IR 511, that this exception also extends to a question of law arising from an offence which the District Judge has decided to send forward for trial.

³ Section 52 of the *Courts (Supplemental Provisions) Act 1961* provides for a consultative case stated from the District Court to the High Court. Section 16 of the *Courts of Justice Act 1947* provides for a consultative case stated from the Circuit Court to the Supreme Court. Section 38(3) of the *Courts of Justice Act 1936* provides for a consultative case stated from the High Court arising in an appeal it is hearing, to the Supreme Court.

findings of fact on which the question of law to be stated will be based.⁴ There has been divergent case law on the issue of the stage at which a consultative case may be stated from the Circuit and High Courts, this will be discussed below. A number of inherent procedural inconsistencies arise between the three courts in which consultative case stated is available. These are discussed in more detail in the body of this section.

3.08 Briefly the legislative provisions which allow for consultative cases stated from the District Court, Circuit Court and High Court are as follows. Section 52 of the *Courts (Supplemental Provisions) Act 1961* allows for a case to be stated during the course of District Court proceedings by a District judge to the High Court when he or she is requested to do so by any person who has been heard in the proceedings or of his or her own will, unless he or she considers the request to be frivolous. Section 16 of the *Courts of Justice Act 1947* provides that a Circuit Court judge may, if an application is made to him in any party to a matter pending before him refer any question of law arising in such a matter by way of case stated to the Supreme Court and may adjourn the pronouncement of his judgment or order in the matter pending the determination of the case stated. Section 38(3) of the *Courts of Justice Act 1936* provides that a High Court judge hearing an appeal pursuant to section 38 (which provides for a automatic, *de novo* appeal from the Circuit Court to the High Court in civil matters) may refer any question of law arising in such appeal to the Supreme Court and may adjourn the pronouncement of his judgment or order in the matter pending the determination of the case stated.

3.09 If a question of law is referred from the District, Circuit or High Court by way of a consultative case stated the final decision in the case is suspended until the case stated has been determined. At this stage, the decision of the higher court is transmitted to the lower court which can then resume its hearing of the case, with the benefit of the legal advice of the higher court.

3.10 Section 2 of the *Summary Jurisdiction 1857 Act* refers to a question on a “point of law” being referred to the High Court. Finlay P in *DPP v Nangle*⁵ noted that the case stated procedure is “exclusively confined to correcting errors of law by an inferior court in the determination of proceedings before it”.⁶ Accordingly, the High Court held that a Superior Court cannot be asked, by an appeal in an appeal by way of case stated to examine the veracity of evidence given in an inferior court.

⁴ This is clear from the dictum of Mr Justice Lynch in *DPP (Travers) v Brennan* [1998] 4 IR 67 at 70.

⁵ [1984] ILRM 171.

⁶ *Ibid* at 173.

(b) History of the case stated procedure

3.11 During the period from the early 17th Century to the early 19th Century judges of the High Court of Chancery often referred difficult questions of law and fact to the common law courts of King's Bench or Common Pleas for their determination.⁷ During this period, those judges began to rely, on the procedure and its obvious benefit in obtaining determinations from the Court with the appropriate level of expertise became apparent during this period. The judges of the High Court of Chancery utilised the case stated procedure to obtain legal opinion from justices of the Courts of Common Law.

3.12 Once the common law courts had reached a determination on the question conveyed by the High Court of Chancery, the decision was returned to that court in the form of a certificate. When the certificate was received, the High Court of Chancery "either ordered the case to final disposition, or if dissatisfied ordered the case sent back to the same or another common law court for a *de novo* determination of the question of law."⁸ It can be seen that the current appeal by way of case stated or consultative case stated has deep roots in this historical mechanism.

3.13 The Common Law courts were empowered to deal with a question of law stated to them by one of the parties to a case, during proceedings at any stage before judgment was handed down.⁹ The parties were not required to issue or give the court any further pleadings to trigger the procedure. A similar power was vested in the Court of Equity.¹⁰

3.14 A further precursor to the modern form of appeal by way of case stated was available from justices (equivalent to District Court Judges) to the Court of King's Bench. This procedure allowed for a speaking record of the reasons for the lower court's decision to be sent to the higher court. The Court of King's Bench was permitted to rule on whether the justices' judgment on the fact was correct. However, unlike the modern form of appeal by way of case stated from the District Court, this mechanism allowed the decision of the lower court to be quashed by *certiorari*. This procedure in Courts of King's Bench, now the High Court, was simplified by the *Summary Jurisdiction Act 1857*.¹¹

⁷ Chesnin and Hazard "Chancery Procedure and the Seventh Amendment: Jury Trials of Issues in Equity Cases before 1791" (1974) 83 Yale Law Journal 999 at 1001-2.

⁸ *Ibid* at 1002.

⁹ Section 92 of the *Common Law Procedure (Amendment) Act 1853*.

¹⁰ Section 111 of the *Chancery (Ireland) Act 1856* 30&31Vic c 44.

¹¹ Collins and O'Reilly *Civil Proceedings and the State* (2nd ed Thomson Roundhall 2004) at 1 and *R v Northumberland Compensation Appeal Tribunal ex p Shaw* [1952] 1 KB 338 at 349-350.

3.15 The mechanism of appeal by way of case stated was readily available and utilised in many of the predecessors of the present day courts in this jurisdiction. Section 138 of the *Civil Bill Court (Ireland) Act 1851* provided for a form of appeal by way of case stated from any Civil Bill Decree or Dismiss in the Civil Bill Court to the Court of Appeal. This differs from cases stated in that the parties were required to lodge an appeal first, and then if the Chairman, Recorder or Assistant Barrister was of the opinion that the appeal involved solely a question of law, he could state a case to the Court of Appeal. The consent of the parties was required before the Chairman, Recorder or Assistant Barrister could state the case. Section 80 of the *Courts and Courts Officers Act 1877* provided that the jurisdiction of the Civil Bill Courts was extended to the Court of Appeal when it was hearing a special case stated from the Civil Bill Court, pursuant to section 138 of the 1851 Act.

3.16 Section 35 of the *Civil Bill Court (Ireland) (Amendment) Act 1864* provided that a Judge at Assize hearing the trial of an appeal could direct for a case to be stated for the opinion of a Superior Court of Common Law in Ireland.

3.17 The *Summary Jurisdiction Act 1857* established an appeal by way of case stated from the hearing and determination of a case by a justice of the peace that was dealt with in a summary way.¹² This Act enabled either party to the proceedings before justices of the peace, if dissatisfied with the determination of the Justices, to require a case to be stated setting out the facts and grounds of the determination.¹³ Under section 4 of the Act, the justices could refuse to state a case if they were of the opinion that the application was frivolous. A number of provisions of the *Summary Jurisdiction Act 1857* are still relevant to the procedural aspects of an appeal by way of case stated available to a District Judge.

3.18 The 1877 Judicature Act provided for a case stated of sorts. Section 48 of the 1877 Act provided that any Judge of the High Court was entitled to reserve a case or any question arising from the case for consideration by a further Divisional Court of the High Court. A further method of case stated was provided for criminal cases, in the form of cases reserved from the Crown Court to the High Court. Such crown cases reserved permitted questions of law arising in criminal cases to be transmitted to the High Court of Justice, and at least five justices sitting together would decide the relevant question.¹⁴

¹² Section 2 of the *Summary Jurisdiction Act 1857*.

¹³ See *Attorney General (Fahy) v Bruen* [1936] IR 750 at 760-761.

¹⁴ Section 50 of the *Supreme Court of Judicature (Ireland) Act 1877*.

3.19 In the United Kingdom, the procedure governing an appeal from a Court of Quarter Sessions to the High Court by way of case stated was put on a statutory basis by section 2 of the *Supreme Court of Judicature (Procedure) Act 1894*.¹⁵

(c) ***Main differences between appeal by way of case stated and consultative case stated***

3.20 There are a number of practical differences between the two forms of case stated. For obvious reasons, they become apparent when an examination is completed of the two forms in the District Court. The primary difference between the two procedures is the time at which a judge may state a case to the higher court. A consultative case stated permits a case to be stated during the proceedings, while an appeal by way of a case stated may only be initiated when the case has been heard and determined by the District Judge.

3.21 One of the most important of these differences arises in relation to a consultative case stated from the District Court to the High Court. The decision of the High Court can only be appealed to the Supreme Court where leave of the High Court has been obtained.¹⁶ No such requirement exists in the case of an appeal by way of case stated; in this case there is an automatic right of appeal to the Supreme Court. The necessity to obtain leave to appeal the decision of the High Court, coupled with the interlocutory nature of the consultative case stated have been advocated as the main reason for the more common use of the appeal by way of case stated.¹⁷ The rationale for the leave requirement in consultative cases stated is two fold: first, as there has been no final determination of the issues between the parties, a further unmeritorious appeal would add to delay in the case, and secondly, a consultative case stated in no way affects the normal avenue of appeal from the District Court to the Circuit Court.¹⁸ On the other hand, if an appeal by way of case stated is taken from the District Court to the High Court, then a

¹⁵ 57&58 Vic c 16.

¹⁶ Section 52(2) of the *Courts (Supplemental Provisions) Act 1961*.

¹⁷ Ryan and Magee *The Irish Criminal Process* (Mercier Press 1983) at 417. The authors make the following comment:

“The great majority of the reported decisions relate to cases stated under the Act of 1857 - probably because neither party is anxious to incur the expense of further proceedings before there is a decision against him, and also because the right of appeal to the Supreme Court under section 52 of the Act of 1961 is restricted.”

¹⁸ Section 84 of the *Courts of Justice Act 1924* provides for an automatic right of appeal from a decision of the District Court to the Circuit Court. This appeal is heard *de novo* in the Circuit Court, and the decision of the Circuit Court is final and unappealable.

party abandons their automatic right of a *de novo* appeal to the Circuit Court.¹⁹

3.22 In its 11th Interim Report, the Committee on Court Practice and Procedure recommended that section 52(2) of the *Courts (Supplemental Provisions) Act 1961* (which provides that an appeal of the High Court's determination of the question of law shall lie only by leave of the High Court) be amended. The Committee recommended that section 52(2) be amended so that a party who has been unsuccessful in the High Court in their application for permission to appeal the decision of that court of a question of law from a consultative case, be entitled to appeal the refusal of leave to the Supreme Court.²⁰ The main reason advanced by the Committee in favour of its recommendation was the likelihood that important points of law could emerge during the consultative case stated procedure.

3.23 While the Commission acknowledges that the Committee's recommendation is a worthwhile one (although it has not been implemented), the Commission queries whether this recommendation is sufficiently far reaching. The Commission is of the view that it is worth considering whether section 52(2) be amended to reflect the more expansive proposition that leave to appeal the decision of the High Court be abolished completely. This would allow for an automatic right of appeal of the decision of the High Court on a question of law referred to it in the form of a consultative case stated. The Commission is of the view that if a District Court Judge saw fit to send the question forward to the High Court in the first instance, this is sufficient evidence of the veracity of the question of law. The Commission agrees with the view of the Committee on Court Practice and Procedure that it is probable that many important legal points may arise in the initial case stated and that a further appeal as of right should be available for that reason. The Commission believes that the removal of the leave requirement would not place an undue number of additional cases in the Supreme Court.

3.24 *The Commission provisionally recommends that section 52(2) of the Courts (Supplemental Provisions) Act 1961 be amended to provide for an automatic right of appeal from the High Court to the Supreme Court in cases where the High Court has made a determination on a question of law referred to it from the District Court in the form of a consultative case stated.*

¹⁹ Section 14 of the *Summary Jurisdiction Act 1857*.

²⁰ Committee on Court Practice and Procedure *Eleventh Interim Report of the Committee on Court Practice and Procedure: The Jurisdiction and Practice of the Supreme Court* (Stationery Office Prl 1835 1970) at 7-8.

3.25 Another difference between the two forms of case stated is highlighted by Collins and O'Reilly who note the decision of the District Judge as to the frivolity of the application to state a consultative case stated is final.²¹ This is because section 83 of the *Courts of Justice Act 1924* as replaced by section 52 of the *Courts (Supplemental Provisions) Act 1961* was so interpreted, and this interpretation continues through the successor to section 83. With regard to appeals by way of case stated, if a District Judge refuses an application, he is required at the request of the intending appellant to sign and deliver to the appellant a certificate of such a refusal.²² It is then open to the aggrieved potential appellant to apply to the High Court pursuant to section 5 of the *Summary Jurisdiction Act 1857* Act for a ruling requiring the judge to show cause why the question should not be stated.

3.26 As has been mentioned at paragraph 2.78 of this Consultation Paper, the Committee on Court Practice and Procedure recommended in the interests of uniformity that all consultative cases stated from lower courts go directly to the Supreme Court.²³ The Commission acknowledges that uniformity would be introduced should this proposal be adopted by the legislature. However the Commission believes that the proposal would be an unnecessary burden on the Supreme Court. The Commission believes that the High Court is of a sufficient high level in the judicial hierarchy to be vested with jurisdiction in matters stated to it from the District Court.

3.27 Finally, there is one further difference in respect of the power exercised by a District Judge when dealing with an application for an appeal by way of case stated and when dealing with an application for a consultative case stated. Where an application for an appeal by way of case stated is made by the Attorney General, the Director of Public Prosecutions, a Government Minister, a Minister of State or the Revenue Commissioners, the judge of the District Court is obliged to accede to it, in accordance with section 4 of the *Summary Jurisdiction Act 1857* and Order 102 Rule 15 of the District Court Rules 1997. There is no such obligation on a judge stating a consultative case in the District, Circuit or High Courts.

3.28 In *Fitzgerald v DPP*²⁴ the High Court declared the provisions of section 4 of the 1857 Act and the District Court Rules relating to section 4 to be unconstitutional. Mr Justice Kearns was of the opinion that the provisions

²¹ Collins and O'Reilly *Civil Proceedings and the State* (2nd ed Thomson Roundhall 2004) at 20-21.

²² Section 4 of the Summary Jurisdiction Act 1857.

²³ Committee on Court Practice and Procedure *Eleventh Interim Report: The Jurisdiction and Practice of the Supreme Court* (Stationery Office Prl 1835 1970) at 11.

²⁴ High Court Kearns J May 4 2001.

constituted an unwarranted interference in the judicial domain and were discriminatory. However, this was overturned by the Supreme Court.²⁵ The Supreme Court held that section 4 does not require the resolution by a court of a justiciable controversy between the parties. The Court was of the opinion that the proviso to section 4 does not require an issue to be determined in any particular manner nor does it interfere in any way in the determination by the courts as to the guilt or innocence of an accused person in accordance with the law. The Court went on to hold that the true construction of section 4 of the 1857 Act was that it does no more than enable the law officers to obtain a ruling from a superior court as to the correctness of the district judge's determination where they are dissatisfied with that determination as being erroneous on a point of law. The Supreme Court also held that it is legitimate for the legislature to work on the basis that the law officers of the State, being persons charged with serious constitutional responsibility, would not have the same motivation for taking frivolous appeals as might private claimants.

3.29 The District Court Rules have been amended so as to extend the obligation on a District Court Judge to state a case when such a request comes from certain parties, originally from the Attorney General alone (as contained in section 4 of the 1857 Act) but now including several others. It has been queried whether such an extension is within the competence of the District Court Rules Committee.²⁶ It is clear that section 91 of *The Courts of Justice Act 1924* vests the District Court rule-making authority with the power to make rules for the "practice and procedure of the District Court generally" but does not permit alterations to the substantive law of the District Court. The concept of practice and procedure was considered by Mr Justice Kingsmill Moore in the *The State (O'Flaherty) v O'Flainn*²⁷ as follows:

"What is meant by the words 'practice and procedure'? Broadly I would answer 'the manner in which or the manner whereby effect is given to a substantive power which is either conferred on a court by statute inherent in its jurisdiction'."

In that case, the Supreme Court considered whether a District Court Rule authorising a District Court Judge to remand a person in custody for 15 days was valid given the statute authorised a remand for a period of not more than 8 days. The court found such authorisation to be invalid given that it related to the fundamental right of liberty. A later decision involving rules 29 and

²⁵ *Fitzgerald v DPP* [2003] 2 ILRM 537

²⁶ Collins and O'Reilly *Civil Proceedings and the State* (2nd ed Thomson 2004) at 5 footnote 39.

²⁷ [1954] IR 295 at 304.

30 of the District Court Rules which conferred on a District Court clerk the power to receive a complaint and decide whether or not to issue a summons, also found this to be beyond the remit of practice and procedure connected with the relevant statute.²⁸ The case of *Kerry County Council v McCarthy*²⁹ has taken a rather different approach to this question, and confined the previous cases to their facts. In this case, Mr Justice O’Flaherty stated that there was an important distinction to be drawn between the instant case (involving a rule that allowed for a District Court clerk to issue a summons in summary proceedings of a civil nature, subject to certain geographical limits) and the previous cases of *McCarthy* and *Rainey* as these cases had been concerned with criminal proceedings, while the instant case was concerned with civil proceedings. On that basis, O’Flaherty J. held that the rules in the case were “fairly and squarely one of administrative procedure only with no consequence affecting the liberty or any other rights of the citizen”.³⁰

3.30 While Order 102 Rule 15 of the District Court Rules 1997 is not concerned exclusively with criminal proceedings or the liberty of an individual, it is arguable that it may still be *ultra vires*. Order 102, Rule 15 extends the class of persons with whose request for an appeal by way of a case stated a District Court Judge must comply. This is a far reaching power. It can be argued that this extension of that class by Order 192 Rule 15 is broader than “the manner in which or the manner whereby effect is given to a substantive power”³¹ The Rule does more than merely giving effect to a substantive power. That is an extension of the substantive power itself, which if the test in *The State (O’Flaherty) v O’Floinn* is followed, means such an extension is beyond the powers of the rule-making authority. However, if the dictum of Mr Justice O’Flaherty in *Kerry County Council* is followed, then as it is not related exclusively to criminal proceedings or the liberty of an individual, it is within the powers of the District Court rules-making authority. However, it may also be argued that the extension of the rule encompasses criminal proceedings and that on that basis could be beyond the powers of the District Court Rules Committee.

(d) Differences in consultative case stated

3.31 The Commission is aware of a number of inherent procedural inconsistencies in the consultative case stated mechanism in the three courts from which it is available. These are highlighted in this section.

²⁸ *Rainey v Delap* [1988] IR 470.

²⁹ [1997] 2 ILRM 481.

³⁰ *Ibid* at 485. See also Delany *The Courts Acts 1924-1998* (2nd ed Roundhall 2000) at 54-58.

³¹ Quote from *State (O’Flaherty) v O’Floinn* [1954] IR 295 at 304.

3.32 Section 52 of the *Courts (Supplemental Provisions) Act 1961* has been interpreted as allowing for a District Court judge to accede to a request to state a consultative case stated unless he is of the opinion that it is frivolous, and that he may also of his own motion and without any request from any of the parties to the proceedings, state a consultative case for the opinion of the High Court. However, no such power exists for a Circuit or High Judge to state a consultative case of his/her own will. This was so held by Mr Justice Lynch in *McKenna v Derry*³² when he stated:

“It will be noted that the District Court shall if requested must state a case for the opinion of the High Court unless the District Judge considers the request to be frivolous and also may of his motion and without any request from any of the parties state such a case for the opinion of the High Court unlike the provisions for consultative case stated by the Circuit Court and the High Court to the Supreme Court”.

The reason for this is the presence of the words “without request” in section 52 of the *Courts (Supplemental Provisions) Act 1961*. The other sections providing for an appeal by way of case stated from the Circuit Court and the High Court contain no such provision. It is the opinion of the Commission that this distinction is an untenable one, as it causes unnecessary differences in procedure which should as far as possible be consistent between the three courts.

3.33 *The Commission provisionally recommends that section 16 of the Courts of Justice Act 1947 and section 38 of the Courts of Justice Act 1936 should be amended to allow for a Circuit or High Court Judge to state a consultative case without a request from any of the parties to the proceedings.*

3.34 Within the three courts from which a consultative case stated is available, there are different standards which the relevant judge must apply in determining whether to accede to the request. This is apparent from the wording of the sections providing for consultative case stated. In relation to consultative case stated from the District Court, the judge shall refer the question of law unless he considers the request frivolous.³³ No such criterion has to be applied by a Circuit Court when determining whether to refer a question of law as the section merely states that the decision of the

³² [1998] 1 IR 62 at 74.

³³ Section 52(1) of the *Courts (Supplemental Provisions) Act 1961*. It is worth noting that the same standard applies to an appeal by way of case stated pursuant to section 2 of the *Summary Jurisdiction Act 1857*. Section 4 of the 1857 Act states that a District Judge can refuse to state a case if he or she is of the opinion that the application is “merely frivolous”.

Circuit Court judge is discretionary.³⁴ This is clear from the use of the word “may” in the section. A High Court judge may state a question of law if he or she “considers it proper on the application of any party”.³⁵

3.35 The Commission considers it desirable in the interests of consistency that uniform criteria be applied by judges in all three courts when determining whether to state a case for a higher court in the form of a consultative case stated. In this regard, it is the opinion of the Commission that the criteria should not be too onerous, given that the case stated mechanism is a beneficial tool to obtain the opinion of a higher court. The English Court of Appeal (Criminal Division) looks at whether an application to appeal or leave to appeal demonstrates a substantial ground of appeal to be a useful standard.³⁶ The relevant standard is whether the application is “frivolous or vexatious”. The Commission has found this to be a useful standard. Therefore the Commission recommends that a judge refer a question of law to the higher court by way of a consultative case stated unless he or she is of the opinion that the request is frivolous or vexatious.

3.36 *The Commission provisionally recommends that a uniform standard be applied by judges of the District, Circuit and High Courts in determining whether to accede to an application to refer a question of law to a higher court through the method of consultative case stated. The Commission provisionally recommends that the judge refer the question of law to the higher court unless he or she is of the opinion that the application is “frivolous or vexatious”. The Commission provisionally recommends that section 53 of the Courts (Supplemental Provisions) Act 1961, section 16 of the Courts of Justice Act 1947 and section 38(3) of the Courts of Justice Act 1936 be amended accordingly.*

3.37 Finally, there is no clear legislative guidance for the stage at which a consultative case may be stated in the three courts at where the mechanism is available. Clearly, a comparison between the two forms of case stated available in the District Court provides guidance on the appropriate stage for a consultative case to be stated. An appeal by way of case stated can only be initiated after a District Court judge has heard and determined the proceedings.³⁷ There is no in-built provision regarding the time at which a consultative case may be stated in District Court proceedings. The availability of an appeal by way of a case stated when the court has heard and determined the proceedings indicates that a consultative

³⁴ Section 16 of the *Courts of Justice Act 1947*.

³⁵ Section 38(3) of the *Courts of Justice Act 1936*.

³⁶ Section 20 of the *Criminal Appeal Act 1968*, as substituted by section 157 of the *Criminal Justice Act 1988*.

³⁷ Section 2 of the *Summary Jurisdiction Act 1857*.

case stated can be taken up to that point. The fact that there is no reference to adjourning of pronouncement of the judgment in section 52 has led to it being held that “prima facie this provision [section 52(1)] gives the District Court power to state a case at any stage of the proceedings.”³⁸ It has been held that the proper procedure regarding the stating of a consultative case from the District Court is as follows:

“The proper procedure leading to the stating of a consultative case for the opinion of the Superior Courts is for the District Judge to hear all of the evidence relevant to the point of law arising, to find the facts relevant to such a point of law in the light of such evidence, then state the case posing the questions appropriate to elucidate the point of law and finally, on receiving the answers to those questions to decide on the matter before him on the basis of those answers.”³⁹

3.38 In relation to the correct stage at which a consultative case may be stated from the Circuit Court to the Supreme Court, divergent case law has emerged on the issue. In *Corley v Gill*⁴⁰ the Supreme Court was influenced by the fact that section 16 of the 1947 Act provides that a Circuit Court judge “may adjourn the pronouncement of his judgement or order in the matter pending the determination of such case stated”. Accordingly he held that this indicated that a Circuit Court judge may only refer a question of law at the conclusion of the evidence adduced in the case.⁴¹ A later Supreme Court decision affirmed this reasoning and at this stage it appeared that a question of law could not be referred by a Circuit Court judge until all of the evidence before him or her had been concluded.⁴² A different view was taken, however, in the Supreme Court decision of *Doyle v Hearne*⁴³ where Chief Justice Finlay held that it is mandatory for a Circuit Court judge to adjourn the pronouncement of judgment when a question of law is referred to the Supreme Court, despite the use of the word “may” in the section.⁴⁴ He did not, however, consider that “an obligation there imposed excludes the power of the court to adjourn any other part of the proceedings pending

³⁸ *Fernandes v Bermingham* High Court 22 May 1985 Barron J.

³⁹ *DPP (Travers) v Brennan* [1998] 4 IR 67 at 70 per Lynch J

⁴⁰ [1975] IR 313.

⁴¹ *Ibid* at 313. See also *The State (Harkin) v O'Malley* [1978] IR 269 at 285-6 where Henchy J interpreted *Corley v Gill* as holding that a case stated may only be stated pursuant to section 16 of the *Courts of Justice Act 1947* when all of the evidence before a Circuit Court judge has been adduced.

⁴² *DPP v Gannon* Supreme Court 3 June 1989 per Finlay CJ.

⁴³ [1987] 1 IR 601.

⁴⁴ *Ibid* at 607.

before it as well as the pronouncement of the judgment or order”.⁴⁵
Accordingly he held:

“It is clear that every court has an inherent jurisdiction in order to secure the due administration of justice to adjourn any part of the hearing of a case before it. For s.16 of the Act of 1947 to be interpreted as removing that jurisdiction once a case has been stated under the section would, in my view, require very clear and unambiguous terms. I do not so read s.16 as to contain those terms...”⁴⁶

The Chief Justice provided the following guidance on when it is most suitable for a question of law to be referred from the Circuit Court:

“I would accept that as a general proposition it is desirable that all the material facts should be found and the evidence concerning them heard before a question of law is raised for determination by this Court. The purpose of that underlying principle is to seek to avoid, if at all possible, the determination of moot questions of law by this Court”.⁴⁷

The case also contained strong dissents from Mr Justice Henchy and Mr Justice Griffin who opined that the wording of section 16 made it clear that the view of the legislature was that a case would be stated only when all of the evidence had been heard.

3.39 The consultative case stated in the High Court has been subject to similar examination.⁴⁸ Like the jurisprudence in relation to the consultative case in the Circuit Court, much emphasis has been placed on the mandatory adjournment provision in section 38(3) of the *Courts of Justice Act 1947*. Mr Justice Henchy held:

“The mandatory adjournment, once the case has been stated, means that the appeal passes out of the hands of the judge while the question of law is being decided in the Supreme Court; when the question of law has been answered there, the appeal returns to the judge for “the pronouncement of his judgment or order”- not, be it noted, for the hearing or the further hearing of the appeal. The word “pronouncement”, by which is meant the oral delivery

⁴⁵ [1987] 1 IR 601 at 607..

⁴⁶ *Ibid* at 607-8.

⁴⁷ [1987] IR 601 at 608.

⁴⁸ *Dolan v Corn Exchange* [1975] IR 315.

of the judicial determination of the appeal, was obviously chosen by the legislature to denote the stage of the hearing when the case may be stated, namely, when it appears to the judge that nothing remains to complete the hearing before him except the pronouncement of his decision.⁴⁹

Given the consideration in *Doyle v Hearne*⁵⁰ of the consultative case stated procedure from the Circuit Court and the similarity between this and section 38(3), it is arguable that the comments made by Mr Justice Finlay apply equally to the High Court procedure.

3.40 While case law has clarified the issue of the ideal time for a consultative case to be stated from the three levels of courts in which it is available, the Commission is still concerned at the lack of legislative provision in the area. The Commission is, however, anxious for judicial discretion in the area to be maintained as far as possible. The Commission has determined that the interests of certainty dictate that some legislative guidance should be provided. It would be beneficial for minimum criteria to be provided.

3.41 *The Commission provisionally recommends that legislative guidance be provided in section 52 of the Courts (Supplementary Provisions) Act 1961, section 16 of the Courts of Justice Act 1947 and section 38(3) of the Courts of Justice Act 1936 as to the stage in proceedings at which a consultative case stated may be requested.*

(e) Monitoring of case stated appeals

3.42 It is widely recognised that appeals by way of case stated and consultative cases stated can move slowly through the courts system, attracting delays during this process. These delays are caused by the inbuilt time limits in the procedure. For example, a party wishing to take an appeal by way of case stated must lodge notice of application for a case stated with the District Court within 14 days from the determination of the case.⁵¹ Where leave to appeal is granted, the District Court judge must prepare and sign the case stated within 6 months from the date of application (although the judge has a discretion to submit a draft of the case within 2 months of the application in order to enable agreement of the parties on the relevant issues).⁵² Upon receipt of the case stated, the District Court clerk notifies the

⁴⁹ [1975] IR 315 at 325-6.

⁵⁰ [1987] IR 601.

⁵¹ Order 102 Rule 8 District Court Rules 1997.

⁵² Order 102 Rule 12 District Court Rules 1997.

parties and transmits the case stated to the High Court.⁵³ Upon receipt of the case stated in the Central Office of the High Court, the relevant officer must set the case down for hearing, but the case shall not appeal in the list until 10 days thereafter.⁵⁴

3.43 The Fennelly Group expressed concern as to the lack of monitoring arrangements in the procedure for appeal by way of a case stated, once leave has been obtained. The Group considered that this be best addressed by the provision for a review hearing in the High Court within 28 days of the lodgement of the case stated to enable the Court to have more active supervision.⁵⁵ The Group also was mindful of the need for more supervision in the District Court, and advocated the insertion of an appropriate rule providing for the matter to be listed for further consideration until such time as case stated is signed and dispatched.⁵⁶

3.44 As a result of the recommendations of the Fennelly Group, Order 102 rule 12 of the District Court Rules was amended by the *District Court (Case Stated) Rules 2006*.⁵⁷ The changes affect both an appeal by way of case stated and a consultative case stated in the District Court. The new arrangements allow for a District Judge “to adjourn proceedings from time to time pending the preparation and signature of the case stated, as he deems appropriate.” This amendment provides for arrangements to monitor proceedings for appeal by way of case stated during the period between the date of application to the Court to state a case and the date of signing the case stated and transmission of same to the High Court.

3.45 The view taken by the Fennelly Group demonstrates unnecessary delays in the appeal by way of case stated procedure. Their views are equally applicable to the consultative case stated procedure. The Commission acknowledges the worthwhile attempts to eradicate delays in the case stated mechanism recently introduced by way of a Practice Direction by the President of the High Court.⁵⁸ The main thrust of this Practice Direction is to require the party requesting the case stated (in both appeal by way of case stated and consultative case stated), once the case is transmitted to the Central Office in accordance with the rules, to have the case listed for mention in the non-jury list in the High Court at the next

⁵³ Order 102 Rule 14 District Court Rules.

⁵⁴ Order 62 Rule 4 Rules of the Superior Courts 2006.

⁵⁵ Working Group on the Jurisdiction of the Courts *The Criminal Jurisdiction of the Courts* (Stationery Office 2003) at 88-9.

⁵⁶ Working Group on the Jurisdiction of the Courts *The Criminal Jurisdiction of the Courts* (Stationery Office 2003) at 89.

⁵⁷ SI No 398 of 2006.

⁵⁸ Practice Direction HC42 *Cases stated to the High Court* 26 April 2006.

available date. However, the Commission still remains anxious about the inbuilt time limits in the case stated procedure and the ensuing delays.

(f) Case stated in England and Wales

3.46 It is noteworthy that the concept of consultative cases stated is unknown in England and Wales. Instead, provision is made for an appeal by way of case stated from the magistrates' court to the High Court⁵⁹ and Crown Court to the High Court.⁶⁰

3.47 The appeal by way of case stated from the magistrate's court to the High Court is very similar to its counterpart in this jurisdiction. Any party to the proceedings can apply to the justices in the magistrate's court seeking that a question of law be stated for the opinion of the High Court. However, a party may not do so if they have a right of appeal to the High Court on the decision of the Magistrate's Court, or where any enactment provides that the decision of the Magistrate's Court is final.⁶¹

3.48 As with appeals by way of case stated in this jurisdiction, the justices in the magistrate's court or the Crown Court judge can refuse to state a case if they are of the opinion the application is frivolous. If they refuse they are required to furnish the aggrieved applicant with a certificate stating that the application has been refused.⁶² In this context frivolous means "futile, misconceived, hopeless or academic".⁶³ However, they are not permitted to refuse an application to state a case, where the applying party is the Attorney General.⁶⁴ There has been no extension of the parties' in relation to whom the justices cannot refuse an application. This is clearly not the case in this jurisdiction.

3.49 It is not clear from a reading of section 111(1) of the 1980 Act whether such an appeal is by way of case stated, that is, when the magistrate's court has made a final determination, or a consultative case stated more in the form of an interlocutory case stated. A number of cases in England and Wales have found that the correct interpretation of section 111(1) of the *Magistrates' Courts Act 1980* means that a case stated can only

⁵⁹ *Magistrates' Court Act 1980* (chapter 43), section 111.

⁶⁰ *Supreme Court Act 1981*, (chapter 54), section 28

⁶¹ Section 111(1) of the *Magistrates' Courts Act 1980*, chapter 43.

⁶² Section 111(5) of the *Magistrates Courts Act 1980*, chapter 43 and Rule 64.7 of the Criminal Procedure Rules 2005.

⁶³ *Per* Lord Bingham in *R v North Suffolk (Mildenhall) Magistrates' Court Ex parte Forest Health District Council* (1997) 161 JP 401 The Times 16 May 1997 Court of Appeal Civil Division.

⁶⁴ Section 11(5) of the *Magistrates Courts Act 1980*, chapter 43.

take place once the magistrates have reached a final determination on the matter before them.⁶⁵

3.50 The first of these cases, *Atkinson v US Government*⁶⁶ noted that prior to section 87 of the *Magistrates' Courts Act 1952* (predecessor of section 111 of the 1980 Act), it was settled law that there was no ability for justices to state a case until they had made a determination in a case. Lord Reid analysed the meaning of the phrase “conviction, order, determination or other proceeding” in relation to which the aggrieved party was permitted to ask the court to state a question for the High Court. He came to the following conclusion:

“I think it must be limited at least to this extent: it frequently happens that a court has to make a decision in the course of the proceedings-e.g. whether certain evidence is admissible-but it cannot have been intended that the proceedings should be held up while a case on such a matter is stated and determined by the superior court. So application for a case can only be made when the litigation or “proceeding” is at an end ... But, in order to avoid having to hold that this consolidating Act did something which Parliament cannot possibly have intended to do, I think that it is possible to hold that section 87 has no application to committal proceedings because such proceedings do not lead to any final decision”.⁶⁷

3.51 The above dictum was quoted with approval in the later case of *Streames v Copping*,⁶⁸ and thus Lord Justice May extended the principle of the previous case to all determinations in the Magistrates’ Court. It follows from this case that the magistrate’s court has no jurisdiction from section 111 (1) of the 1980 Act to state a case until it has reached a final determination on the matter at issue and the High Court has no jurisdiction to consider the case until that stage.⁶⁹

3.52 The “undesirability” of the use of case stated in interlocutory matters was recognised by Lord Justice Butler-Sloss in *R v Greater*

⁶⁵ *Streames v Copping* [1985] 2 All ER 122, approved in *Loade v Director of Public Prosecutions* [1990] 1 All ER 36 (dealing with appeals from the Crown Court by way of case stated); see also the dicta in *Atkinson v United States of America Government* [1969] All ER 1417, *Greater Manchester Justices, ex. P. Aldi GmbH and Co KG* The Times, December 28 1994.

⁶⁶ [1969] 3 All ER 1313.

⁶⁷ [1969] 3 All ER 1317 at 1324.

⁶⁸ [1985] 2 All ER 122.

⁶⁹ *Ibid* at 127.

*Manchester Justices ex parte Aldi GmbH and Co KG*⁷⁰ on the basis that it would cause numerous delays “if Justices could state cases on interlocutory points from time to time when what ought to happen in that sort of case is a determination of the summonses and the whole matter to be dealt with by the Divisional Court together.”

3.53 Therefore, justices in the Magistrates’ Court have no jurisdiction to state an “interlocutory” case during a hearing for determination by the High Court. Accordingly, where either party to summary proceedings considers that the magistrates have made an error of law, they must wait for the final decision before seeking for a case to be stated.

3.54 The same applies to cases stated from the Crown Court to the High Court, with one possible caveat. In *Loade and others v Director of Public Prosecutions*⁷¹ the Queen’s Bench Division approved the dicta in *Streames* and held that on the true construction of section 28(1) of the 1981 Act the word “decision” meant a final decision. Accordingly the High Court has no jurisdiction to hear an appeal from the Crown Court by way of a case stated on a ruling made during a criminal trial until the Crown Court had reached a final decision and the proceedings in the Crown Court had been concluded. The Court did however acknowledge *obiter*, that a case stated may be permissible in relation to an interlocutory decision in certain civil cases, such as the grant or refusal of licences. The Court was careful to point out that it was not the practice of the courts to allow case stated on interlocutory issues, and that the jurisdiction “should be exercised sparingly and only in exceptional cases”.⁷² The Court stated that in criminal matters, the issue is clear: the High Court cannot entertain an appeal by way of case stated unless the judges have made a final determination.⁷³

3.55 The decision of the High Court when determining a case stated transmitted to it by either the Magistrates’ Court or the Crown Court is final.⁷⁴ There is an exception to this rule in criminal cases, where an appeal can be taken to the House of Lords.⁷⁵ The High Court is also permitted to

⁷⁰ The Times 28 December 1994.

⁷¹ [1990] 1 All ER 36.

⁷² *Ibid* at 43.

⁷³ *Ibid* at 43.

⁷⁴ Section 28A of the *Supreme Court Act 1981*, as amended by section 61 of the *Access to Justice Act 1999*.

⁷⁵ See *Farley v Child Support Agency and Secretary for State for Works and Pensions* [2005] EWCA 869 [2005] FCR 343, in which the Court of Appeal (Civil Division) recognised the “regrettable consequence” of section 28A of the 1981 Act that no appeal lies against the decision of the High Court to the Court of Appeal.

send the case back to the relevant court for amendment, and if the High Court does so, the case must be amended.

(g) Discussion

3.56 The Commission notes the above-mentioned differences between the two forms of case stated available in this jurisdiction. At first glance, it could be argued that the appeal by way of case stated available only in the District Court is a mere anomaly and archaic principle that was carried over and extended by the *Courts (Supplemental Provisions) Act 1961* without real consideration of its consequences. This argument could be strengthened by the fact that it is not possible to take an appeal by way of case stated in the Circuit or High Courts. This argument is somewhat weakened, however, when one examines the law in England and Wales and more specifically the recognition of the delay caused should case stated be available at interlocutory stages in the proceedings (similar to the consultative case stated in this jurisdiction). As noted above in general, there is no form of consultative case stated in England and Wales.

3.57 The procedure for appeal by way of case stated could be abandoned completely if the relevant sections of the 1857 and 1961 Acts were repealed. However, it is worth considering whether the consultative case stated is a useful procedure, or merely a mechanism which causes delay in proceedings. The Commission is of the view that the rationale behind case stated generally is a worthwhile one and that the procedure is hugely advantageous in providing a mechanism whereby a lower court can obtain an opinion from a higher court. The Commission is particularly cognisant of the comments made in England and Wales on the idea of case stated being available before the final determination is handed down. The Commission considers that the consultative case stated a very valuable legal tool as it allows for an interlocutory decision to be made by a higher court, and for the lower court who has heard the evidence to apply this decision. Accordingly the Commission believes that the advantage of the procedure outweighs the possible disadvantage of delay identified by judiciary in England and Wales.⁷⁶ The Commission considers that the form of appeal by way of case stated does not serve a continuing comparable function and has concluded that, at the end of proceedings, an ordinary appeal is the more appropriate appeal mechanism. On this basis the Commission has provisionally concluded that the form of appeal by way of case stated should be repealed.

3.58 *The Commission provisionally recommends that the form of appeal by way of case stated procedure should be repealed and that the*

⁷⁶ See the quote from *Atkinson v US Government* [1969] 3 All ER 1313 at 1324 quoted at paragraph 3.50 above. Also see *R v Greater Manchester Justices Ex parte Aldi GmbH and Co KG* The Times 28 December 1994 at paragraph 3.52 of this consultation paper.

consultative case stated continue to be available from the District, Circuit and High Courts.

3.59 Finally, the Commission has considered the argument put forward by Lord Justice Auld in his 2001 Review of the Criminal Courts in England and Wales. He questioned the justification for two overlapping forms of appeal from the Crown Court to the High Court by way of case stated and by judicial review. Accordingly he recommended that one form of appeal should lie to the Court of Appeal, using its general appellate jurisdiction and that this jurisdiction could be enlarged if necessary to encompass the remedies provided by appeal by way of case stated and judicial review.⁷⁷ Further, he proposed that such appeals should be subject to the permission of the Court of Appeal, which should only grant permission in a case involving an important point of principle or practice or where there is a compelling reason for the Court to hear such appeal.⁷⁸

3.60 However, it is also worth considering the dicta in *R v Crown Court at Ipswich ex parte Baldwin*⁷⁹ wherein Mr Justice McNeill commented:

“in a case such as this which bristles with factual difficulties the only convenient and proper way to get it before the Divisional Court is by case stated and not by way of application for judicial review.”⁸⁰

3.61 The Commission concurs with this view and has concluded that the consultative case stated is not capable of being subsumed into judicial review proceedings.

(2) *In camera rule and proceedings heard in private*

(a) *Introduction*

3.62 The purpose of this section is to examine the development of the *in camera* rule in this jurisdiction, the procedure in which cases may be heard otherwise than in public as authorised by Article 34.1 of the Constitution and to determine whether the rule sufficiently addresses its objectives or whether it requires amendment.⁸¹ The *in camera* rule is

⁷⁷ Auld *Review of the Criminal Courts of England and Wales* (Stationery Office October 2001) at 623.

⁷⁸ *Ibid* at 623-4.

⁷⁹ [1981] 1 All ER 596.

⁸⁰ *Ibid* at 597.

⁸¹ ‘*In camera*’ proceedings are those held in private, with the press and public excluded. The origins of the phrase derive from the fact that proceedings held in private took place in the private chambers of a judge. The New Oxford Dictionary of English (Oxford University Press 2001) at 262.

discussed in the context of family law, with particular reference to recent developments, company law cases and finally cases of a sensitive nature that fall outside the ambit of the rule.

3.63 The *in camera* rule is discussed in this part given recent developments in the area with regard to family law matters. In addition, it is of significance that the European Court of Human Rights has recently examined cases of a sensitive nature in this jurisdiction not currently covered by the rule. Finally, there have been recent judicial developments in the area of family law matters involving minors in England and Wales.

3.64 Article 34.1 of the Constitution⁸² provides that courts must hear all cases in public “save in such special and limited cases as may be prescribed by law”.

3.65 Briefly, the rationale for the firmly entrenched and fundamental right in a democratic society to have courts open to the public is to provide welcome public scrutiny of the judicial system. Jeremy Bentham emphatically stated this as follows:

“In the darkness of secrecy, sinister interest and evil in every shape, have full swing. Only in proportion as publicity has place can any of the checks, applicable to judicial injustice, operate. Where there is no publicity there is no justice.”⁸³

In another work he commented:

“Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial.”⁸⁴

The compelling rationale for the administration of justice in public was explained by Mr Justice Keane as follows:

“Justice must be administered in public, not in order to satisfy the merely prurient or mindlessly inquisitive, but because, if it were not, an essential feature of a truly democratic society would be missing. Such a society could not tolerate the huge void that would be left if the public had to rely on what might be seen or

⁸² Article 34.1 of the Irish Constitution.

⁸³ *Constitutional Code, Book II, ch. XII, sect. XIV, The Works of Jeremy Bentham* published under the superintendence of John Bowring 11 vols (Edinburgh Tait 1843) vol ix at 493.

⁸⁴ *Draught of a New Plan for the Organization of the Judicial Establishment in France: The Works of Jeremy Bentham* published under the superintendence of John Bowring, 11 vols (Edinburgh Tait 1843) vol iv at 316.

heard by casual observers, rather than on a detailed daily commentary by press, radio and television. The most benign climate for the growth of corruption and abuse of powers, whether by the judiciary or members of the legal profession, is one of secrecy.⁸⁵

While the judiciary in this jurisdiction are subject to a number of methods of review whether by appellate review or by removal from office for stated misbehaviour pursuant to Article 35.4.1^o, case law from the United States suggests that public monitoring can also act as an essential means of deterring arbitrary judicial behaviour.⁸⁶

3.66 However paradoxically, it is also recognised that in certain circumstances it is manifestly unjust and unfair for proceedings to be heard in public. In some exceptional circumstances, it is acknowledged that open justice can operate to the detriment of the administration of justice. Bentham also saw the necessity for some exceptions to be provided to the general rule requiring publicity:

“But essential as it is it is that nothing should ever pass in justice which it should be in the power of the judge, or of any one, ultimately to conceal, it is not by any means so that every incident should be made known at the very instant of it taking place. If, then, in any case, things should be so circumstanced, that the unrestrained publication of one truth might give facilities for the suppression of another, a temporary veil might be thrown over that part of the proceedings of without any infraction of the general principle.”⁸⁷

3.67 The most obvious situation where such exception to the general rule is required is family law proceedings.

3.68 It has been recognised in a small number of cases from outside this jurisdiction that open justice is not sufficient, and that it is vitally important that the media be given sufficient access to cases and documents in order that they may report in an accurate and responsible way.⁸⁸ The English Courts have acknowledged that in reality most people do not avail of

⁸⁵ *Irish Times v Ireland* [1998] 1 IR 359 at 409.

⁸⁶ *United States v Amodeo* 71 F 3d 044 at 1048 (2nd Cir 1995).

⁸⁷ Bowring (ed) *Works of Jeremy Bentham Volume 4* (Tait 1843) at 317.

⁸⁸ *Richmond Newspapers Inc v Virginia* 448 US 555 at 572-572 (1980); *R v Davis* (1995) 57 FCR 512 at 514; *Re Guardian Newspapers* [2005] 3 All ER 155 at 162. See also Rodrick “Open Justice, the Media and Avenues of Access to Documents on the Court Record (2006) 29(3) UNSWLJ 90.

the right to attend judicial proceedings; instead they rely on media reports for information regarding judicial proceedings.⁸⁹

3.69 Article 45(1) of the *Courts (Supplemental Provisions) Act 1961* provides for a number of circumstances in which justice may be administered otherwise than in public. These are as follows:

- Applications of an urgent nature for relief by way of habeas corpus, bail or prohibition or injunction;
- Matrimonial causes and matters;
- Lunacy and minor matters;
- Proceedings involving the disclosure of secret manufacturing process.

It appears that the Oireachtas at the time of enacting the 1961 Act was of the view that section 45(1) “represented a satisfactory balance between the desirability of having justice appear to be done and the impossibility or undesirability in the general interest of having hearings in open court.”⁹⁰

3.70 Section 45(2) of the 1961 Act provides that the Oireachtas has liberty to prescribe other cases in addition to those expressly contained in section 45(1). An example of where the Oireachtas determined that such provision was required is section 205(7) of the *Companies Act 1963*. This section allows for proceedings relating to alleged oppression in company law to be heard in private which, if “in the opinion of the court, the hearing of the proceedings under this section [section 205, oppression] would involve the disclosure of information the publication of which would be seriously prejudicial to the legitimate interests of the company, the court may order that the hearing of the proceedings or any part thereof shall be in camera”.

⁸⁹ Mr Justice Park commented that :

“It is an excellent thing that any member of the public can walk into any courtroom, watch the proceedings and listen to what is said. But for the public as a whole to be informed about the important or interesting matters which are going on in the courts, the press is crucial. It is through the press identifying the newsworthy cases, keeping itself well informed about them and distilling them into stories or articles in the newspapers that the generality of the public secure the effects and, I trust, the benefits of open justice”.

Re Guardian Newspapers [2005] 3 All ER 155 at 162

⁹⁰ Dáil Debates 191 Col 2099. Quoted in Delany *The Courts Acts 1924-1997* (2nd ed Roundhall 2000) at 255.

3.71 Section 45(1) does not provide for the types of cases contained in the section to be automatically heard in private. This was recognised by Mr Justice Walsh in the case of *In re R Limited*⁹¹ when he stated:

“What was to be noted in section 45 of the Act of 1961 is that the cases set out in subsection (1) do not impose any requirement for hearing otherwise than in a public court but leave it to the discretion of the judge in question, but naturally the discretion must be conditioned by the necessary qualification that the doing of justice remains the paramount consideration.”⁹²

3.72 At this stage, it is worth noting that the Constitutional Review Group considered whether it was necessary for Article 34.1 to be amended. The Review Group saw no reason for any amendment given the fundamental principal that justice be administered in public. The Group suggested that should the Oireachtas deem it necessary that a category of cases be heard *in camera*, it is open for it to enact legislation to this effect once this is justifiable on objective factors.⁹³

(b) Family law cases

(i) Ireland

3.73 Although section 45(1) of the *Courts (Supplemental Provisions) Act 1961* refers to matrimonial matters and causes being heard in private, the section gives discretion to the courts to decide whether or not they should be heard in private. Later individual family statutes make the *in camera* rule mandatory in most family law matters.⁹⁴ As a result, all family law cases are heard *in camera*. The *in camera* provisions relating to family law cases were up until recently absolute. The Courts have interpreted the provisions of the family law legislation in a strict manner. In *RM v DM (Practice in camera)*⁹⁵ Mr Justice Roderick Murphy held that the *in camera* provisions of both the *Judicial Separation and Family Law Reform Act 1989* and *Family Law (Divorce) Act 1996* implied:

⁹¹ [1989] IR 126.

⁹² [1989] IR 126 at 136.

⁹³ Constitutional Review Group *Report of the Constitutional Review Group* (Stationery Office 1996) at 145.

⁹⁴ See for example section 34 of the *Judicial Separation and Family Law Reform Act 1989*, section 38(5) of the *Family Law (Divorce) Act 1996*, section 25(1) and (2) of the *Family Law (Maintenance of Spouses and Children) Act 1976*, section 29 of the *Child Care Act 1991*, section 38(6) of the *Family Law Act 1995* and section 16(1) of the *Domestic Violence Act 1996*.

⁹⁵ [2000] 3 IR 373 at 386. See also *Eastern Health Board v Fitness to Practice Committee of the Medical Council* [1998] 3 IR 399 and *MP v AP* [1996] 1 IR 144.

“an absolute embargo on the production in subsequent proceedings of information which derives from or was introduced in proceedings protected by the rule. It would seem to follow that...such information whether in documentary form or otherwise is protected by the in camera rule cannot be the subject matter of investigation in an inquiry by a professional body having a duty to investigate such complaints.”

A consequence of this statement, if taken literally would mean that disclosure of any information from a family law case would not be permitted. This could have manifestly unjust results, for example in cases where a spouse was seeking a barring order.⁹⁶ In such cases, it would not be possible for welfare reports, etc produced in judicial separation proceedings to be produced at a barring order application.

3.74 In practice in family law cases, section 45(1) has operated to exclude all except the parties and their legal representatives. In essence, the rule was effectively a ban on identifying the parties, a ban on disclosure of documents used in any proceedings, a ban on attendance in court by anyone not involved in the case, and an effective ban on reporting and publishing of judgments handed down. The Law Reform Commission expressed concern regarding some of the consequences of holding family law proceedings behind closed doors:

“It is increasingly recognised that the absence of any opportunities for external scrutiny of family proceedings, even if it does not in fact affect the quality and consistency of judicial behaviour, creates an unhealthy atmosphere in which anecdote, rumour and myth inform the public’s understanding of what goes on in the family law courts.”⁹⁷

⁹⁶ A literal interpretation of “in camera” was also taken in the criminal sphere in *The People (DPP) v WM* [1995] 1 IR 226 where Mr Justice Carney held that the phrase “all proceedings” in section 5 of the *Punishment of Incest Act 1908* had the effect that sentence could not be pronounced in public.

⁹⁷ Law Reform Commission *Consultation Paper on Family Law Courts* (LRC CP 78 1994) at paragraph 7.09. A similar view had earlier been expressed by the Law Commission of Canada who commented that it believed “that legislative provisions should prevent undue publicity and promote private hearings and the confidentiality of court records. The parties, the judge and auxiliary personnel should have every opportunity to examine the total situation with a view to achieving reconciliation, amicable settlement, or at the most appropriate judicial disposition. Although this necessitates some degree of privacy and confidentiality, it should not be confused with total secrecy. The public is entitled to know the way justice is administered in the courts; no court should be permitted to operate in secrecy. Constructive criticism and proposals for reform can only come from knowledge and understanding of the

Further, in its *Report on Family Law Courts*⁹⁸, the Commission was of the opinion that the *in camera* rules in relation to family law proceedings were too stringent. The Commission recommended that bona fide researchers and students of family law should be permitted to attend family proceedings. The Committee on Court Practice and Procedure took a different approach to the family law conundrum. In its 23rd Interim Report, it took the view that:⁹⁹

“it seems proper...that the representatives of the press should have the right to address the court on the question of whether an *in camera* order should be made, or if it has been made, whether it should be lifted.”¹⁰⁰

3.75 However, the Committee advocated that change was required in civil cases, excluding family law and related matters. The Committee took the view that a distinction should be drawn between the general public and organs of the media whose role in society is to publicise events of public interest. In the context of the public interest, the Committee considered that where there is an application for a case to be heard *in camera*, there would be a workable framework in which a third party could with the media apply for a right of audience. However, any right of application should be restricted to organs of the press.

3.76 On this basis, the Committee recommended that an independent body made up of representatives of organs of the media be given a right to make an application in advance to attend a case that is to be heard *in camera*. The Committee decided that family and related matters be expressly excluded from such applications. The Committee favoured legislation as the best approach to introduce this change. The Committee provided guidance on the procedure for such applications, such as stating that the party seeking to have a proceeding heard *in camera* would have to give court 14 days notice of the intended application so that the independent body or representatives of the press could be informed of the application and be enabled to be represented at the hearing. Each application would be heard *in camera*.

operations of the courts.” Law Commission of Canada *The Family Law Court* (Working Paper 1 1974) at 36.

⁹⁸ Law Reform Commission *Report on Family Law Courts* (LRC 52-1996).

⁹⁹ The Twenty Third Interim Report of the Committee on Court Practice and Procedure *The Provision of a Procedure to Enable Representatives of the Media to be heard by the Court, where an application is being made in Civil Proceedings to have a case heard otherwise than in Public* (1994).

¹⁰⁰ *Ibid* at 45.

3.77 Section 40 of the *Civil Liability and Courts Act 2004* has amended the *in camera* rule in respect of family law cases.¹⁰¹ Section 40 now allows a barrister, solicitor, researcher or specialist working in a particular area to prepare and publish a report of proceedings taken under certain family law legislation. A report or decision must not contain any information that would enable the parties to the proceedings, or any child, to be identified. The barrister, solicitor or researcher may attend court, subject to any directions the court may give. It is possible for a spouse to apply to court seeking exclusion of the reporter, but the legislation does not set out the grounds on which such an application may be made.¹⁰² Section 40 is in line with the recommendations made by the Working Group on a Courts Commission in its Sixth Report. Further, it is useful to refer to the Law Reform Commission's *Report on Family Law Courts*¹⁰³ where the Commission expressly recommended that access by bona fide researchers to family proceedings should not be refused by a judge except on the basis of compelling and stated reasons. Section 40 has retrospective effect, in its entirety, as it applies to all proceedings and decisions of a court made, within the ambit of section 40 whether before or after the commencement of section 40.

3.78 Section 40(6) of the 2004 Act also allows for orders made and evidence given in *in camera* proceedings to be used in other specified hearings.¹⁰⁴ Section 40(6) applies to "an enactment that prohibits proceedings to which the enactment relates from being heard in public". There is no provision within the *Guardianship of Infants Act 1964* that expressly provides that cases pursuant to the Act are to be heard in private. Instead, such proceedings are heard otherwise than in public pursuant to section 45(1) of the *Courts (Supplemental Provisions) Act 1961* which provides *inter alia* that "minor matters" may be heard otherwise than in public.¹⁰⁵ The use of the phrase "an enactment that prohibits

¹⁰¹ Section 40 of the 2004 Act is very much in line with recommendations made in the Sixth Report of the Working Group on a Courts Commission *Conclusion with a Summary* (Pn 2690 1998).

¹⁰² O'Brien *Blind Justice* (2006) 100(1) Law Society Gazette 28 at 28.

¹⁰³ Law Reform Commission *Report on Family Law Courts* (LRC 52-1996).

¹⁰⁴ The *Civil Liability and Courts Acts 2004 (Matters Prescribed under Section 40) Order 2005* (SI No 339 of 2005) and the *Civil Liability and Courts Act 2004 (Matters Prescribed under Section 40) Order 2005* (SI No. 339 of 2005) set out the types of investigation to which the exception applies and the bodies which benefit from the exception.

¹⁰⁵ If applications pursuant to the *Guardianship of Infants Act 1964* are ancillary to divorce or separate proceedings then section 40(6) would apply to such documents and such cases are automatically heard in private. See O'Brien *Blind Justice* (2006) 100(1) Law Society Gazette 28 at 28.

proceedings...to be heard in public” could suggest that for an enactment to come within the terms of section 40(6) it is necessary for an express section to be provided within the Act in which that enactment is contained which provides that proceedings taken pursuant to the Act to be held in private. It may not be sufficient for the Act or proceeding taken pursuant to the Act to be heard in private pursuant to section 45(1) of the 1961 Act. It is arguable therefore, that the *Guardianship of Infants Act 1964* is not within section 40(6). The Commission wishes to highlight this possible lacuna and possible resulting difficulties caused.

3.79 A recent case in this jurisdiction could signal a realisation of the importance, even in highly sensitive family cases, of judgments being put in the public domain. In *Dowse v Adoption Board*¹⁰⁶ Mr Justice MacMenamin considered to what extent his judgment in a highly sensitive case involving an adoption should be put in the public domain. In particular, he was conscious of the position of certain family law cases after the implementation of section 40 of the 2004 Act and the incorporation of the European Convention on Human Rights (ECHR) into Irish law by the *European Convention on Human Rights Act 2003*. Mr Justice MacMenamin decided not to consider the issue of whether the judgment should be put in the public domain under section 40 of the 2004 Act, but rather under section 7 of the *Adoption Act 1991*. He stated that section 7(4) of the *Adoption Act 1991* vested in the court the discretion to hear cases involving foreign adoptions otherwise than in public. Mr Justice MacMenamin acknowledged that

“It is a fundamental principle of Irish Law that justice should be administered in public, and that the administration of justice in public is an essential feature of a truly democratic society.”¹⁰⁷

He went on to say that “[a]s a constitutional and legal principle, even if cases are heard in private there may be issues which are of public concern and where the interest of justice requires that after the hearing in private the judgement made therein should as far as possible be made public.”¹⁰⁸

3.80 It is of significance that Mr Justice MacMenamin was of the opinion that the portions of the judgment which dealt with relevant facts and general legal principles could be distinguished from other specific areas which should remain private.

3.81 Mr Justice MacMenamin also was cognisant of the obligations under Article 6 of the ECHR as is clear from the following:

¹⁰⁶ [2007] 2 IR 510 [2007] 1 ILRM 81.

¹⁰⁷ [2007] 2 IR 510 at 536 [2007] 1 ILRM 81 at 106.

¹⁰⁸ [2007] 2 IR 510 at 536 [2007] 1 ILRM 81 at 106.

“As a general principle of Convention rights, as well as rights under the Constitution, courts must make their judgments public unless such a course of action would constitute a denial of justice. Even if a court considers that the publication of certain matters in the judgment would constitute such a denial, then it must nonetheless publish as much of the judgment as is possible without bringing such a denial of justice.”

He referred to the case of *Re A Ward of Court*¹⁰⁹, where the judgments of both the High Court and Supreme Court were delivered in public because of the importance of the principles involved, although the evidence at first instance was heard in private. Mr Justice MacMenamin stated that the *Dowse* case was unusual as much of the information was already in the public domain. On that issue, he found the case *Blunkett v Quinn*¹¹⁰ to be a persuasive precedent. In the course of his judgment in that case, the appeal judge, Mr Justice Ryder came to the following conclusion about privacy of the courts and sensitive cases; cases which had already been the subject of large media coverage:

“I have come to the clear conclusion that having regard for the quantity of the material that is in the public domain some of it even in the most responsible commentaries wholly inaccurate, it is right to give judgement in public... I have guarded against arbitrary interference in the private and family lives of all concerned by hearing the appeal in private and by excluding from this judgment unnecessary personal material such as that concerning the detail of the health of Mrs Quinn. To give this judgment in public is, I believe, the most proportionate of the options available to me.”¹¹¹

3.82 Mr Justice MacMenamin stated that this approach was of assistance “to a degree” but was subject to a number of caveats including the impropriety of a third party acting in such a manner as to force the judgment be given in public.¹¹² Secondly, Mr Justice MacMenamin reiterated the well-established principle that the welfare of the child must at all times remain paramount. On this basis, the substantive judgment was published, with the exception of certain names and the personal financial affairs of the child’s parents.

¹⁰⁹ [1996] 2 IR 79 [1995] 2 ILRM 401.

¹¹⁰ [2005] 1 FLR 648

¹¹¹ *Ibid* at 652.

¹¹² [2007] 2 IR 510 at 537 [2007] 1 ILRM 81 at 108.

3.83 It is also noteworthy that the High Court considered as a preliminary issue, whether the later substantive hearing in *Re Ward of Court*¹¹³ should be completely or partly heard in private.¹¹⁴ Mr Justice Lynch directed that the substantive action be heard in camera, as this was necessary to do justice in the circumstances of the case. He did, however, direct that the judgment be delivered in public “but in a manner which preserves the anonymity of the parties”.¹¹⁵ However, when the substantive action was appealed to the Supreme Court, that court rejected an application for the appeal to be heard in private. The Supreme Court took the view that the case involved an issue of great public concern and importance and as such the public was entitled to know the arguments advanced from both sides in the appeal and the basis for the decision ultimately given by the court.¹¹⁶

(ii) England and Wales

3.84 In England and Wales, the position on openness on the courts depends on the level of the court at which the family law proceedings are heard. In the Magistrates Courts, the general rule is that the public are excluded in family law cases, but the media are permitted to attend providing it is not an adoption case.¹¹⁷ County Court cases are generally heard in private with the court having the discretion to open the court to the public or the press. High Court proceedings are heard in private with the judges given discretion to open the court to the public. Reporting restrictions apply in the High Court depending on the type of proceedings. It is increasingly prevalent for judgments in family law cases to be given in open court. In the Court of Appeal and the House of Lords, family law proceedings are open to the public and the press. Judgments from these courts are anonymised on a case by case basis and the courts are vested with the power to impose reporting restrictions. Generally, the press are permitted to report on judicial proceedings for the dissolution of marriages or civil partnerships and on nullity. The newspapers can publish the names and address of the witnesses and the parties to such proceedings.

3.85 The value of giving judgment on family law issues in public and of the judgment itself being publicly available is well recognised in England and Wales. In *Forbes v Smith*,¹¹⁸ Mr Justice Jacobs stated that “[t]he concept

¹¹³ [1996] 2 IR 79 [1995] 2 ILRM 401.

¹¹⁴ *In re A Ward of Court (withholding medical treatment) (No. 1)* [1996] 2 IR 73.

¹¹⁵ *Ibid* at 78.

¹¹⁶ Irish Times 15 June 1995.

¹¹⁷ Section 69(2) of the *Magistrates Courts Act 1980*.

¹¹⁸ [1998] 1 All ER 973.

of a secret judgment is one which I believe to be inherently abhorrent.”¹¹⁹ He held that a judgment given in chambers was to be regarded as a public document unless it was given *in camera* and the judge ordered for it to remain private. In this case, the judge allowed for the court’s judgment to be forwarded to certain persons as there was a legitimate interest in so doing. Mr Justice Jacobs was also influenced by that fact that the request had come from the parties that the matter be heard in chambers.

3.86 In June 2006, after much consultation, the Department for Constitutional Affairs published a consultation paper examining how to improve transparency and privacy in family law courts.¹²⁰ The recommendations pertain to all family law proceedings, including those proceedings involving children (excluding adoption cases) in England and Wales. The main thrust of the recommendations is to allow the media to attend all family law proceedings with discretion being vested in the courts either to exclude the media or impose reporting restrictions in appropriate cases. The consultation paper also advocated that other persons be permitted to attend family law proceedings on application to the court, or on the court’s motion. After a period of public consultation, the Ministry of Justice, which has inherited the role previously designated to the Department for Constitutional Affairs, published a consultation paper on the issue of openness in family law courts.¹²¹ The Ministry for Justice found from its completion of a public consultation on the issue, that the key issue in openness of the courts is not who has access to the family law courts in order to obtain information about the cases for the purposes of reporting them. Instead, they found that the key question is who has access to the information emanating out of the family law courts in relation to the decisions taken by those courts.¹²²

3.87 In the recent case of *Norfolk County Council v Webster*,¹²³ the High Court allowed for an order to be lifted which prohibited a couple talking to the media about their case. The case related to the adoption of their fourth child. As a result, the couple are now permitted to talk to the media about that case. Mr Justice Munby held that in a case where a miscarriage of justice had been claimed

¹¹⁹ [1998] 1 All ER 973 at 974.

¹²⁰ Department for Constitutional Affairs *Confidence and confidentiality: Improving transparency and privacy in family courts* Consultation Paper (CP11/06 June 2006)

¹²¹ Ministry for Justice *Confidence and confidentiality: Openness in family courts-a new approach* (CP 10/07 June 2007).

¹²² *Ibid* at 15.

¹²³ [2006] EWHC 2733.

“it is more than usually important that the truth—the full truth—should out. If, as the parents allege, they have lost three children and stand at risk of losing a fourth due to the deficiencies in the system, then there is a pressing need for the true facts to be exposed. If, on the other hand, the parents are wrong, and the system has performed conscientiously, competently and correctly, then it is equally highly desirable that this should be known and published.”

This case is the first private care case that has been open to public scrutiny. It follows in the wake of *Clayton v Clayton*¹²⁴ where the Court of Appeal held that the prohibition contained in section 97 of the *Administration of Justice Act 1960*¹²⁵ preventing the publication of any material likely to identify a child involved in court proceedings under particular Acts comes to an end when the proceedings are concluded. Instead, judges will balance in any case whether an entitlement to anonymity should outweigh the right to freedom of expression.

(iii) New Zealand

3.88 The law in relation to the reporting of family law cases involving children changed in New Zealand on 1 July 2005. Section 139 of the *Care of Children Act 2004* allows for accredited media to attend cases involving children and for limited persons to be permitted to be present at the discretion of the court, such as support persons. Additionally, any person is permitted to publish reports of cases involving children provided all the identifying details have been omitted. In New Zealand, guidelines as to anonymity have been drafted so that every judgment is to be written in such a form as to be ready for professional publication. This also ensures consistency in judgments.

(c) Company Law Cases¹²⁶

3.89 As discussed above, the Oireachtas has legislated for areas beyond those expressly contained in section 45(1) of the 1961 Act in relation to which the court may hear proceedings in the absence of the public. Section 205(7) of the *Companies Act 1963* provides that any court hearing actions involving alleged oppression of a company shareholder may order that the hearing of the proceedings or any part thereof be heard *in camera*.

3.90 In the past, the courts were more favourable towards such applications, and many such applications were granted. A change in attitude

¹²⁴ [2006] EWCA Civ 878, [2006] 3 WLR 599. *Clayton v Clayton* was followed in *In Re Webster (A Child)* [2006] EWHC 2733.

¹²⁵ 1960, chapter 65.

¹²⁶ See Courtney *The Law of Private Companies* (2nd ed Butterworths 2003) at 1116-8.

in the courts became apparent in *In re R Ltd.*¹²⁷ The Court noted that the discretion vested in the court by section 205(7) of the *Companies Act 1963* cannot be “exercised unless the court is of the opinion that the hearing of the proceedings under the section would involve the disclosure of information the publication of which would be seriously prejudicial to the legitimate interests of the company”.¹²⁸ The Court added an additional layer to the test by declaring that once it is shown that the publication is seriously prejudicial to the interests of the company, it is then necessary for an applicant to demonstrate that “the public hearing of the whole or part of the proceedings which it is sought to have heard other than in public court would fall short of the doing of justice”.¹²⁹ The Court stressed that the nature of section 205 proceedings relate to a juristic person and are not the private affairs of a human person.¹³⁰ The Court was satisfied that sensitive commercial information would be disclosed during the proceedings, but did not find that this would be sufficient to impede the doing of justice being done between the parties. On that basis the Court found that the High Court had been incorrect to order that the proceedings be heard *in camera*.

3.91 The law applicable to the hearing of applications under section 205(7) of the *Companies Act 1963* was examined in *Irish Press plc v Ingersoll Irish Publications Ltd*¹³¹ in which the Supreme Court provided a summary of the jurisprudence in respect of section 205. It is clear from that judgment that the courts do not make an order allowing for such proceedings to be heard *in camera* unless they are satisfied that to do otherwise would cause injustice to the parties or be seriously prejudicial to the legitimate interests of the parties. Such cases are relatively rare, and the courts do not grant such orders in the normal course of events.

3.92 There is a clear contrast in the level of transparency between family law proceedings and company proceedings taken pursuant to section 205. Often, very sensitive commercial material is dealt with in public in section 205 cases. The inconsistency between section 205 cases and family law cases is stark.

(d) Issues regarding the *in camera* rule and sensitive cases

3.93 However, if proceedings do not come within the exceptions in section 45(1) of the 1961 Act or legislation enacted pursuant to section 45(2), there is no jurisdiction given to judges to hear cases (or parts of their

¹²⁷ [1989] 1 IR 126.

¹²⁸ *Ibid* at 136.

¹²⁹ [1989] 1 IR 126 at 137.

¹³⁰ [1989] 1 IR 126 at 137.

¹³¹ [1993] ILRM 747.

cases) in private at their discretion, even where the needs of the parties dictate that justice will not be met if the case is heard in public. A related issue is the fact that it is not possible for a case to be conducted using an alias to protect the identity of an individual. It has been commented that a possible reason for this lacuna is the reference to “special and limited cases” in Article 34.1 of the Constitution.¹³²

3.94 The Commission is acutely aware of the recent High Court case *R(M) v R(T)*¹³³ which involved a former husband and wife contesting ownership and consent issues vis-à-vis embryos. Counsel for the woman asked the court to ask the media not to identify the parties because of their two children and the private nature of the case. Mr Justice McGovern was unable to accede to this request as the court had no jurisdiction to make such an order. In the circumstances, the sole option available to Mr Justice McGovern was to request the media to exercise sensitivity in the case. Despite this request by the High Court Judge, a number of Irish newspapers printed both the name of the parties involved and their photograph. Similar considerations arise in relation to applications pursuant to section 117 of the *Succession Act 1965*. These applications relate to whether a testator has failed in his or her moral duty to make proper provision for a child in accordance with his means. However, these proceedings are heard “in chambers”.¹³⁴

3.95 The issue of whether a court had the power to order an *in camera* hearing outside of the civil cases prescribed by law was considered as a preliminary issue in *In re Ansbacher (Cayman) Ltd.*¹³⁵ The applicants in this case were solicitors for two of the persons who had been informed that their names were to appear in the Ansbacher Report as clients of the company. They sought an order directing that this application and any subsequent applications in the proceedings be heard *in camera*, or alternatively seeking a direction from the court as to the manner in which the proceedings were to be heard. Mr Justice McCracken examined the earlier case of *Irish Times v Murphy*¹³⁶ which had held that the right for proceedings to be heard in public (Article 34.1) is limited not only by Acts of the Oireachtas but also by the courts when it is necessary to protect an accused’s persons constitutional

¹³² Forde *Constitutional Law* (2nd ed Firstlaw 2004) at 501.

¹³³ Two judgments were given in this case. The first is at [2006] IEHC 221 High Court (McGovern J) 18 July 2006 and the second *MR v TR and ors* [2006] IEHC 359 High Court (McGovern J) 15 November 2006. For an analysis of this case see Coveney “Assisted Reproductive Technologies and the Status of the Embryo [2007] 13 MLJI 14.

¹³⁴ Section 19 of the *Succession Act 1965*.

¹³⁵ [2002] 2 ILRM 491.

¹³⁶ [1998] 1 IR 359.

right to a fair trial, pursuant to Article 38.1 of the Constitution. In *Ansbacher*, Mr Justice McCracken took the view that as Article 38.1 relates only to criminal cases, the *Irish Times* case does not establish that the courts have jurisdiction to hear legal proceedings *in camera* and or to permit a party to use a pseudonym in circumstances where such a jurisdiction has not been conferred by law.¹³⁷ He also held that as Article 34.1 protects the public good, it cannot be overridden by the personal right to privacy or the right to a good name simply in order to justify anonymity in a court case. He saw the purpose and rationale of Article 34.1 as follows:

“The fact that Article 34.1 requires courts to administer justice in public by its very nature requires the attendant publicity, including the identification of parties seeking justice. It is a small price to be paid to ensure the integrity and openness of one of the three organs of the State namely the judicial process in which openness is a vital element. It is often said that justice must not only be done, but also be seen to be done, and if this involves innocent parties being accused, that is unfortunate, but is essential for the protection of the entire judicial system.”¹³⁸

He concluded by holding as follows:

“In my view, therefore, there is no possible harmonious construction of the Constitution whereby the applicants’ personal rights could be considered to give rise to any special or limited case prescribed by law as an exception to Article 34.1”¹³⁹

3.96 Although this case appears to clearly and firmly reject any idea of anonymity in proceedings outside those within the “special and limited” cases prescribed in the legislation or in the Constitution, there is an argument which was not advanced during this case. It remains to be decided what will result if the constitutional right to privacy is breached by publication of the person’s name (for example for facts similar to *Ansbacher*), yet the act of attempting to assert constitutional rights itself destroys the right as there is no possibility of anonymity.

3.97 A relevant issue to *in camera* hearings was discussed in *Roe v Blood Transfusion Service Board*,¹⁴⁰ where the plaintiff sought an order

¹³⁷ [2002] 2 ILRM 491 at 500.

¹³⁸ [2002] 2 IRLM 491 at 505.

¹³⁹ [2002] 2 ILRM 491 at 504.

¹⁴⁰ [1996] 1 ILRM 555. See also the earlier decision in *Claimant v Board of St. James’s Hospital ex tempore* High Court (Hamilton P) 10 May 1989. where it was stated:

“As I say, Article 34 of the Constitution is quite specific, it is mandatory. It says that justice shall be administered in public and, having regard to the statement of the Chief Justice and Walsh J [in *In re R Ltd*] that proceedings, including pleadings, affidavits

permitting her to maintain proceedings using an alias in order to prevent embarrassment and real injustice to her. She argued that she would be socially ostracised and discriminated against if it became known in her local community that she suffered from hepatitis C. The plaintiff had contracted hepatitis C and alleged that the defendants were responsible for this. She had pleaded the case using an alias 'Bridget M. Roe'. She was contactable 'care of' her solicitors at their address. The plaintiff accepted that as her case did not come within the terms of section 45 of the *Courts (Supplemental Provisions) Act 1961*, the trial of the action would be held in public and she would have to give oral testimony. Despite this, she argued that Article 34.1 of the Constitution did not amount to an impediment to the granting of relief sought, as she was not seeking a hearing in private.

3.98 Ms Justice Laffoy rejected the applicant's claim as she was of the opinion that:

"in the context of the underlying rationale of Article 34.1, the public disclosure of the true identities of parties to civil litigation is essential if justice is to be administered in public. In a situation where the true identity of a plaintiff in a civil action is known to the parties to the action and to the court but is concealed from the public, members of the general public cannot see for themselves that justice is done".¹⁴¹

3.99 Most recently the issue of anonymity in circumstances other the prescribed cases in this jurisdiction was discussed by the European Court of Human Rights.¹⁴² The applicant in the relevant case, known as D, claimed that the unavailability of abortion to her in Ireland in circumstances where the foetus suffered a life threatening abnormality was a denial of her rights. As a preliminary issue, the European Court of Human Rights had to decide whether the applicant had exhausted all of her legal remedies in national law. The applicant argued that she could not take her case to any court in this jurisdiction as her anonymity could not be guaranteed and the case would not be heard *in camera*.

3.100 In its submissions, the Irish government argued that "it was improbable in the highest degree" that the proposed domestic remedies would have resulted in the forcible disclosure of the applicant's identity. They also argued that as the case involved a foetus, the matter could fall within section 45(1) of the 1961 Act, as it concerned a minor. The

exhibits, as well as oral testimony, I can find nothing in the law or the Rules of Courts which would permit me to accede to this application..."

¹⁴¹ [1996] 1 ILRM 555 at 559.

¹⁴² *D v Ireland* Application No 26499/02 Decision of the Fourth Section 27 June 2006.

government referred to the cases of *Attorney General v X*¹⁴³ and *A&B v Eastern Health Board, Mary Fahy, C and the Attorney General*¹⁴⁴ for the proposition that Irish courts always treated sensitive cases with care. However, both of these cases involved minors, and this was not necessarily the same as the instant case. Finally the government argued that although it was most likely that the applicant's case would be heard in open court, it was likely that her name or identity would not be disclosed. They also alluded to the fact that it was common for judges in sensitive cases to request that journalists not reveal the identity of the litigant. At this juncture, it is worth noting the futility of such requests, in practical terms, as seen in the recent case of *R (M) v R (T)*.¹⁴⁵

3.101 The applicant argued that her identity would have been disclosed in litigation before the Irish courts, and that given the abortion debate in Ireland, she would have attracted immense national and international media attention. She had two minor children at the time.

3.102 The Court was not persuaded by the arguments of the government that the applicant's case would be captured by section 45(1) as it related to the exception for proceedings connected with minors. The Court took the view that the judgment of Mr Justice McCracken in *Ansbacher* did not exclude as a matter of principle a case such as the 'D' case from the exception to the publicity rule. The Court found that Mr Justice McCracken assessed the particular and individual circumstances of the applicants in that case before refusing them the *in camera* order sought. This suggests that should an appropriate non-criminal case come before the courts, such an order would be made. The European Court of Human Rights was of the opinion this was a far stronger case for the exception given the intimate and personal nature of the subject matter of the proceedings, as the media attention would be exceptionally intrusive. The Court noted that the government's assertions that there were practices open to the applicant to ensure her identity remain secret were indefinite.

3.103 Finally, the Court acknowledged that there was some uncertainty attached to the guarantee of confidentiality with respect to the applicant's identity. It was of the view that she should have issued a plenary summons seeing an urgent, preliminary, *in camera* hearing to elicit the High Court's response to her publicity concerns. In this respect, the Court referred to the

¹⁴³ [1991] 1 IR 1.

¹⁴⁴ [1998] 4 IR 464.

¹⁴⁵ Two judgments were given in this case. The first is at [2006] IEHC 221 High Court (McGovern J) 18 July 2006 and the second *MR v TR and ors* [2006] IEHC 359 High Court (McGovern J) 15 November 2006.

fact that in the cases of *Re A Ward of Court* and *Roe*, such a preliminary hearing was heard *in camera* to deal with the issue of publicity.

3.104 The applicant in the ‘D’ case was granted confidentiality before the European Court of Human Rights pursuant to Rules 33(3) and 47(3) of the Rules of Court of the European Court of Human Rights. Briefly, Rule 33 provides that documents deposited with the Registry in connection with an application before the European Court of Human Rights are accessible to the public. A request for confidentiality of the documents may be made, giving reasons and specifying which documents are to be inaccessible to the public.¹⁴⁶ Rule 47 sets out the contents of an application lodged before the Court. The Rule requires applicants who do not wish for their identity to be disclosed to the public to submit a statement of reasons as to why this should be the case. The President of the Chamber is empowered to authorise anonymity in “exceptional and duly justified cases.”¹⁴⁷

(e) Discussion

3.105 It is clear that worthwhile reform has taken place in this jurisdiction in the family law arena. A possible lacuna within section 40(6) of the *Civil Liability and Courts Act 2004* has also been highlighted.

3.106 As can be seen from the body of this Chapter, other jurisdictions are increasingly recognising the benefit of allowing anonymised judgments in cases involving children to be made available to the public in order for much needed public scrutiny to take place in such cases. It is also imperative that privacy is still maintained in such cases. The Commission welcomes submissions on whether the area of family law should become more open to the public. The Commission acknowledges the worthwhile nature of section 40(6) of the 2004 Act in that it allows the production of documents prepared for or used in family law matters to be furnished in other specified proceedings. Therefore, the possible exclusion of the *Guardianship of Infants Act 1964* from the section could cause injustice to parties as it appears that an absolute embargo would apply should the Act be outside the ambit of the section.

3.107 The Commission is also conscious that various phrases are used in legislation concerning proceedings being heard in private. A number of provisions state that proceedings can be heard “otherwise than in public”,¹⁴⁸ or “heard *in camera*”,¹⁴⁹ and “heard in chambers”.¹⁵⁰ It is the view of the

¹⁴⁶ Rule 33(3) of Rules of Court of the European Court of Human Rights July 2006.

¹⁴⁷ Rule 47(3) of Rules of Court of the European Court of Human Rights July 2006.

¹⁴⁸ For example section 14(1) of the *Family (Protection of Spouses and Children) Act 1981* and section 3(5) of the *Adoption Act 1988*.

¹⁴⁹ Section 20(2) of the *Adoption Act 1952*.

Commission that it would be beneficial for a common phrase to be used in legislation providing for cases to be heard otherwise than in public.

3.108 The apparent willingness of the courts to allow the dissemination of highly sensitive information in company law cases is difficult to reconcile with the strict interpretation given to family law cases. The Commission believes it appropriate for this anomaly to be highlighted.

3.109 The Commission is cognisant that protection for privacy and sensitivity is already catered for in Irish law. One example is the provision made in respect of rape trials under the *Criminal Law (Rape) (Amendment) Act 1990*. At all times the anonymity of the complainant and the accused is protected and the verdict, decision and sentence are announced in public and available for publication.¹⁵¹ The *in camera* rule regarding rape cases was reformed following the Law Reform Commission's *Report on Sexual Abuse*,¹⁵² which recommended that the press be admitted to private hearings subject to safeguards. The Commission is aware that this procedure has worked well in criminal trials, and that the media has taken a responsible attitude in the arena of rape cases.

3.110 It is worth considering whether the courts in this jurisdiction should be vested with discretion to allow for cases outside those currently outlined in the relevant legislation to be heard *in camera*. Should this discretion be vested in judges, it would be necessary for strict guidelines to be laid out for judges in order for consistency to be maintained. It is further worth considering whether in exceptional cases the parties should be entitled to maintain proceedings using a pseudonym or fictitious name. In this regard, it is useful to take note of the approach taken in the Rules of Court of the European Court of Human Rights.

3.111 In the United States, although the Federal Rules of Civil Procedure require "in the complaint the title of the action shall include the names of all the parties",¹⁵³ under special circumstances the courts have permitted plaintiffs to use fictitious names in cases which involve matters of a sensitive and highly personal nature. Such cases include those involving issues such as birth control,¹⁵⁴ abortion¹⁵⁵ and the welfare rights of children

¹⁵⁰ Section 25(2) of the *Family Home Protection Act 1976* and sections 56, 119 and 122 of the *Succession Act 1965*.

¹⁵¹ Section 11(4) of the *Criminal Law (Rape) (Amendment) Act 1990*.

¹⁵² Law Reform Commission *Report on Sexual Abuse* (LRC 32-1990).

¹⁵³ Federal Rules of Civil Procedure P 10(a).

¹⁵⁴ *Poe v Ullman* 376 US 497 (1961).

¹⁵⁵ *Roe v Wade* 410 US 113 (1973).

born outside marriage.¹⁵⁶ In such cases, the normal practice is that the disclosure of the parties' identities yields to "a policy of protecting privacy in a very private matter."¹⁵⁷ The courts apply the following test in such cases:

"The ultimate test of permitting a plaintiff to proceed anonymously is whether the plaintiff has a substantial privacy right which outweighs the customary and constitutionally-embedded presumption of openness in judicial proceedings."¹⁵⁸

3.112 Although it appears from the *Ansbacher* case that it is not possible from a constitutional point of view to allow for an individual's constitutional right to privacy to outweigh the public good in having cases heard in public, it is arguable that the principles emerging from *Ansbacher* may not be absolute in civil cases. First, the following argument was not put before the court: what is the position if the constitutional right to privacy is breached by publication of the person's name (for example for facts similar to *Ansbacher* or *Roe v Blood Transfusions Services Board*), yet the act of attempting to assert one's constitutional rights itself destroys the right as there is no possibility of anonymity. Secondly, as recognised by the European Court of Human Rights in *D v Ireland*, Mr Justice McCracken examined the individual circumstances of the applicants in *Ansbacher*, thereby suggesting that should the appropriate case come before the Courts, an exception to the publicity rule may be granted.

3.113 However, the Commission believes it necessary in the interests of justice for a more general rule protecting the anonymity of parties to be provided for exceptional cases that are currently outside the ambit of the *in camera* rule where the needs of justice dictate that the parties not be identified. In such matters, an application would be made to a judge who would have the discretion to apply the *in camera* rule. The Commission suggests that the public and media be permitted to attend and report on the proceedings, but that the parties' anonymity remains protected. This rule would cover situations such as the *D*, *Ansbacher* and *Roe* cases. The Commission believes that the test applied by the US courts¹⁵⁹ is a useful standard to be considered in devising suitable criteria for the application of discretion.

¹⁵⁶ *Doe v Carleson* 356 US 753 (1973).

¹⁵⁷ *Southern Methodist University Association of Women Law Students v Wynne* 599 F.2d 707 (5th Cir 1979).

¹⁵⁸ *Roe v Aware Woman Centre* 253 F.3d 678 (11th Cir 2001).

¹⁵⁹ *Roe v Aware Woman Centre* 253 F.3d 678 (11th Cir 2001).

3.114 *The Commission provisionally recommends that a more general rule protecting the anonymity of the parties to proceedings be provided for exceptional cases currently outside the ambit of the in camera rule where the needs of justice dictate that the parties not be identified. The Commission provisionally recommends that a party should be enabled to make an application for such relief and that it should be at the discretion of the judge whether to grant the relief. The Commission considers that the public and media be permitted to attend and report on such proceedings but that the parties should not be identified. The Commission welcomes submissions on the criteria to be applied in such applications.*

(3) *Vesting of statutory jurisdiction in statutory bodies and the removal of court jurisdiction in other areas*

3.115 This section deals with the removal of jurisdiction from the courts and the vesting of such jurisdiction in statutory bodies. This section mainly deals with the issue of fixed charge penalties, which are devices that divert minor offences from the courts. There has been considerable discussion on the increased use of such devices by the Law Commission of New Zealand and the Committee on Court Practice and Procedure and their use has been addressed by the European Court of Human Rights. The views of these bodies are examined in this section. The Commission also notes the increase in the use of penalties both in number and in the type of offences to which they apply. It is also considered in this section whether criteria can be devised which could apply to the use of fixed penalty offences in order to ensure consistency.

3.116 In a 2001 lecture, Mr Justice Keane noted that:

“The vesting of some statutory jurisdiction in the courts also calls urgently for reappraisal. Local authorities are now entrusted with the grant of permissions and licences in areas of enormous importance, such as planning and the environment generally. The retention by the District Court and the Circuit Court of a licensing jurisdiction in the case of alcohol can be seen, in this context, as an anachronistic survival which is also wasteful of judicial resources”¹⁶⁰.

3.117 Increasingly, statutory bodies have been vested with statutory jurisdiction. Examples of such bodies include An Bord Pleanála, which is responsible for the determination of appeals and certain other matters under the *Planning and Development Acts 2000 to 2004*, and the Equality Tribunal under the *Employment Equality Act 1998*. Until 1988, applications for

¹⁶⁰ Keane “*The Irish Courts System in the 21st Century: Planning for the Future*” (2001) 6(6) Bar Review 321.

renewals of liquor licenses were heard by the District Court. By virtue of section 4 of the *Courts (No. 2) Act 1986*, a licence holder may now apply for a renewal of most liquor licences from the Revenue Commissioners. An application to the District Court for the renewal of a liquor licence is only required in certain circumstances, such as the instance where an objection has been lodged against the renewal of the licence. However, it is also worth noting that section 19 of the *Intoxicating Liquor Act 2003* provides that a person who has been discriminated against on one of the grounds contained in the *Equal Status Acts 2000 and 2004* must bring their case to the District Court. Such cases were previously dealt with by the Equality Tribunal. The *Residential Tenancies Act 2004* confers much of the jurisdiction formerly exercised by the Circuit Court in landlord and tenant matters on the Private Residential Tenancies Board.

3.118 The removal of court jurisdiction is also seen in the increased use of fixed penalties, which provide that should an accused pay a fixed penalty (often known, inaccurately, as an ‘on the spot fine’), the need for recourse to the courts is obviated. It is the opinion of the Commission that the increased use of fixed penalties requires further examination.

3.119 The benefit of such penalties is that they are easy to administer, generally provide for a proportionate response to a minor offence, remove a minor offence from needlessly heading to the arena of the courts and from the stigma attached to appearing before the courts and finally, they are a uniform penalty for all who have committed that particular offence. The primary argument levelled against such penalties is that they can increase ‘net-widening’ of individuals. That is to say, individuals are diverted from the formal criminal justice system as they are given a fixed penalty as a consequence of their behaviour. Their behaviour is relatively minor in nature and ordinarily would not be subject to a serious penalty such as to bring them within the ambit of the criminal justice system. However, should the individual be in default of payment of a fixed penalty, then there is a possibility of imprisonment or some other form of formal punishment, thereby widening the net of people within the criminal justice system and the control of the state.

3.120 Increasing use is now being made of fixed charge penalties. Recent proposals include those in the *Criminal Justice Act 2006* and the *Road Traffic Act 2006*. For example, section 5 of the *Road Traffic Act 2006* provides for a fixed charge penalty of €300 and disqualification for certain drink-driving offences. The section allows for an administrative procedure to be chosen by a person who allegedly committed the offence of being in charge of a vehicle while under the influence of alcohol¹⁶¹ or driving while

¹⁶¹ An offence pursuant to section 50 of the *Road Traffic Act 1961* as inserted by section 11 of the *Road Traffic Act 1994*.

under the influence of alcohol,¹⁶² and who did not exceed certain levels of alcohol in their blood, urine or breath. In such circumstances, the person can choose to be served with a fixed disqualification notice, pay the sum of €300 and have a 6 month driving disqualification endorsed on his or her licence, without any prosecution being initiated against them. This option is not available to people who have been convicted of either of the two offences outlined above within the previous five years. If the individual decides not to choose the administrative procedure, criminal proceedings will be instituted against them. This section awaits commencement. It is worth noting that should the individual decide not to choose the fixed penalty procedure and instead have criminal proceedings initiated, they are liable for a one year disqualification on a first offence or two years for a second or subsequent conviction.¹⁶³ Section 184 of the *Criminal Justice Act 2006* provides for a new section 23A to be inserted into the *Criminal Justice (Public Order) Act 1994*, which provides that a member of an Garda Síochána who has reasonable grounds for believing that a person (who is not under 18) is committing or has committed the offence of disorderly conduct in a public place¹⁶⁴ may serve a fixed charge notice on that person either personally or by post.

3.121 Another emerging feature of fixed charge penalties in this jurisdiction is the recent introduction of a provision that permits the agency imposing the penalty to retain the amount paid. Section 79(3)(b) of the *Safety, Health and Welfare at Work Act 2005* permits the Health and Safety Authority to retain funds paid to it pursuant to a fixed charge penalty imposed by a HSA Inspector. The fixed charge penalties that will be captured by this provision have not yet been specified in Regulations.

3.122 The Law Commission of New Zealand has considered in some detail the issue of infringement offences, which are the same as fixed charge penalties.¹⁶⁵ They found that for many instances of minor offending, infringement notices (similar to fixed charge penalty notices) provide a sufficient and proportionate response to certain behaviour. They were of the

¹⁶² An offence pursuant to section 49 of the *Road Traffic Act 1961* as inserted by section 10 of the *Road Traffic Act 1994*.

¹⁶³ Section 6 of the *Road Traffic Act 2006* commenced by *Road Traffic Act 2006* (Commencement) Order 2006 SI 86/2007 which provided that the section was to commence on 5 March 2007.

¹⁶⁴ Contrary to section 5 of the *Criminal Justice (Public Order) Act 1994*.

¹⁶⁵ Law Commission of New Zealand *The Infringement System: A Framework for Reform* (Study Paper 16 August 2005). This paper follows a joint discussion paper by the New Zealand Ministry for Justice and the Law Commission of New Zealand entitled *Review of the Infringement System: Options for Reform: A Discussion Paper* (November 2004).

opinion that an infringement offence should never result in imprisonment.¹⁶⁶ They also stated that if the defendant denies liability for an offence he or she should be furnished with the right to apply to court for a determination.

3.123 The main issue uncovered by the Law Commission of New Zealand was that the use of fixed penalties in that jurisdiction had expanded so as to cover a multitude of offences with varying sizes of fixed penalties. The Law Commission of New Zealand commented as follows:

“As a result the system sometimes results in unfairness. High penalties can be imposed in circumstances where the defendant’s rights are diminished and where the penalties can have grossly different impacts on grossly different defendants.”¹⁶⁷

The Law Commission of New Zealand considered the infringement system to be an essential part of dealing with minor offending. However Acting President of the Commission, Dr Warren Young, stated:

“...contemporary conditions demand the reworking of the criteria for infringements. A more sophisticated approach is required that takes account of the needs of the prosecuting authorities in penalising the behaviour and encouraging compliance, but contains adequate protections for defendants.”¹⁶⁸

3.124 To remedy this situation, the Commission recommended that two tiers of fixed penalties be established:

- i) Tier One offences. These offences should have fixed penalties, with an upper limit for fees set at a level, such that it is not worth the expense and effort to challenge them. No opportunity should be provided for the enforcement authorities, or the court to vary the penalty. First tier offences are always subject to the right of the defendant to have the opportunity to request a court hearing to determine liability.
- ii) Tier two offences. These should include offences that can still be dealt with by way of a fixed penalty but where the penalty for the offending is higher than for tier one offences. For tier two offences, there must be administrative means by which the circumstances of the offender and the offence can be taken into

¹⁶⁶ Law Commission of New Zealand *The Infringement System: A Framework for Reform* (Study Paper 16 August 2005) at 15.

¹⁶⁷ Press release of Law Commission of New Zealand *The Infringement System: A Framework for Reform* (Study Paper 16 August 2005).

¹⁶⁸ Law Commission of New Zealand Media Release “Law Commission proposes overhaul of infringement system” available at <http://www.lawcom.govt.nz>.

account, and the penalty reduced if not to do so would result in undue hardship. The offender should also be able to challenge the level of the penalty in court. In relation to tier two offences, enforcement authorities are vested with the discretion to proceed summarily to enable them to deal with a recidivist defendant or with particularly grave instances of offending.

3.125 The issue of fixed penalties has been considered by the European Court of Human Rights on a number of occasions. The Court was invited to consider whether lesser offences that were punishable by a fine attracted the full protection of the rights contained in Article 6 of the European Convention on Human Rights. Article 6(1) of the European Convention on Human Rights provides:

“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 by an independent and impartial tribunal established by law...”

3.126 This Article provides a number of safeguards in criminal cases so as to ensure that the rights of the accused are protected. In two cases, the Court stated that the nature and severity of the offence and penalty was relevant, and that although a country had decriminalised a number of offences this did not affect the classification of an offence under the ECHR. *Lutz v Germany*¹⁶⁹ involved a minor road traffic offence whereby the applicant had caused an accident. In *Schmautzer v Austria*¹⁷⁰ the Plaintiff had been stopped when driving his car without wearing a seat belt. In these cases the Court found that despite local classification as ‘administrative’ these offences were ‘criminal’ in nature and that accordingly, Article 6 applied.¹⁷¹ This means that where a decision is taken by an administrative authority in relation to an offence to which Article 6 applies, the decision of the administrative authority must be subject to subsequent review by a “judicial body that has full jurisdiction.”¹⁷² Without such recourse, the procedure would be inconsistent with the Convention. In *Ozturk v Germany*,¹⁷³ the European Court of Human Rights had to decide whether careless driving, although treated as a ‘regulatory’ non criminal offence under German law, in fact amounted to a criminal offence for the purpose of

¹⁶⁹ (1988) 10 EHRR 182

¹⁷⁰ (1996) 21 EHRR 511.

¹⁷¹ *Lutz v Germany* (1988) 10 EHRR 182 and *Schmautzer v Austria* (1996) 21 EHRR 511.

¹⁷² *Schmautzer v Austria* (1996) 21 EHRR 511 at 525 and *Ozturk v Germany* (1984) EHRR 409 at 425.

¹⁷³ (1984) 6 ECHR 409.

Article 6 of the European Convention. The Court decided that it would be contrary to the object and scope of Article 6 if a state were permitted to remove offenders from the scope of Article 6 merely because the offences were not serious. The Court found the fact that the rule of law infringed by the applicant prescribes conduct of a certain kind and subjected this behaviour to punitive deterrent penalties was sufficient to show that the offence was criminal in nature.¹⁷⁴ The Court concluded by stating that the conferral on administration authorities of the power to prosecute and punish minor offenders is not inconsistent with the Convention, provided that the person concerned is able to appeal any decision made against him to a tribunal that offers the guarantee of Article 6.¹⁷⁵

3.127 These cases demonstrate that the European Court of Human Rights is concerned with the severity of the offence and the penalty imposed in respect of such offences and not with the classification of the offences by the national legislature. While recognising the benefit of diverting such offences from the national courts, the European Court recognised that protections must be afforded to those affected by these penalties. In this regard, the Law Commission of New Zealand was also aware of the injustice that could be caused to those convicted of offences that are subject to fixed penalties.

3.128 The use of fixed penalties has also been examined in this jurisdiction. In its 5th Interim Report, the Committee on Court Practice and Procedure considered the system of on the spot fines. The Committee recommended that the option for the accused to either pay a fixed penalty or stand trial could be extended to other petty offences that do not involve an appreciable degree of moral culpability.¹⁷⁶

3.129 The Committee on Court Practice and Procedure considered fixed charge penalties in more detail in its 15th Interim Report.¹⁷⁷ The Committee noted that in the wake of its 5th Interim Report, the system of on the spot fines had operated well and resulted in the substantial saving of the time of the District Court, Gardaí and of other parties attending court. The Committee reiterated that their use could be advantageous in relation to petty offences which do not involve an appreciable degree of moral culpability. The Committee took the view that such a system would not contravene the

¹⁷⁴ (1984) 6 ECHR 409 at 424.

¹⁷⁵ This was reiterated in *Lutz v Germany* [1987] 10 EHRR 182.

¹⁷⁶ Fifth Interim Report of the Committee on Court Practice and Procedure *Increase of Jurisdiction of the District Court and the Circuit Court* (Stationery Office Dublin Pr 8936 1966) at 22.

¹⁷⁷ Fifteenth Interim Report of the Committee on Court Practice and Procedure *On the Spot Fines* (Pr 2349 1971).

provisions of the Constitution, as it does not amount to the running of a trial. Instead they give the accused person the right to choose between paying the fixed penalty or going to court for trial.

3.130 The Committee recommended that the fixed charge penalty system be extended to such offences as failure to display a tax disc, not having a television licence, street trading without a licence and litter offences. The Report contained a strong dissent from Mr Justice Kenny, who felt that the offence of driving with defective tyres or brakes (to which the Committee suggested that an on the spot fine be extended) is a morally culpable act and that to allow it to be punishable by fixed charge penalties would trivialise the offence.

(i) Discussion

3.131 The Commission acknowledges the increased establishment of statutory bodies and the vesting in such bodies of statutory jurisdiction. The Commission believes that these bodies divert caseload from the courts and lessen the wasteful use of judicial resources. The Commission does not propose to express a view on whether such a trend is a worthwhile one, and it confines itself to highlighting the increasing trend.

3.132 The Commission adheres to the view expressed by the Committee on Court Practice and Procedure in its Fifth Interim Report that offences suitable for fixed penalties are those which do not involve an appreciable degree of moral culpability. The Commission is of the opinion that offences that are difficult to establish, such as those which require expert evidence, are not amenable to punishment by way of fixed penalties.¹⁷⁸ It is arguable that section 6 of *Road Traffic Act 2006*, which provides the option for a person who has committed a drink driving offence to choose an administrative procedure, demonstrates that fixed charge penalties are being used in serious offences. The Commission wishes to express concern at this potential development and seeks to underline the contention that fixed penalties are not designed for such serious offences. The Commission believes that section 6 places undue pressure on accused persons who have to elect at a relatively early stage and possibly without the benefit of legal advice, whether to challenge the offence in court. In addition, should a person choose to challenge the offence in court, they may be liable to a heavier driving ban than the ban to which they would be subject if they chose to pay the fixed penalty. The Commission believes that the subjective nature of section 23A of the *Criminal Justice (Public Order) Act 1994* means that the offence may not be suitable to be subject to a fixed penalty. The fact that there is no possibility of imprisonment for this offence, as the

¹⁷⁸ Legislation Advisory Committee (New Zealand) *Guidelines on Process and Content of Legislation* (2001) at paragraph 12.5.3. Available at www.justice.govt.nz/lac/.

only possible punishment is a fine of up to €634.87, lessens but does not completely remove the argument that the offence is not suitable for a fixed charge penalty.¹⁷⁹

3.133 The Commission also adheres to the view of the Law Commission of New Zealand that in no circumstances should imprisonment ever follow from non compliance with an on the spot fine. This is because the type of offending to which on the spot fines apply is too minor in nature to justify, in any circumstances, the imposition of a term of imprisonment. However, the Commission acknowledges that consideration may be given to recidivist offenders where once a number of defaults have occurred, the possibility of imprisonment may be a useful punishment.

3.134 The Commission is concerned at the prospect of a provision that permits revenue generated by fixed charge penalties to be available for use by the agency that imposed the penalty.¹⁸⁰

3.135 The Commission recognises the benefits in diverting minor offences from the courts by using the fixed penalty system. However, the Commission is of the opinion that a person subjected to a fixed charge penalty should be afforded a right to recourse to the courts if they dispute liability in respect of the penalty. The Commission follows the jurisprudence of the European Court of Human Rights that any person upon whom a fixed penalty has been imposed should be permitted to appeal or query this imposition to a tribunal which will guarantee basic fairness. Additionally, the Commission found the detailed work completed by the Law Commission of New Zealand in this area to be most beneficial and has considered the proposals advanced by that Commission regarding the use of fixed penalties. The Commission also acknowledges that net-widening is an unwelcome disadvantage of the use of fixed penalties.

3.136 It is the opinion of the Commission that given the increase in the level of seriousness of offences now subject to punishment by fixed charge penalty notice, consideration should be given to the proposal of the Law Commission of New Zealand that there be a two tier system of fixed penalties. This two tier system is based on the gravity and level of penalty.

3.137 *The Commission provisionally recommends that detailed criteria should be drafted in order for a consistent policy to be maintained in respect of offences that are punishable by a fixed penalty. The Commission provisionally recommends that the criteria should include:*

¹⁷⁹ Section 5(2) of the *Criminal Justice (Public Order) Act 1994* provides that a person found guilty of an offence of disorderly conduct in a public place shall be liable on summary conviction to a fine not exceeding €634.87.

¹⁸⁰ Section 79(3)(a) of the *Safety, Health and Welfare at Work Act 2005*.

- i) *Proportionality between harm and degree of culpability;*
- ii) *Recourse to the courts should be available at the behest of the accused;*
- iii) *The fixed penalty fine should be relative to other fixed penalty fines, depending on the seriousness of the offence;*
- iv) *Fixed penalties should only be available in relation to summary offences;*
- v) *Defendants should not face a term of imprisonment in default of payment of a fixed penalty;*

(4) *The appeals system in general, including leave to appeal in criminal cases*

(a) *Introduction*

3.138 This section deals with appeals in general in both criminal and civil matters. First, the theory behind appeals is examined in order to place the topic in its rightful legal landscape. The leave requirement is the main issue discussed in this section. This is not surprising, given the recent literature on the issue of appeals in criminal and civil appeals in the United Kingdom. The section examines whether the leave requirement as it currently operates achieves its declared purpose and whether it needs to be reformed. There has been an emerging recognition of the inherent delay and hardship caused by unjustified appeals. The leave requirement can act as an appropriate filter for unmeritorious or frivolous appeals.

3.139 The idea of a Court of Appeal is mentioned in this part in recognition of the recent establishment of the Working Group on a Court of Appeal. In this regard, the formation of the Group is noted with no recommendations made by the Commission as the Group has yet to report.

3.140 An appeal is, in essence, a request to a competent tribunal to reconsider a decision arrived at by another body, or a request to the same body to review its decision.¹⁸¹ It is widely acknowledged that appeals serve two purposes. First, they correct mistakes made by lower courts and create some consistency and certainty in the administration of justice. Secondly, theoretically, appeals provide case law precedent and clarify and develop the law. It is a truism to state that the nature and character of an appeal system in any jurisdiction depends on a number of factors operating within the legal system. Blom-Cooper and Drewry suggest that the factors include:

¹⁸¹ Blom Cooper and Drewry *Final Appeal: A Study of the House of Lords in its Judicial Capacity* (Clarendon Press 1972) at 44.

“The structure of the courts; the status and role (both objectively and subjectively perceived) of judges and lawyers, the form of law itself-whether, for example, it is derived from a code or from judicial precedent modified by statute; the attitude of the courts to the authority of decided cases; the political and administrative structure of the country concerned...”.¹⁸²

The nature of the legal system in this jurisdiction involves a further consideration: the Constitution has much influence on the appeal system in the courts. In addition, appeals in criminal matters involve a further aspect: the liberty of an individual. Consequently, in criminal matters there can be appeals on a without prejudice basis and in many instances permission to appeal is required, whereas, by contrast, in civil matters, many appeals are as of right.

3.141 Although it is recognised that in any judicial system appeals are important, it is equally important in any judicial system for there to be finality of litigation and certainty in the law. It is owing to this competing consideration that most jurisdictions have restricted the availability of second appeals and that in certain cases, in order for an appeal to proceed, permission must be obtained either from the court of first instance or the court determining the appeal.¹⁸³

3.142 As discussed in Chapter 1 of this Consultation Paper, the procedure of appeals has changed as our legal system has developed. The 1877 Judicature Act introduced a more expansive more of appeal. Prior to the Act, only a procedural form of appeal was available. This allowed for appeals against technical errors on the face of writs; once the facts were proven and the case was correctly pleaded no appeal was available. The expansion of the appeals available was inspired by a concern for fairness in the judicial system and a desire for certainty in the substantive law.

3.143 With respect to the substantive law on appeals, differing approaches are taken as to whether one opportunity to appeal is sufficient.

¹⁸² Blom Cooper and Drewry *Final Appeal: A Study of the House of Lords in its Judicial Capacity* (Clarendon Press 1972) at 45.

¹⁸³ Although the comments of Lord Wilberforce in *The Amphill Peerage* [1977] AC 547 at 568 are not made in the context of appeals (his comments are made on the finality of a declaration of legitimacy), they are equally applicable to any system of appeals. He stated :

“It is vitally necessary that the law should provide a means for any doubts which may be raised to be resolved, and resolved at a time when witnesses and records are available. It is vitally necessary that any such doubts once disposed of should be resolved once and for all and that they should not be capable of being reopened whenever allegedly, some new material is brought to light which might have borne on the question”.

Depending on the level at which the first appeal is initiated, a further appeal may be available. The advantage of a two tier appeal system is that it provides “the opportunity for legal argument to develop and mature, with the issues being crystallised and refined.”¹⁸⁴ In the past, the view was taken that as far as practicable, there should be two opportunities to appeal judicial decisions in substantive matters.¹⁸⁵ However, it has been increasingly recognised that for judicial resource reasons, this may not be desirable or sustainable. In considering the issue, the Law Commission of New Zealand retracted their earlier contention by narrowing the second right of appeal to matters of law alone.¹⁸⁶ In England and Wales, the 2001 Auld Report discussed the issue of number of appeals and made recommendations on the issue.¹⁸⁷

3.144 A related issue is whether as an appeal progresses up the hierarchy of the judicial system, the number of judges hearing the appeal should increase in an ‘inverted pyramid’ structure. The Law Commission of New Zealand advocated that an appeal from one judge to another is not an ideal model.¹⁸⁸ However, in its later Report, the Commission recognised that such a model was not feasible for issues relating to judicial resources. More specifically, the Commission was of the opinion that an automatic presumption that three judges would hear an appeal was unsustainable on the basis of proportionality (not all appeals are sufficiently complex or important to require the time and resources of three judges on appeal) and efficiency. On that basis they recommended that appeals from a lower court (similar to the District Court in this jurisdiction) should be heard by one judge; appeals from primary criminal court jury trials (in this jurisdiction the Circuit Court and the Central Criminal Court) should be heard by three judges, but the general presumption is that two judges hear appeals.¹⁸⁹

3.145 In this jurisdiction, given that there is no central Court of Appeal for civil appeals, unlike the position with criminal appeals in relation to

¹⁸⁴ Royal Commission on the Courts *Report of the Royal Commission on the Courts* (EC Keating 1978) at paragraph 267.

¹⁸⁵ See for example Law Commission of New Zealand *Seeking Solutions Options for Change to the New Zealand Court System* (Preliminary Paper 52 December 2002) at 207.

¹⁸⁶ Law Commission of New Zealand *Delivering Justice for All: A Vision of New Zealand Courts and Tribunals* (NWLR R 85 2004) at 114.

¹⁸⁷ *Auld Review of the Criminal Courts of England and Wales* (Stationery Office October 2001)

¹⁸⁸ Law Commission of New Zealand *Seeking Solutions Options for Change to the New Zealand Court System* (Preliminary Paper 52 December 2002) at 210.

¹⁸⁹ Law Commission of New Zealand *Delivering Justice for All: A Vision of New Zealand Courts and Tribunals* (NWLR R 85 2004) at 275.

indictable offences, civil appeals are heard by a court at the next level in the hierarchy of courts. For example, civil appeals from the District Court are determined by the Circuit Court. The weakness of this approach was recognised by Lord Woolf, who noted that “the more appellate courts there are, the more likely it is that there will be a divergence of approach in appellate decisions, where coherence is essential”.¹⁹⁰ On the other hand, Lord Woolf noted that it would be impracticable for all civil appeals to be heard by a central Court of Appeal and that this would lead to an unmanageable workload for the Court of Appeal. For that reason, he noted that the more beneficial model is for appeals to be heard by the next court in the hierarchy of the courts.

3.146 Some appeals are heard *de novo* or by way of a rehearing, while others are merely based on the transcript of the case. Generally, the lower the court from which the appeal is taken, the more likely it is that the appeal will be by way of a complete rehearing. In appeals heard *de novo*, it is possible for all evidence to be reheard by the appeals court. For example, section 38 of the *Courts of Justice Act 1936* provides for an automatic right of appeal to the High Court in respect of civil matters heard by the Circuit Court. Such appeals are dealt with by way of a rehearing and the decision of the High Court (and High Court on Circuit) is final and unappealable. By contrast, an appeal in a criminal matter from the Circuit Court to the Court of Criminal Appeal is neither automatic nor in the form of a rehearing.¹⁹¹

3.147 There are inherent inconsistencies in appeals in many judicial systems. The main crux of this inconsistency lies in the differing rights of appeal arising depending on what level in the judicial system the appeal is heard. This difficulty has been highlighted by the former Chief Justice, Mr Justice Keane¹⁹² and by the Law Commission of New Zealand.¹⁹³ For example, in this jurisdiction, the only automatic appeal from the Circuit Court in civil matters is to the High Court, irrespective of the complexity or seriousness of the issue arising in the case. The only method of transmitting the case to the Supreme Court is either to appeal the decision of the High Court to the Supreme Court once that court has granted the appellant leave to do so, or else to use the case stated procedure.

3.148 Finally, an issue which has been at the core of appeals is the issue of whether appeals should be available as of right or whether permission to

¹⁹⁰ Lord Woolf *Access to Justice Final Report* (1996 Stationery Office) at 156.

¹⁹¹ Sections 31 and 33 of the *Courts of Justice Act 1924*.

¹⁹² Keane “The Irish Courts System in the 21st Century: Planning for the Future” (2001) 6(6) *Bar Review* 321 at 327.

¹⁹³ Law Commission of New Zealand *Seeking Solutions Options for Change to the New Zealand Court System* (Preliminary Paper 52 December 2002) at 207.

take such appeals should first be obtained. There has been increasing awareness of the delay and cost implications in permitting unmeritorious appeals to be taken. Generally it can be said that there has been an increase in the number of calls for a requirement of leave or permission to apply to most forms of appeals. The Law Commission of New Zealand has stressed the importance of an adequate system for appeals in the justice system:

“The ability to appeal a decision or request a review of the way a decision was reached is fundamental to our system of justice. However, it is a legitimate matter of public policy whether access to an appellate court should be as of right or by leave of the court.”¹⁹⁴

It was on this basis that the Law Commission of New Zealand recommended that the first appeal from a primary court should be a general appeal to a higher court on fact and on law, as of right. A further appeal from the higher court should be on a matter of law only and require leave from the court which would hear the appeal.¹⁹⁵ Additionally, a number of reports have considered the issue of leave in appeal cases and these will be discussed in further detail in this section. An issue related to leave is the question of which court should hear the leave application: the lower court which has decided the case or the higher court which will hear the appeal should be permission be granted.

3.149 The following section will discuss the issues identified above and the differing approaches to these issues. The appeals structure in this jurisdiction differs considerably in the civil and criminal sphere so these will be discussed separately. Similarly, differing considerations apply to appeals in criminal and civil cases. Criminal cases involve a person’s liberty so appeals in criminal cases could be seen to involve more important policy considerations.

(b) Appeals in civil cases and summary criminal matters

(i) District Court

3.150 Section 84 of the *Courts of Justice Act 1924* provides for a *de novo* appeal in civil matters to the Circuit Court from a decision of the District Court. The decision on the appeal in the Circuit Court is final and unappealable. An appeal on a point of law can be taken from the District Court to the High Court while the case is still in progress (consultative case

¹⁹⁴ Law Commission of New Zealand *Delivering Justice for All: A Vision of New Zealand Courts and Tribunals* (NWLR R 85 2004) at 111.

¹⁹⁵ *Ibid* at 114.

stated)¹⁹⁶ or after the case is heard and the judge has made a final determination in the case (appeal by way of case stated).¹⁹⁷

3.151 Section 18 of the *Courts of Justice Act 1928* allows for an automatic appeal to be taken by the defendant in criminal cases from the District Court to the Circuit Court. If the appeal is against conviction and sentence, the appeal is heard *de novo* by the Circuit Court.¹⁹⁸ If the appeal relates only to the sentence imposed by the District Court, then the Circuit Court is not permitted to rehear the whole case. Instead, the Circuit Court will rehear only those portions of the case that are necessary to adjudicate upon the sentence imposed by the lower court.¹⁹⁹ In certain circumstances when provided by statute, a right of appeal is available to the prosecution in summary matters.²⁰⁰

3.152 The Working Group on the Jurisdiction of the Courts (the Fennelly Group) examined criminal appeals in summary matters and concluded that no alteration to the current procedure was required given the general satisfaction of the judiciary and of practitioners with the form of appeal available in such cases.²⁰¹

(ii) Appeals in criminal cases from magistrates' courts

3.153 In England and Wales, only a defendant may appeal from a criminal case determined in the Magistrates' Court, and the *de novo* appeal is heard in the Crown Court.²⁰² This appeal may be taken in respect of conviction and/or the sentence imposed by the Magistrates' Court. Such appeals are heard by two magistrates and a judge. Appeals on a question of

¹⁹⁶ Section 52 of the *Courts (Supplemental Provisions) Act 1961* replacing section 83 of the *Courts of Justice Act 1924*.

¹⁹⁷ Section 2 of the *Summary Jurisdiction Act 1857* as extended by section 51 of the *Courts (Supplemental Provisions) Act 1961*. Section 14 of the 1857 Act provides that where a party chooses to appeal by way of case stated from the District Court to the High Court, they abandon their automatic right of appeal to the Circuit Court.

¹⁹⁸ It was held in *AG (Lambe) v Fitzgerald* [1973] 1 IR 195 that the provisions of section 18 of the 1924 Act permitted an appeal against both conviction and sentence.

¹⁹⁹ Section 50 of the *Courts (Supplemental Provisions) Act 1961*.

²⁰⁰ This right is available under section 310(1) of the *Fisheries (Consolidation) Act 1959*, section 83 of the *Safety, Health and Welfare at Work Act 2005* and section 18(2) of the *Courts of Justice Act 1928*.

²⁰¹ Working Group on the Jurisdiction of the Courts *The Criminal Jurisdiction of the Courts* (Pn237 2003) at 84-85.

²⁰² *Magistrates' Courts Act 1980* chapter 43 section 108. Auld noted in his review of the criminal courts in England and Wales that only 1% of Magistrates' Courts' decisions are appealed. See *Auld Review of the Criminal Courts of England and Wales* (Stationery Office October 2001) at paragraph 16 of Chapter 12.

law alone lie to the divisional court of the High Court by way of case stated.²⁰³

3.154 In his Review of the Criminal Courts of England and Wales, Lord Justice Auld recommended that there should be a single line of appeal from the Magistrates' Courts and higher courts in the court hierarchy to the Court of Appeal (Criminal Division). He was dissatisfied with the duplicity of proceedings, in that there are three forms of appeal available from the Magistrates' Courts: straight appeal to the Crown Court, appeal by way of case stated to the High Court, and judicial review to the High Court.²⁰⁴ He advocated that appeals in respect of criminal cases heard by the Magistrates' Court should lie only to the Crown Division (Crown Court), constituted by one single judge. Auld recommended that such appeals should not be automatic. Instead, he suggested that it should be necessary to obtain permission to appeal from the Crown Court. The proposed leave stage would be in writing, and would in that way be clearly distinguished from the appeal stage.²⁰⁵ Auld proposed that the *de novo* aspect of such appeals should be abandoned. In this way, a more limited review form of appeal would be created. He also recommended the abolition of appeals by way of a case stated from the Magistrates' Court to the High Court.

3.155 Finally, Auld recommended that a second appeal to the Court of Appeal (Criminal Division), from the decision of the Crown Court in respect of the appeal from the Magistrates' Court, should only be available in special circumstances with that Court's permission.²⁰⁶ Under Auld's proposals, the second, limited appeal to the Court of Appeal (Criminal Division) would be the only legal avenue for challenging the decision of the Crown Court sitting in its appellate capacity, as he further recommended that there should be no right of challenge to the High Court by an appeal by way of case stated or by way of judicial review.

3.156 None of Auld's recommendations in relation to appeals from the Magistrates' Courts have been legislated for and the law remains as stated in section 108 of the *Magistrates' Courts Act 1980*.

²⁰³ *Magistrates' Court Act 1980* (chapter 43), section 111. See also paragraphs 3.46 - 3.53 of this Consultation Paper

²⁰⁴ Auld *Review of the Criminal Courts of England and Wales* (Stationery Office October 2001) at 620.

²⁰⁵ *Ibid* at 621.

²⁰⁶ *Ibid* at 623.

(iii) Circuit Court

3.157 There is an automatic appeal in civil cases from the Circuit Court to the High Court. The appeal is heard *de novo*²⁰⁷ and the decision of the High Court (and the High Court on circuit) is final.²⁰⁸ Again, a question of law may be stated from the Circuit Court to the Supreme Court.²⁰⁹ The Joint Committee on the *Courts of Justice Act 1924* recommended that the High Court judge or judges²¹⁰ hearing appeals from the Circuit Court should have the power to state a case to the Supreme Court, but that this should be the only form of appeal from the High Court sitting in its appellate capacity in civil matters.²¹¹

3.158 The Report of the Judiciary Committee in 1923 recommended that civil appeals from the Circuit Court should be heard by two judges of the High Court.²¹² This recommendation was enacted by section 61 of the *Courts of Justice Act 1924*. Section 61 was, however, later repealed by section 3 and the First Schedule of the *Courts of Justice Act 1936*. The Joint Oireachtas Committee on the Courts of Justice Act 1924 made no comment on this aspect of civil appeals from the Circuit Court to the High Court. The Joint Committee did make recommendations in relation to the form of hearing and, following these recommendations, the form of appeal was amended by the 1936 Act so as to be *de novo*.²¹³ The Joint Committee also recommended that civil appeals from Circuit Court decisions should be heard locally at convenient centres.²¹⁴

3.159 The former Chief Justice, Mr Justice Keane, writing extra judicially, expressed dissatisfaction with the *de novo* aspect of every appeal from the District Court to the Circuit Court and from the Circuit Court to the High Court. He noted that the appeal by way of rehearing was particularly “unfortunate” in family law cases as further tension and confrontation is

²⁰⁷ Section 38 of the *Courts of Justice Act 1936*. This right of appeal by way of a complete rehearing has existed since the *Supreme Court of Judicature (Ireland) Act 1877*.

²⁰⁸ Section 39 of the *Courts of Justice Act 1936*.

²⁰⁹ Section 16 of the *Courts of Justice Act 1947*.

²¹⁰ At the time of the Report, appeals from the Circuit Court were heard by two High Court Judges.

²¹¹ See Joint Committee on the Courts of Justice Act 1924 *Report of the Joint Committee on the Courts of Justice Act 1924* (Stationery Office 1930) at liii.

²¹² The Judiciary Committee *Report of the Judiciary Committee* (Stationery Office 1923) at 14.

²¹³ See paragraphs 2.118, 2.120, and 2.122 of this Consultation Paper.

²¹⁴ See Joint Committee on the Courts of Justice Act 1924 *Report of the Joint Committee on the Courts of Justice Act 1924* (Stationery Office 1930) at xxv.

caused by the evidence being heard for a second time during the appeal.²¹⁵ However, it worth considering the view taken by the Joint Oireachtas Committee on the Courts of Justice Act 1924 in 1930. They were of the view that in order for appeals from the Circuit Court to the High Court to be effective, it is necessary for the appeal to take the form of a rehearing. The rationale behind this view was the opinion that new evidence can often come to hand after the determination made by the lower court and that this new evidence should be admissible in the appeal. At the time of the Report of the Joint Committee, appeals in civil matters from the Circuit Court were heard by the High Court using an official transcript of the Circuit Court proceedings, unless the court saw fit to admit new evidence. The recommendation of the Joint Committee was enacted by section 38 of the *Courts of Justice Act 1936* which provides for a *de novo* appeal in civil matters from the Circuit Court to the High Court.

(iv) High Court

3.160 The sole form of appeal that is available from decisions of the High Court in civil matters is an appeal on a point of law to the Supreme Court. The Supreme Court is the “Court of Final Appeal” under Article 34.4.1 of the Constitution. Articles 34.4.3 and 34.4.4 of the Constitution deal with the appellate jurisdiction of the Supreme Court. It is clear from Art 34.4.4 that the Supreme Court always has jurisdiction to hear appeals from the High Court in constitutional cases. Article 34.4.3 envisages a further substantial appellant jurisdiction “from all decisions of the High Court” but this jurisdiction is subject to “such exception and ... regulations as may be prescribed by law”. The Supreme Court has made it clear that any exception to its appellant jurisdiction must be provided for in clear statutory language.²¹⁶

3.161 It has become common practice for the Supreme Court to sit in divisions in order to deal with court business more efficiently.²¹⁷ In more important constitutional cases, it has become the policy for seven Supreme Court judges to hear the appeal.²¹⁸

²¹⁵ Keane “The Irish Courts System in the 21st Century: Planning for the Future” (2001) 6(6) Bar Review 321 at 327.

²¹⁶ *The People (AG) v Conmey* [1975] IR 341.

²¹⁷ Sections 7(3) and (4) of the *Courts (Supplemental Provisions) Act 1961*, as inserted by section 7 of the *Courts and Courts Officers Act 1995* allows the Supreme Court to sit in divisions of 5 or 3.

²¹⁸ For example, in *Sinnott v Minister for Education* [2001] 2 IR 545, seven Judges sat to hear the appeal. They were: the Chief Justice, Mr Justice Keane, Ms Justice Denham, Mr Justice Murphy, Mr Justice Murray, Mr Justice Hardiman, Mr Justice Geoghegan and Mr Justice Fennelly. Section 7(4) of the *Courts (Supplemental Provisions) Act*

(v) *Appeals in civil cases in other jurisdictions*

(I) *England and Wales*

3.162 In England and Wales, the issue of civil appeals has been considered in detail in a number of reports²¹⁹ and legislation has been enacted to change the trajectory of civil appeals considerably.²²⁰

3.163 In 1953, the Evershed Committee considered the position of the Court of Appeal. The Committee realised that it is not feasible or realistic to abolish all appeals completely. The Committee recognised, however, that some limitation on appeals is essential in order for costs to be limited or controlled in some way. The Committee agreed that the imposition of a requirement of leave to appeal in all cases from the High Court would limit costs in appeals that have little merit or prospect of success. However, they decided that it was too arduous a task to formulate any principle in accordance with which leave to appeal might be granted or refused. Finally, the Committee found that the use of unrestricted oral argument is the most efficient method of testing every point raised by each party in the Court of Appeal.

3.164 Some 34 years after the issue was discussed by the Evershed Committee, the Bowman Committee was given the task of completing “a full review of the Civil Division of the Court of Appeal against the background of an increasing number of applications.” The Bowman Report followed the wake of the Woolf Report, which had considered policy implications for civil appeals. First, Lord Woolf recognised the possibility that parties use appeals as a delaying tactic.²²¹ For that reason, Lord Woolf recommended that the Court of Appeal be vested with the jurisdiction to summarily dispose of appeals that demonstrate no merit.²²² Lord Woolf also advocated against appeals by way of full rehearing, as *de novo* appeals cause undue delay. In furtherance of this proposal, he argued that it is rarely necessary for the appeals court to rehear all evidence previously heard by the lower court, and all new evidence. Lord Woolf recommended that the majority of appeals should be dealt with on the grounds of appeal set out by

1961, as inserted by section 7 of the *Courts and Courts Officers Act 1995* allows for the Supreme Court to sit in divisions of 5 or 3.

²¹⁹ Evershed Committee *Final Report of the Committee on Supreme Court Practice and Procedure* (1953 Cmd. 8878); Lord Woolf *Access to Justice Final Report* (1996); Bowman Report to the Lord Chancellor by the Review of the Court of Appeal (Civil Division) (1997 Lord Chancellors Department); Middleton Report to the Lord Chancellor by Sir Peter Middleton (1997 Lord Chancellors Department).

²²⁰ Principally the *Access to Justice Act 1999* and associated amendments and rules.

²²¹ Woolf *Access to Justice Final Report* (1996 Stationery Office) at 153.

²²² *Ibid* at 158.

the appellant, and recommended that civil appeals should be based on documents and evidence heard during the original hearing.²²³ He provided examples of cases where a second hearing is appropriate. These included the situation where one party was absent from the first hearing or where the appeal relates to an application to set aside a judgment in default of defence.²²⁴ Finally, Lord Woolf considered that in the interests of efficacy, it was necessary to rationalise the rules on appeals in all cases.²²⁵

3.165 The Bowman Committee agreed with the principle that an aggrieved party in a civil case should always be able to have his or her case examined by a higher court so as to adjudicate on whether an injustice has been caused, and that if such an injustice is identified, an appeal should be allowed to proceed. The main findings of the Committee were as follows:

- appeals must be dealt with in a manner that is proportionate to the grounds of the complaint and the subject matter of the dispute;
- one level of appeal should be the norm;
- not all appeals need to reach the Civil Division of the Court of Appeal.

The Committee recommended the extension of the requirement of leave to appeal to almost all cases coming before the Court of Appeal. They suggested that only one right of appeal should generally be available and that written submissions should form the basis of such appeals. The Bowman Committee differed from the Evershed Committee in that the former recognised that it is possible to devise a test for a court to apply when making its decision as to whether leave to appeal should be granted, whereas the latter was prepared to leave the exact formulation of the test to the Rules Committee of the Courts.

3.166 The main change in civil appeals in England and Wales has been a reduction in the opportunity to appeal to higher courts against a decision made in a lower court. The main impetus for such a change came from the 1997 Bowman Report, which concluded that the Court of Appeal (Civil Division) was dealing with too many less important cases and appeals, and which identified a consequent delay in the hearing of appeals.²²⁶

3.167 As a result of the Bowman Report, the civil appeal process was streamlined and reformed by the *Access to Justice Act 1999*. Leave must

²²³ Woolf *Access to Justice Final Report* (1996 Stationery Office) at 161.

²²⁴ *Ibid.*

²²⁵ Woolf *Access to Justice Final Report* (1996 Stationery Office) at 167.

²²⁶ *Bowman Report to the Lord Chancellor by the Review of the Court of Appeal* (Civil Division) (1997 Lord Chancellors Department) at 42.

now be obtained for almost all civil appeals. There is no longer an automatic right of appeal.²²⁷ The Bowman Committee recommended that the court that made the original decision is best placed to make the decision as to whether or not leave should be granted. Additionally, there is now generally only one level of appeal, where in the past some civil cases could be appealed at two levels.²²⁸ Further, the rehearing aspect of civil appeals in England and Wales has been lessened as in many cases, long oral arguments have been replaced by written submissions which are provided by counsel to the judges in advance of the appeal. The policy of restricting appeals to a review of the lower court's decision is founded not only on the need to use resources economically, but also on the rationale that the lower courts should bear responsibility for the cases that they hear and for their decisions.²²⁹ This policy is at the forefront of the decision in England and Wales to base appeals on written submissions. Deference is now given to the decision of the lower court that determined the case at first instance. It is clear that the refined appeals process in England and Wales is based on the twin objectives of efficiency and effectiveness. It is now the case that only appeals that can justify their place in the appeals system should come before the courts. This process ensures finality of decisions.

3.168 In England and Wales, section 54 of the *Access to Justice Act 1999* provides that permission to appeal must be obtained in all appeals to the County Court, High Court or Court of Appeal (Civil Division). There are three appeals to which this general principle does not apply: committal to prison, refusal to grant *habeas corpus*, and the making of secure accommodation orders under section 25 of the *Children's Act 1989*. In normal circumstances, there will only be one level of appeal as section 55 of the 1999 Act provides that where the County Court or High Court has already reached a decision in a case brought on appeal, there is no further possibility of an appeal of that decision to the Court of Appeal (Civil Division) unless the Court of Appeal considers that the appeal would raise an important point of principle or practice or that there is some other compelling reason for the Court to hear the appeal on another level. Part 52 of the Civil Procedure Rules 1999 (CPR), made under the *Civil Procedure Act 1997*, in England and Wales further develops the main thrust of the findings of the Bowman Report by stating that the general rule that permission to appeal is required in virtually all civil appeal cases is in fact a mandatory rule. Such permission should be obtained immediately following the judgment of the lower court and will only be obtained if the court considers that the prospective appellant shows a real prospect of success or

²²⁷ Section 54 of the *Access to Justice Act 1999*.

²²⁸ Section 55 of the *Access to Justice Act 1999*.

²²⁹ Zuckerman *Civil Procedure* (Lexis Nexis 2003) at 721.

that there is some other compelling reason to allow the appeal. All civil appeals are now limited to a review rather than a rehearing and an appeal will only be allowed if the decision of the lower court was wrong or unjust due to serious procedural or other irregularity in the proceedings in the lower court.

3.169 Part 52 of the CPR also clearly discards the possibility of a second or subsequent appeal in the majority of civil cases. Permission for a subsequent appeal must be requested from the Civil Division of the Court of Appeal. This Court will only grant permission if the appeal would raise important principles or practice or if there is some other compelling reason for it to be heard by the Court of Appeal.

3.170 In 2005, the Department for Constitutional Affairs delivered a consultation paper on proposed changes to civil appeals rules.²³⁰ The consultation paper sets out proposals for the reform of the rules regarding applications for permission to appeal to the Court of Appeal. At present, an application for permission to appeal is made to the court that decided the case or to the appeals court by way of an appeal notice. If the lower court refuses permission to appeal, a further application can be made to the appeals court.²³¹ The consultation paper expressed the view that the judges of the Court of Appeal were concerned with the number of unmeritorious and hopeless applications that they had received. These judges considered that oral hearings in the Court of Appeal in respect of leave applications were a disproportionate use of resources that would be better applied to meritorious leave applications. The paper also argued that to allow unmeritorious leave applications to proceed to an oral hearing the Court of Appeal gives to the applicant unrealistic expectations as to the outcome of the case and creates uncertainty for the respondent as to the finality of the case. In order to alleviate such difficulties, the consultation paper proposed an increase in the power of the Court of Appeal to refuse leave applications in civil cases that are totally without merit, without holding an oral hearing. Accordingly, the consultation paper recommended that the CPR be amended so as to give the Court of Appeal the power to refuse permission to appeal based solely on the papers lodged in court and, where the application is hopeless, to order that there is no right to an oral hearing concerning permission to appeal. An independent study commissioned by the Department for Constitutional Affairs to ascertain the effect that might be caused by such an amendment found that the risk of injustice was small to

²³⁰ Department for Constitutional Affairs *Proposed Changes to Civil Appeal Rules* (Consultation Paper 20/05 2005)

²³¹ Civil Procedure Rules October 2006 Rule 53.3.2.

negligible, and that this small risk should be weighed against the potential gains to the system of releasing judicial time.²³²

(II) *'Leapfrog' civil appeals in England and Wales*

3.171 Part II of the *Administration of Justice Act 1969* provides that in certain tightly-defined circumstances, it is possible for civil appeals to go directly from the High Court to the House of Lords for determination. Under the procedure set down in the 1969 Act, a High Court judge can, if he considers it an appropriate case and if all the parties consent, certify the case fit for an application to the House of Lords for leave to appeal. The High Court's certificate merely permits the parties to apply to the House of Lords for leave to appeal. The leave application is determined by the House of Lords on written submissions lodged by one of the parties to the proceedings.²³³ This procedure allows for the House of Lords to consider points of law of general public importance or points of law relating to the construction of an enactment or of a statutory instrument that have been fully argued in the proceedings and fully considered in the judgment of the lower court, or points of law in respect of which the High Court judge was bound by a previous decision of the Court of Appeal or House of Lords.²³⁴

(III) *Northern Ireland*

3.172 The system in Northern Ireland of appeals from County Courts to the High Court is the same as in this jurisdiction. Capper advocated that this should remain the same, and should not follow the English appeal system in respect of County Courts.²³⁵ He stated that:

“If there were only an English appellate process, County Court judges might have to take more copious notes of evidence, stenographers and tape recording equipment might be needed to prepare transcripts of proceedings, and the whole process would probably be slowed down and rendered more expensive.”

3.173 The Civil Justice Reform Group in Northern Ireland recommended that the right of appeal from the County Court to the High Court continue to be way of rehearing. The Group was persuaded by

²³² Department for Constitutional Affairs *Proposed Changes to Civil Appeal Rules* (Consultation Paper 20/05 2005) at 10. This study was completed by Hazel Genn, Professor of Socio-Legal Studies at University College London.

²³³ Section 13 of the *Administration of Justice Act 1969*.

²³⁴ Section 12 of the *Administration of Justice Act 1969*.

²³⁵ Capper *Keeping Woolf from the door: the Reform of Civil Procedure in Northern Ireland* (1999) 50(4) NILQ 434 at 443.

submissions received after the publication of its Interim Report²³⁶ that an appeal by way of a rehearing should offer an opportunity for the case to be addressed afresh and without preconditions.²³⁷

(vi) Discussion

3.174 The Commission is of the opinion that the almost universal right of appeal to the Supreme Court in civil matters in Ireland merits reconsideration. In recent years, there has been an increase in the number of appeals lodged with the Supreme Court.²³⁸ Much of this increase can be explained by the almost universal right of appeal from the High Court to the Supreme Court.²³⁹

3.175 Auld has remarked that the practice of holding a full rehearing of a case in criminal appeals from the Magistrates' Courts to the Crown Court has its origins in a general lack of confidence in the impartiality and competence of the old 'police courts' manned by individuals with little knowledge of the law.²⁴⁰ He stated that this logic can not be applied to today's well trained District Judges. It is arguable that the rehearing aspect of appeals from the District Court to the Circuit Court in civil and criminal matters is a carryover from the pre-1922 days of Resident Magistrates and the level of dissatisfaction with such Magistrates.

3.176 The Commission is of the view that in order to consider whether civil appeals should continue to be heard *de novo*, it is necessary to have regard to two competing considerations. First, it is acknowledged that the rehearing of cases on appeal, with the possibility of new evidence being adduced, causes delay and can worsen relations between the parties involved. On the other hand, it can be argued that in order for the appeals court to be best placed to adjudicate fully on the appeal and ultimately for justice to be done, it is necessary for the appeals court to rehear all the evidence and to have the opportunity to adjudicate upon any new evidence.

²³⁶ The Civil Justice Reform Group *Review of the Civil Justice System in Northern Ireland Interim Report* (1999).

²³⁷ The Civil Justice Reform Group *Review of the Civil Justice System in Northern Ireland Final Report* (2000) at paragraph 76.

²³⁸ In 2001, 361 appeals were lodged in the Supreme Court and the Court dealt with 243 appeals. In 2002, 415 appeals were lodged in the Supreme Court and 324 appeals were dealt with by the Court. In 2003, 440 appeals were lodged in the Supreme Court and 304 appeals were dealt with. In 2004, 531 appeals were lodged in the Supreme Court and 722 were dealt with. In 2005, 446 appeals were lodged in the Supreme Court and 211 were dealt with.

²³⁹ Denham *Proposal for a Court of Appeal* [2006] 6 *Judicial Studies Institute Journal* 1 at 2.

²⁴⁰ Auld *Review of the Criminal Courts of England and Wales* (Stationery Office October 2001) at 617.

The Commission acknowledges the benefits of rehearing cases on appeal but is particularly aware of the delay caused by *de novo* appeals. The Commission agrees with Lord Woolf's contention that it is rarely necessary for the appeals court to rehear all of the evidence and to hear new evidence on appeal. It is the Commission's view that written submissions are an adequate substitute for the rehearing of appeals and that although reliance on a transcript of the first instance case would cause further expense, the benefit of efficiency to the judicial system would outweigh this cost.

3.177 *The Commission provisionally recommends that all civil appeals should be by leave of the court at first instance and where such leave is granted, civil appeals should be based on the transcript of the original trial and on the written submissions of the parties to the case.*

(c) Appeals in indictable matters, including leave to appeal

(i) Ireland

(I) Introduction:

3.178 The most noticeable divergence between civil and criminal appeals is in relation to trials on indictment. As discussed above, appeals in summary matters heard in the District Court follow the same appeal route as their civil law counterparts. Criminal appeals in indictable matters are, however, a relatively new concept. It is striking that prior to 1924 there was no mechanism by which a person convicted of a crime in a jury trial could appeal the conviction. The Court of Criminal Appeal, established by statute in 1924, granted such a right to convicted persons for the first time.²⁴¹ The Court was re-established by the *Courts (Establishment and Constitution) Act 1961*.²⁴² The Court of Criminal Appeal hears appeals against conviction and/or sentence from the Circuit Court, the Central Criminal Court and the Special Criminal Court. In its Seventh Interim Report, the Committee on Court Practice and Procedure considered whether it would be advisable to establish separate appeals tribunals for criminal appeals from the Circuit Court and for those from the Central Criminal Court.²⁴³ More specifically, the Committee discussed whether appeals from criminal cases in the Circuit Court should lie to the High Court and those from the High Court to the Supreme Court, thereby mirroring the appeals structure in civil cases. The Committee concluded that to do so would be neither practicable nor desirable.²⁴⁴

²⁴¹ Section 8 of the *Courts of Justice Act 1924*.

²⁴² Sections 12 and 48 of the *Courts (Supplemental Provisions) Act 1961*.

²⁴³ Committee on Court Practice and Procedure Seventh *Interim Report: Appeals from Conviction on Indictment* (Stationery Office Pr1 9169 1966) at 8.

²⁴⁴ *Ibid* at 12.

3.179 No defendant has an automatic right of appeal to the Court of Criminal Appeal. To be allowed to appeal to the Court of Criminal Appeal, a defendant must first apply to the court of first instance for a certificate that the case is fit to appeal.²⁴⁵ If this application is refused by the court of first instance, the defendant may appeal this refusal to the Court of Criminal Appeal, ultimately seeking leave to appeal from that Court.²⁴⁶ Section 32 of the *Courts of Justice Act 1924* provides that the Court of Criminal Appeal shall grant leave “in cases where the court is of the opinion that a question of law is involved, or where it appears to the court to have been unsatisfactory or there appears to the court to be any other sufficient ground of appeal”.

3.180 Although it appears from an initial reading of sections 31 and 32 of the *Courts of Justice Act 1924* that an appeal to the Court of Criminal Appeal against the refusal of the court of first instance to grant leave is independent and separate from the appeal as to the merits of the case, in practice this is not the reality. In *DPP v Corbally*,²⁴⁷ Mr Justice Geoghegan made the following comment about the current system of appeals to the Court of Criminal Appeal:

“[A] mere reading of the relevant sections would not of itself give rise to any understanding as to how the appeal procedure is worked out in practice. In the vast majority of cases the trial judge refuses certificates enabling the convicted defendant to appeal to the Court of Criminal Appeal. Accordingly, an application for leave to appeal is brought to that court. But usually, the court, having given a full hearing to the application for leave to appeal, either refuses such leave or grants it but treats the hearing of the application for leave as the hearing of the appeal itself and goes on to make an order allowing the appeal. This telescoped procedure was probably not anticipated by the draftsman of section 32 of the 1924 Act as that section seems to envisage that leave to appeal might be granted well before the hearing of the appeal itself “where the court is of the opinion that a question of law is involved” or in the other prima facie situations referred to in the section.”²⁴⁸

²⁴⁵ Section 31(i) of the *Courts of Justice Act 1924*.

²⁴⁶ Section 31(ii) of the *Courts of Justice Act 1924*.

²⁴⁷ [2000] IESC 38 Supreme Court 5 December 2000.

²⁴⁸ A similar recognition of the unreal distinction between the hearing of appeal and hearing of application for leave to appeal by the Court of Criminal Appeal was expressed by the Committee on Court Practice and Procedure. See the Committee on Court Practice and Procedure *Seventh Interim Report: Appeals from Conviction on Indictment* (Stationery Office Prl 9169 1966) at 10.

3.181 The Committee on Court Practice and Procedure in its Seventh Interim Report stated that as the Court of Criminal Appeal has available to it the transcript of the case as heard at first instance before it decides the application for leave to appeal, it is arguable that the leave requirement can be abandoned.²⁴⁹ The Committee recommended that every convicted person be vested with the right to appeal without first having to obtain permission. The Committee expressed the view that this would have the effect of abolishing the distinction between a leave application and an appeal on its merits.²⁵⁰

3.182 The Fennelly Working Group recommended the abolition of the leave requirement in indictable criminal cases, as it serves no meaningful purpose. They believed that the leave stage as it currently stands does not act as a filter.²⁵¹ In support of this, they pointed out the fact that judges in the Central Criminal Court habitually refuse leave to appeal. This refusal is then appealed to the Court of Criminal Appeal, which effectively treats the leave stage as the actual hearing of the appeal.

3.183 It is noteworthy that it is not necessary for the Court of Criminal Appeal to deal with the full merits of the appeal or the appeal of refusal to grant leave. Section 5 of the *Criminal Procedure Act 1993* provides for summary determination by the Court of Criminal Appeal of applications for leave to appeal and of applications for review of an alleged miscarriage of justice or of excessive sentencing which do not show any substantial ground of appeal. However, in order for the Court to do so, the Registrar of the Court of Criminal Appeal must refer the leave application to the Court if he or she is of the opinion that the application for leave shows no substantial ground of appeal. The Fennelly Working Group drew attention to this section and its worthwhile and sensible provisions. The Group noted that as of the date of their Report in May 2003, the provision had never been used. However the Group felt that the procedure placed an unfair onus on the Registrar of the Court of Criminal Appeal to initiate the procedure, without advanced judicial guidance. They recommended that the section be amended so that the judge in charge of the appeals list would initiate the

²⁴⁹ Committee on Court Practice and Procedure *Seventh Interim Report: Appeals from Conviction on Indictment* (Stationery Office Pr1 9169 1966) at 10.

²⁵⁰ *Ibid* at 12.

²⁵¹ The Working Group on the Jurisdiction of the Courts *Report on the Criminal Jurisdiction of the Courts* (Stationery Office 2003) at 163.

procedure, following the Registrar's consideration of the case list.²⁵² On this basis, they recommended that the statute be amended accordingly.²⁵³

3.184 There are a number of different versions of appeals in criminal matters depending on the type of appeal initiated.

(aa) *Appeal against conviction:*

3.185 A person convicted on indictment in the Circuit Court, Central Criminal Court or Special Criminal Court may appeal against their conviction to the Court of Criminal Appeal, either where the trial judge grants a certificate that the case is fit for appeal, or the Court of Criminal Appeal grants leave to appeal following an appeal against the refusal of a trial judge or judges to grant leave.²⁵⁴ It is usual for the Court of Criminal Appeal to hear the application for leave the appeal itself at the same time as the appeal on the merits of the case.

(bb) *Appeal against sentence only:*

3.186 In these appeals, the Court of Criminal Appeal is asked whether the sentence imposed by the trial judge or court was appropriate to the severity of the crime of which the accused was convicted. Until 1993, only a convicted person could bring an appeal concerning sentence, but now it is possible for the prosecution to initiate an appeal against the leniency of a sentence.²⁵⁵

(cc) *Appeals concerning miscarriages of justice:*

3.187 Section 2 of the *Criminal Procedure Act 1993* introduced a statutory mechanism to review a conviction which is alleged to have resulted in a miscarriage of justice. Section 2 allows for the Court of Criminal Appeal to review alleged miscarriages of justice in cases where the Court has previously rejected an appeal or an application for leave to appeal in the case. The mechanism allows for consideration of a new fact or newly discovered fact that is alleged to demonstrate that there has been a miscarriage of justice in relation to the conviction or to show that the sentence was excessive. In such appeals, the application to the Court of Criminal Appeal is made by the convicted person.

²⁵² Working Group on the Jurisdiction of the Courts *Report on the Criminal Jurisdiction of the Courts* (Stationery Office 2003) at 163.

²⁵³ Working Group on the Jurisdiction of the Courts *The Criminal Jurisdiction of the Courts* (Pn237 2003) at 19-20.

²⁵⁴ The *Courts of Justice Act 1924* sections 31 and section 63, and *Offences Against the State Act 1939* section 44.

²⁵⁵ *Criminal Justice Act 1993* section 2

(II) *Appeal to the Supreme Court*

3.188 There are a number of different routes by which a criminal appeal may come before the Supreme Court. First, section 22 of the *Criminal Justice Act 2006* amends section 29 of the *Courts of Justice Act 1924* to provide for a ‘without prejudice’ prosecution right of appeal from the Court of Criminal Appeal to the Supreme Court.²⁵⁶ To avail of this section, it is necessary for the Court of Criminal Appeal or the Attorney General 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 appeal be taken. Secondly, section 34 of the *Criminal Procedure Act 1967* as amended provides that the Attorney General or the Director of Public Prosecutions may, on a without prejudice basis, refer a question of law arising during a trial to the Supreme Court for determination. Thirdly, section 3 of the *Criminal Justice Act 1993* provides for an appeal to the Supreme Court by the convicted person or by the DPP from a determination of the Court of Criminal Appeal where an application is brought by the DPP for a review of sentence. This appeal is subject to the certification of the Supreme Court, the Attorney General or the DPP that the decision of the Court of Criminal Appeal involves a point of law of exceptional public importance. Finally, a consultative case may be stated from the Circuit Court to the Supreme Court.²⁵⁷

3.189 In a recent Report, the Commission expressed dissatisfaction with section 3 of the *Criminal Justice Act 1993*.²⁵⁸ The Commission pointed to an anomaly in the procedure whereby the DPP does not have to apply for leave whereas the convicted person does. It follows that the DPP has, in effect, an appeal as of right to the Supreme Court from a decision of the Court of Criminal Appeal on an application in relation to unduly lenient sentences, whereas the convicted party, who is directly affected by the decision, can only appeal to the Supreme Court if the Court, the Attorney General or the DPP grants a certificate to allow the appeal. On that basis, the Commission recommended the removal of the right of the DPP or the Attorney General to certify that the decision of the Court of Criminal Appeal on an application by

²⁵⁶ This section follows from a recommendation of The Working Group on the Jurisdiction of the Courts *Report on the Criminal Jurisdiction of the Courts* (Stationery Office 2003) at 19 that provision be made for the Attorney General or Director of Public Prosecutions to seek a certificate from the Court of Criminal Appeal to appeal to the Supreme Court on a point of law of exceptional public importance. Section 29 of the 1924 Act has been amended by section 22 of the *Criminal Justice Act 2006*, which has been further amended by section 59 of the *Criminal Justice Act 2007*.

²⁵⁷ Section 16 of the *Courts of Justice Act 1947*.

²⁵⁸ Law Reform Commission *Report on Prosecution Appeals and Pre-Trial Hearings* (LRC 81-2006).

the DPP under section 2 of the *Criminal Justice Act 1993* involves a question of law of exceptional public importance.²⁵⁹

(ii) England and Wales

3.190 A person convicted of an indictable offence in England and Wales can appeal such conviction to the Court of Appeal (Criminal Division). This Court was created by the *Criminal Appeal Act 1966* to replace the Court of Criminal Appeal.

3.191 However, a right of appeal in indictable matters is not an automatic right, as permission to appeal must be obtained from either the judge of the court of trial or the Court of Appeal.²⁶⁰ Prior to the *Criminal Appeal Act 1995*, which amended the *Criminal Appeal Act 1968*, it was possible to appeal against conviction without first obtaining leave. In practice, a single Court of Appeal judge decides whether or not to grant leave to appeal on reading the application on paper without holding an oral hearing. If leave is refused, there is an automatic right to renew the application for leave before the full Court of Appeal.²⁶¹

3.192 Similar to section 5 of the Irish *Criminal Procedure Act 1993*, there is provision for the Registrar of the Court of Appeal (Criminal Division) to refer groundless appeals or applications for leave to appeal to the Court of Appeal (Criminal Division) for summary determination.²⁶² Such an action occurs where the notice of appeal or application for leave to appeal “does not show any substantial ground of appeal”. During the summary determination, if the Court considers that the appeal or application for leave is “frivolous or vexatious, and can be determined without adjourning it for a full hearing”, the Court is empowered to summarily dismiss the appeal or application for leave to appeal, without calling on anyone to attend a hearing.

3.193 Auld considered that it could not be justified that recourse could be had to two forms of appeal, by way of case stated and judicial review. Instead, he proposed a single form of appeal to the Court of Appeal

²⁵⁹ Law Reform Commission *Report on Prosecution Appeals and Pre-Trial Hearings* (LRC 81-2006) at 49-59.

²⁶⁰ Section 2 of the *Criminal Appeal Act 1968* as amended by section 1(1) of the *Criminal Appeal Act 1995*.

²⁶¹ Maleson *The Legal System* (Lexis Nexis 2003) at 182.

²⁶² Section 20 of the *Criminal Appeal Act 1968* (chapter 19) as substituted by section 157 of the *Criminal Justice Act 1988* (chapter 33).

(Criminal Division). Auld was of the opinion that the Court of Appeal (Criminal Division) is the proper venue for such appeals.²⁶³

3.194 In relation to the composition of the Court of Appeal (Criminal Division), Auld advocated that the Court should be “variously constituted according to the nature, legal importance and complexity of its work.”²⁶⁴ For example, in cases that involve a point of law of general public importance, then the Court should consist of the Lord Chief Justice or the Vice President or a Lord Justice and two High Court judges. By contrast, if the appeal was more straightforward in nature, then the Court should consist of two High Court judges or one High Court judge and a Circuit Court judge.

3.195 Finally, Auld considered that in cases involving points of law of general public importance, where there are conflicting decisions of the Court of Appeal (Criminal Division) or where the law in such decisions is generally unsatisfactory, such that only the House of Lords can resolve, consideration should be given to introducing a form of ‘leap frog’ appeal from the Crown Court to the House of Lords.²⁶⁵ A similar concept is provided for civil appeals by Part II of the *Administration of Justice Act 1969*.

(iii) Discussion

3.196 The main issue in relation to appeals in indictable matters is whether such appeals should continue to require permission to appeal from either the trial judge or the Court of Criminal Appeal. In practice, as discussed above at paragraph 3.180 of this Consultation Paper, the hearing of an appeal and the application for leave to appeal in the Court of Criminal Appeal do not take place separately. In effect, the leave requirement is not operating as intended as it does not act as a filter to prevent unnecessary or unmeritorious appeals coming before the Court of Criminal Appeal.

3.197 It is the Commission’s view that there are two solutions to the current unsatisfactory situation. First, the leave requirement could be abandoned completely or secondly, a more effective form of leave could be put in place. The recommendation of the Fennelly Group, amongst others, that the leave requirement be abolished has been criticised.²⁶⁶ It has been recognised that the leave requirement in judicial review proceedings

²⁶³ Auld *Review of the Criminal Courts of England and Wales* (Stationery Office October 2001) at 623.

²⁶⁴ *Ibid* at 647.

²⁶⁵ Auld *Review of the Criminal Courts of England and Wales* (Stationery Office October 2001) at 657.

²⁶⁶ Coonan “Reforming the leave procedure on appeal to the Court of Criminal Appeal” (2005) 15(4) ICLJ 12.

provides a mechanism for weeding out claims that are frivolous, vexatious or unmeritorious.²⁶⁷ However, the manner in which the leave requirement in criminal appeals in indictable matters currently operates does not have this effect.

3.198 In England and Wales, the leave stage operates in a satisfactory manner and achieves the purpose of leave. The Commission believes that the reason for this efficiency is the fact that the leave stage is clearly separate from the appeal on the merits, and the fact that the leave stage takes place by way of written submissions only. It is worth considering the introduction of another possible form of leave to replace the existing form. This modified form would involve the trial judge screening the draft notices of appeal to ensure that they are properly drafted, but with no function in assessing the merits of the grounds of appeal themselves. Instead the trial judge would simply decide whether the grounds are sufficiently stated in order to allow the Court of Criminal Appeal to fulfil its appellate jurisdiction.²⁶⁸ Coonan suggests the retention of the requirement to obtain a certificate from the trial judge that a case is “fit” for appeal from the trial judge. Coonan further suggests that “fitness” would indicate that a properly drafted and completed notice of appeal has been received.

3.199 Aligned to the unsatisfactory leave procedure in indictable matters is the fact that unmeritorious appeals are not filtered out of the judicial system. This filtering system is the rationale behind the leave requirement. While the Commission acknowledges that section 5 of the *Criminal Procedure Act 1993* and its counterpart in England and Wales, section 20 of the *Criminal Appeal Act 1968*, are useful mechanisms to filter unmeritorious appeals out of the judicial system, the Commission believes that the onus placed on the Registrar by section 5 of the 1993 Act is probably the main reason for its non-use. The Commission agrees with the proposal put forward by the Fennelly Group that the onus for initiating the use of such a procedure should lie with the judge in charge of the appeal list rather than with the Registrar. The Commission believes that the Registrar should have no role whatsoever in the procedure, and takes issue with the recommendation of the Fennelly Working Group that the Registrar of the Court of Criminal Appeal should first consider the case list and only after this could the procedure be invoked by a judge in charge of the list. If invoked, section 5 would operate to prevent appeals going before the Court of Criminal Appeal, a result that would be of major significance to an accused. It is for that reason that the Commission believes it is for the

²⁶⁷ Law Reform Commission *Consultation Paper on Judicial Review Procedure* (LRC CP 20-2003 January 2003) at 10.

²⁶⁸ Coonan “Reforming the leave procedure on appeal to the Court of Criminal Appeal” (2005) 15(4) ICLJ 12.

judiciary alone to be involved in the section 5 procedure and ultimate decisions.

3.200 *The Commission provisionally recommends that the leave procedure in criminal appeals be amended so that the trial judge is entrusted to ensure in advance of the leave hearing that the procedural aspects are satisfied, so that the Court of Criminal Appeal alone has jurisdiction to decide whether leave should be granted, and that the Court's decision is therefore based on written submissions only. The Commission also recommends that section 5 of the Criminal Procedure Act 1993 be amended so as to place all obligations concerning procedure on the Court of Criminal Appeal itself and not on the Registrar of the Court, and that the amended section 5 of the Criminal Procedure Act 1993 be used by judges to exclude applications for leave to appeal that do not demonstrate any substantial ground of appeal. The Commission considers that if this section is used by judges in suitable cases, leave to appeal will be a more meaningful procedure and act as a filter for unmeritorious, wasteful or frivolous appeals.*

(d) Intermediate Court of Appeal

3.201 As has been discussed above, there have been previous attempts to introduce an intermediate Court of Appeal with jurisdiction in both civil and criminal matters.²⁶⁹ Ms Justice Susan Denham of the Irish Supreme Court has indicated that a Court of Appeal for Ireland would be “more efficient and effective, and assist to the establishment of consistent jurisprudence”.²⁷⁰ She also noted that in common law countries, it is usual for there to be a Court of Appeal between the courts of trial and the Supreme Court, which is a constitutional court. If the proposed intermediate Court of Appeal were established, the Supreme Court's workload would be comprised of the determination of constitutional cases and issues of exceptional public importance.

3.202 The Court of Criminal Appeal is purely a statutory invention. The Supreme Court has held that there is nothing in the Constitution to preclude the establishment of courts by this means.²⁷¹ The Supreme Court held that Article 34.3 of the Constitution contemplates the establishment of other courts of first instance apart from the Supreme Court and the High Court (which are vested with jurisdiction by the Constitution) and of courts with appellate jurisdiction. The Court concluded that “Article 34 gives authority to the Oireachtas to establish such courts as it may think fit and to

²⁶⁹ See paragraphs 2.86-2.92 of this Consultation Paper.

²⁷⁰ Denham “Proposal for a Court of Appeal” [2006] 6 Judicial Studies Institute Journal 1 at 9.

²⁷¹ *The People (Attorney General) v Conmey* [1975] IR 341.

disestablish them as it may think fit but subject to the mandatory provisions which relate to the High Court and the Supreme Court...The Court is satisfied that the statutory provisions establishing the Court of Criminal Appeal is not invalid having regard to the provisions of the Constitution.²⁷² Accordingly, a unified Court of Appeal with civil and criminal jurisdiction could be established by way of legislation.

3.203 In England and Wales, the Court of Appeal is divided into the Civil Division and the Criminal Division. Originally, the Court of Appeal was only vested with jurisdiction in civil appeals, but in 1966 its criminal division was created to replace the Court of Criminal Appeal.²⁷³

3.204 At this juncture, it is not surprising that the idea of an intermediate Court of Appeal is being examined. With the general increase in size of judicial lists has come an increase in the number of appeals lodged with the Supreme Court. The Supreme Court is often required to determine appeals in cases that are of relatively small or no legal importance. The establishment of a Court of Appeal, sitting in the legal hierarchy between the High Court and the Supreme Court, would leave the Supreme Court free to determine constitutional matters and cases that involve a question of public importance. In light of the establishment of a Working Group to consider this issue, the Commission does not consider it appropriate to express a concluded view on this matter in this Consultation Paper.

(5) *Increase in general monetary limits in the civil jurisdiction of the District and Circuit Courts*

3.205 This section discusses the issue of whether there is a need to increase the monetary levels of the civil jurisdiction of the courts. It is necessary to examine this issue owing to the lack of any increase in the monetary limits since 1991, despite legislation enacted in 2002 to make such an increase. The Commission is of the opinion that the increase in monetary jurisdiction requires additional examination, given recommendations made by the Legal Costs Working Group.

3.206 The jurisdiction of the Circuit Court and District Court in civil matters is restricted by certain monetary limits. These courts generally do not have jurisdiction in civil matters beyond these limits. At present, the District Court can hear civil cases where the claim does not exceed the sum of €6,348.69. The jurisdiction of the Circuit Court is limited to civil claims beyond the monetary jurisdiction of the District Court but not exceeding €38,092.14. These monetary limits were set in the *Courts Act 1991*.

²⁷² *The People (Attorney General) v Martin* [1975] IR 341 at 349.

²⁷³ Section 1 of the *Criminal Appeal Act 1966* chapter 31.

3.207 Section 13 of the *Courts and Court Officers Act 2002* provides for an extension of the jurisdiction of the Circuit Court from €38,092.14 to €100,000 while section 14 provides for an extension of the jurisdiction of the District Court to €20,000. These sections have not yet come into force, as no Commencement Order has been made. In the absence of such an Order, the general monetary limits remain at those set in 1991.²⁷⁴

3.208 It is worth noting that the Government can vary the monetary jurisdiction of the courts by way of Statutory Order. Section 16 of the *Courts Act 1991* states that such changes may only be made “having regard to changes in the value of money generally in the State since the said monetary amount was so specified.” As the extension of the monetary jurisdiction of these Courts in the 2002 Act was by way of an Act of the Oireachtas, it appears that the Government must have been of the opinion that the variations in the 2002 Act were greater than a mere increase to reflect inflation or changes in the value of money in general.

3.209 It is clear that in the 16 years since the last monetary changes in 1991 to the jurisdiction of the District and Circuit Courts, increases in the value of money and the natural increases caused by inflation could lead to more cases being pushed into the High Court jurisdiction when they should be dealt with at a more local and convenient court such as the District or Circuit Courts. Similar sentiments were expressed by the Legal Costs Working Group when it remarked that it believed that:

“the failure to increase the civil jurisdictional limits since 1991 has led to a situation where more and more cases are unnecessarily heard in the higher courts with attendant increased legal costs”.²⁷⁵

Conversely, it is also arguable that the impact of the *Personal Injury Assessment Board Act 2003* and the *Civil Liability and Courts Act 2004* on personal injury litigation in this jurisdiction has freed up considerable time in the High Court so that there is no real pressing need to alter the monetary limits. In 2004, a total of 15,399 personal injury cases were initiated in the High Court, but by 2005 this had dropped to 746.²⁷⁶ This increased to 2673

²⁷⁴ The *Courts Act 1991* amended the monetary limits for the District Court and the High Court. Section 4 of the 1991 Act amended section 77 of the *Courts of Justice Act 1924* so that the District Court jurisdiction was raised to £5,000. Section 2 of the 1991 Act amended the Third Schedule to the *Courts (Supplemental Provisions) Act 1961* so that the jurisdiction of the Circuit Court in civil matters was raised to £30,000.

²⁷⁵ Working Group on the Legal Costs Working Group *Report of the Legal Costs Working Group* (Pn A5/1816 Stationery Office 2005) at 34.

²⁷⁶ Annual Report of the Courts Service 2005 (Courts Service 2006) at 94.

in 2006,²⁷⁷ but the number of personal injury cases initiated in the High Court are still considerably down on pre-PIAB times.

3.210 Any undue increase in the monetary limit of the District Court's civil jurisdiction would result in that Court having to entertain claims that are too complex for the summary civil procedure of the Court.²⁷⁸ The Commission is of the opinion that the increase contained in the 2002 Act would not substantially alter the complexity of matters heard in the District Court.

3.211 The Commission finds it useful to examine the monetary jurisdiction in civil matters of courts in New Zealand, which has a similar population to this jurisdiction.²⁷⁹ Although the courts system in New Zealand is two-tier in nature, it is relevant that the jurisdiction of the District Court in civil matters is \$200,000 New Zealand Dollars.²⁸⁰ If the matter is in excess of this jurisdiction, it falls within the jurisdiction of the High Court. This District Court jurisdiction equates to just over €106,000.²⁸¹ The District Court of New Zealand can be equated largely with the Circuit Court in this jurisdiction.

3.212 It is also worth considering the recommendation of the Legal Costs Working Group as to whether the monetary jurisdiction of the courts should be increased. The Group were particularly concerned with the effect that a large increase in jurisdiction would have, if the provisions of the 2002 Act were to come into force. In addition, the Group took cognisance of the relatively recent introduction of PIAB, and the corresponding lack of longer term analysis as to the position of personal injuries cases. It was for these reasons that the Group's recommended, in a piecemeal fashion, that:

“the jurisdictional limits of the courts be progressively increased and adjusted regularly thereafter, save for personal injuries cases where the status quo should be maintained for a further period

²⁷⁷ Annual Report of the Courts Service 2006 (Courts Service 2007) at 102.

²⁷⁸ The Committee on Court Practice and Procedure in its Fifth Interim Report expressed similar sentiments in its discussion of whether the jurisdiction of the District Court should be increased. See the Committee on Court Practice and Procedure *Fifth Interim Report: Increase of Jurisdiction of the District Court and Circuit Court* (Stationery Office Pr 8936 1966) at 12.

²⁷⁹ The most recent statistics available on the population of the Republic of Ireland found that the population as at April 2006 was 4,234,925. Central Statistics Office *Census 2006 Preliminary Report* (2006 CSO). The population of New Zealand as at 17 February 2007 is 4,172,415. See <http://www.stats.govt.nz/populationclock.htm>.

²⁸⁰ Section 9 of the *District Courts Act 1947* (no 16).

²⁸¹ <http://www.xe.com/ucc/convert.cgi> as at 17 February 2007.

until a more complete understanding of the dynamics of the Government's insurance reform programme is available."²⁸²

The Legal Costs Implementation Advisory Group saw no good reason why the monetary jurisdiction of the courts should be frozen indefinitely. The Advisory Group, like the Legal Costs Working Group, acknowledged the change to the nature of cases dealt with by courts after the introduction of PIAB. Accordingly, they recommended that the increases provided for in section 13 and 14 of the 2002 Act should be implemented forthwith, save in the case of personal injuries matters.²⁸³

3.213 The Commission is particularly aware of the length of time that has elapsed since the last alteration to the monetary jurisdiction of the Courts. For that reason, the Commission recognises that increases in the levels set in 1991 are required. The Commission has considered whether the large increases contained in the 2002 Act, which amount to a tripling of the level of monetary jurisdiction, are appropriate levels for the courts in this jurisdiction. Given the level of the monetary jurisdiction of the District Court of New Zealand, which has a similar population to this jurisdiction, the Commission is of the opinion that the increases proposed in the 2002 Act are not too large an increase in the jurisdiction of the respective courts.

3.214 *The Commission provisionally recommends that the monetary jurisdiction of the District Court and Circuit Court in civil matters be increased as recommended in 2006 by the Legal Costs Implementation Advisory Group. The Commission welcomes submissions as to the exact level of such increases, but believes that the increases contained in the Courts and Courts Officers Act 2002 should be considered in this exercise. The Commission adopts the recommendation of the Legal Costs Advisory Board that personal injuries matters be excluded from the jurisdictional increases.*

(6) The Rules of Court Committees

(a) Introduction

3.215 In this section, the Commission examines the position of the Rules of Court Committees in this jurisdiction, including their membership and responsibilities, and compares the Committees to similar bodies in other jurisdictions. The Commission acknowledges the beneficial report on Rules of Court Committees completed by the Committee on Court Practice and

²⁸² Working Group on the Legal Costs Working Group *Report of the Legal Costs Working Group* (Pn A5/1816 Stationery Office 2005) at 34.

²⁸³ Legal Costs Implementation Advisory Group *Report of the Legal Costs Implementation Advisory Group* (Pn A7/0027 Stationery Office 2006) at 25.

Procedure,²⁸⁴ and a consideration of the issue by the Working Group on a Courts Commission,²⁸⁵ reports from which the Commission has drawn much advice.

3.216 The Commission believes that the Rules of Courts Committees require discussion in the light of the reports completed in this jurisdiction and in light of the fundamental change in the nature of the committees in England and Wales.

3.217 While the Courts Acts contain a large amount of material on the jurisdiction of the courts, it is the Rules of the Courts that set down the practical and substantive rules under which the courts in this jurisdiction operate. There are currently three sets of Rules for the different levels of courts: the Rules of the Superior Courts of 1986, the Circuit Court Rules of 2001 and the District Court Rules of 1997. The task of amending and updating these rules, due to the exigencies of new legislation, falls to the relevant Rules of Court Committee: the Superior Court Rules Committee,²⁸⁶ the Circuit Court Rules Committee²⁸⁷ and the District Court Rules Committee.²⁸⁸

(b) Rules of Court Committees in Ireland

(i) General

3.218 The current Rules of Court Committees are jurisdiction-based, so that separate rules committees exist for each of the three levels of court in this jurisdiction: the Superior Courts (Supreme Court and High Court), the Circuit Court and the District Court. Initially, the Minister for Home Affairs sat as a member of the rules making authority for the Superior Courts Rules Committee, the Circuit Court Rules Committee and the District Court Rules Committee.²⁸⁹ These Committees also consisted of members of the judiciary, the President of the Law Society and two practising barristers, one junior counsel and one senior counsel. The agreement of the judiciary and

²⁸⁴ Committee on Court Practice and Procedure *Twenty Eighth Interim Report The Court Rules Committees* (September 2003).

²⁸⁵ Working Group on a Courts Commission *Second Report: Case Management and Court Management* (1996 P 39228 Brunswick Press) chapter 2.

²⁸⁶ Established by section 67 of the *Courts of Justice Act 1936* as amended by section 46 of the *Civil Law (Miscellaneous Provisions) Bill 2006*.

²⁸⁷ Established by section 69 of *Courts of Justice Act 1936* as amended by section 47 of the *Civil Law (Miscellaneous Provisions) Bill 2006*.

²⁸⁸ Established by section 71 of the *Courts of Justice Act 1936* as amended by section 48 of the *Civil Law (Miscellaneous Provisions) Bill 2006*.

²⁸⁹ Section 68 of the *Courts of Justice Act 1936*, section 65 of the *Courts of Justice Act 1924* and section 90 of the *Courts of Justice Act 1924*.

practitioner members of the Committees was required before any rules could be made or annulled.

3.219 The Judiciary Committee Report in 1923 recommended that the rules committees be composed of judges of the relevant level, together with representatives of the legal professions. The Chairman of the Judiciary Committee, Lord Glenavy, expressed dissatisfaction with the proposed level of input that the Minister for Home Affairs would be able to exercise over the Rules of Court Committees.²⁹⁰ However, the *Courts of Justice Act 1924* saw the Minister for Home Affairs being empowered to exercise a significant level of power in the formulation of the rules of court.

3.220 The 1930 Report of the Joint Oireachtas Committee on the Courts of Justice Act 1924 did not make any comment on the position of the Minister for Home Affairs with regard to the Rules Committee, but it did recommend that the three Committees individually assemble at least once a year for the purpose of considering, among other things, the Acts that affect the rules of court.²⁹¹ This recommendation was enacted by section 75 of the *Courts of Justice Act 1936* which provides that:

“the secretary of each of the several committees established by this Part of the Act shall summon a meeting of such committee at least once a year on such a day as may be fixed by the chairman of such committee, for the purpose of the general consideration by such committee of the practice, procedure and administration of the court in relation to which such committee is constituted or the law affecting or administered by such court with a view to the improvement of the administration of justice...”

Following such a meeting, the secretary of each of the Committees is required to report to the Minister for Justice on the subject of whether any amendments or alterations should be made to the practice, procedure or administration of the Courts “with a view to the improvement of justice”.²⁹² Section 75 of the 1936 Act contains the sole criteria to be employed by the Rules Committees in prescribing court rules.

3.221 Secondly, the 1930 Report of the Oireachtas Joint Committee recommended that two lay persons be permitted to sit on the Rules of Court Committees. This recommendation has not been acted upon at any time by the Oireachtas. It remains the position that the Rules of Courts Committees

²⁹⁰ Keane “The voice of the Gael Chief Justice Kennedy and the emergence of the new Irish Court” (1996) 31 Ir Jur 205 at 216.

²⁹¹ Joint Committee on the Courts of Justice Act 1924 *Report of the Joint Committee on the Courts of Justice Act 1924* (Stationery Office 1930) at lix.

²⁹² Section 75(2) of the *Courts of Justice Act 1936*.

consist of members of the judiciary of the relevant level of the Committee and members of the bar and solicitors' profession.

3.222 The position in relation to the Minister for Home Affairs on the Rules of Court Committees was completely altered by the *Courts of Justice Act 1936*. The role of the Minister for Home Affairs on the three Rules of Court Committees ceased to exist and instead, the power of making, annulling or altering the rules of Court was vested in the relevant Rules of Court Committees. The agreement of the Minister for Justice must now be obtained by the Superior Courts Rules Committee before it makes any rules regarding the fees chargeable in court offices.²⁹³

3.223 The Rules Committees in this jurisdiction meet in private and there is no provision in any statute to allow for the public to attend or to be consulted.

(ii) Superior Courts Rules Committee

3.224 The Superior Courts Rules Committee was established under section 67(1) of the *Courts of Justice Act 1936*, and it was assigned the power to annul, alter or make new rules in particular for pleading, practice and procedure generally in all civil case and criminal cases before the High Court, Central Criminal Court, or Court of Criminal Appeal. The Superior Courts Rules Committee was reconstituted by the provisions of section 15 of the *Courts of Justice Act 1953* so as to consist of three ex-officio members: the Chief Justice, acting as Chairman, the President of the High Court, acting as Vice-Chairman, the Master of the High Court, two ordinary judges of the Supreme Court, two ordinary members of the High Court, two members of the Bar nominated by the Bar Council and two practising solicitors, nominated by the Law Society of Ireland.

3.225 In 1999, the Chief Executive of the Courts Service became a member of the Rules Committee²⁹⁴ as did the Attorney General in 2002.²⁹⁵ Section 36 of the 2002 Act allows for the Chief Justice to appoint an ordinary judge of the Supreme Court to act in his or her place on the Committee. Section 36 also makes a similar allowance for the President of the High Court and the Attorney General to provide for an alternate to sit on the Committee on their behalf.²⁹⁶

²⁹³ Section 68 of the *Courts of Justice Act 1936*.

²⁹⁴ Section 30 of *Courts Service Act 1998*. This follows a recommendation of the Working Group on a Courts Commission in its Second Report.

²⁹⁵ Section 35 of *Courts and Court Officers Act 2002*.

²⁹⁶ The Working Group on a Courts Commission in its Second Report recommended that ex-officio members of the Rules Committees be permitted to delegate their membership to another.

3.226 Section 46 of the *Civil Law (Miscellaneous Provisions) Bill 2006* proposes to draw together and restate the present statutory provisions relating to the composition of the Rules of the Superior Courts Committee. The section also proposes the repeal of those sections that have become redundant owing to this restatement. The most significant feature of the proposed provision is the proposal that the Chief Executive of the Courts Service appoint a member of the Courts Service to act as a secretary to each of the three Courts Rules Committees. The Commission welcomes this proposal it would bring some welcome liaison and continuity to each of the Courts Rules Committees.

3.227 The scope of the court rules to which each Committee is assigned is contained in section 36 of the *Courts of Justice Act 1924*, as amended. These include matters such as pleading, practice and procedure generally in all civil and criminal cases, the use of the national language in the courts and the commencement and duration of sittings and vacations.

(iii) Circuit Court Rules Committee

3.228 Section 69(1) of the *Courts of Justice Act 1936* establishes the Circuit Courts Rules Committee and gives to it the power formerly exercisable by the Minister for Justice pursuant to section 66 of the *Courts of Justice Act 1924*. The Circuit Court Rules Committee now has the power to regulate the sessions, vacations and circuits of Circuit judges and to regulate practice and procedure generally. The remit of the Rules Committee was extended in 1995 to include the regulation of disclosure by any party to a personal injury action of certain information and documentation, and the regulation of the rules as to hearsay.²⁹⁷ The current ex-officio members of the Circuit Court Rules Committee are the President of the Circuit Court, who is Chairman of the Committee, and the County Registrar for the county and city of Dublin, who acts as Secretary to the Committee.²⁹⁸ The ordinary members of the Rules Committee are as follows: two judges of the Circuit Court (nominated by the President of the Circuit Court), two practising (nominated by the Bar Council) and two practising solicitors (nominated by the Law Society).²⁹⁹ On the establishment of the Courts Service, the Chief Executive became a member, although the Chief Executive may assign his or her place to a member of staff of the Courts Service.³⁰⁰ Section 35 of the *Courts and Courts Officers Act 2002* allows for the Attorney General to be a

²⁹⁷ Section 45(1) and (4) of the *Courts and Courts Officers Act 1995*.

²⁹⁸ This will be altered if section 45 of the *Civil Law (Miscellaneous Provisions) Act 2006* is enacted as a member of the Courts Service will be provided to act as secretary for each of the three Court Rules Committees.

²⁹⁹ Section 69(4) of the *Courts of Justice Act 1936*.

³⁰⁰ Section 30(1) of the *Courts Service Act 1998*.

member of the Committee. Section 36(2) of the 2002 Act allows for the President of the Circuit Court to appoint an ordinary judge of the Circuit Court to act in his or her place on the Committee.

3.229 As with section 46 of the *Civil Law (Miscellaneous Provisions) Bill 2006*, discussed above, section 47 of 2006 Bill restates and amalgamates the statutory provisions as to the composition of the members of the Circuit Court Rules Committee.

(iv) District Court Rules Committee

3.230 Under section 71 of the *Courts of Justice Act 1936*, the District Court Rules Committee was established and made the rules making authority for that court. The Minister for Justice previously exercised this function, under section 90 of the *Courts of Justice Act 1924*. Within the ambit of the Committee fall rules for form of process, summons, case stated, appeals or otherwise, the conditions with which a party must comply in stating a case both in civil and criminal cases and the practice and procedure of the District Court generally. A number of areas are expressly excluded from the power of the rules making authority, including the making of rules for the hearing by the Circuit Court of appeals in the District Court and the hearing by the High Court of cases stated in the District Court.

3.231 The ex-officio members of the District Court Rules Committee are the President of the District Court (who is chairperson) and such District Court clerks as the Minister shall nominate.³⁰¹ The remainder of the Committee is made up of four judges of the District Court (nominated by the Minister), one practising barrister (nominated by the Bar Council), and two practising solicitors (nominated by the Law Society). Similar to the Superior Courts and Circuit Court Rules Committees, the Attorney General or his or her nominee and the Chief Executive of the Courts Service and his or her nominee are ex-officio members of the District Court Rules Committee.

(v) The Working Group on a Court Commission's consideration of Court Rules Committees

3.232 The Working Group on a Courts Commission considered the position of the Rules Committees of the Courts in its Second Report.³⁰² They noted that the Rules Committees “have potential to be active vehicles for improving the practice and procedure of the Courts”.³⁰³ After examining

³⁰¹ Section 44 of *Courts (Supplemental Provisions) Act 1961*, substituted by section 40 of the *Courts and Courts Officers Act 1995*.

³⁰² Working Group on a Courts Commission *Second Report: Case Management and Court Management* (1996 P 39228 Brunswick Press) chapter 2.

³⁰³ Working Group on a Courts Commission *Second Report: Case Management and Court Management* (1996 P 39228 Brunswick Press) at 22.

the Rules Committees, the Working Group made the following recommendations:³⁰⁴

- that the Committees be enabled to be active vehicles for introducing improvements in the Court system;
- that the ex-officio members be permitted to delegate their membership of the Committee to another person and that the legislation be amended accordingly. This recommendation was enacted in respect of all three of the Rules Committees.³⁰⁵
- that on the establishment of the Courts Service, the Chief Executive of the Courts Service (or his or her nominee) be a member of the Rules Committees. Again, this recommendation was enacted in respect of all three of the rules committees.³⁰⁶
- Finally, that the resources of the newly established Court Service be available to the Rules Committees. The proposed amendment to the relevant sections of the Courts Acts relating to each of the Rules Committees contained in the *Civil Law (Miscellaneous Provisions) Bill 2006* in order to facilitate a member of the Courts Service to act as a secretary of each of the three Courts Rules Committees goes some way to achieving this recommendation.

(vi) Committee on Court Practice and Procedure

3.233 The Minister for Justice requested the Committee on Court Practice and Procedure to “inquire into the structures and operation of the Courts Rules Committees.” The Committee acceded to this request in its 28th Interim Report.³⁰⁷ The main issues identified for consideration by the Committee were as follows:

- the *ad hoc* nature of administrative support available to the Committees (most particularly with regard to the secretary of each of the Committees),
- the lack of provision for co-ordination or liaison between the different Rules Committees,

³⁰⁴ Working Group on a Courts Commission *Second Report: Case Management and Court Management* (1996 P 39228 Brunswick Press) chapter 2.

³⁰⁴ Working Group on a Courts Commission *Second Report: Case Management and Court Management* (1996 P 39228 Brunswick Press) at 22-3.

³⁰⁵ Section 36 of the *Courts and Courts Officers Act 2002*.

³⁰⁶ Section 30 of the *Courts Service Act 1998*.

³⁰⁷ Committee on Court Practice and Procedure *Twenty Eighth Interim Report The Court Rules Committees* (September 2003).

- whether the jurisdiction based model of Rules Committees was the most appropriate model for this jurisdiction,
- whether a system of public inquiry in relation to proposed rules should be initiated,
- whether the Committees' meeting should be held in public,
- whether the Rules Committees should act subject to general policy objectives,
- whether there should be lay representatives present on the Rules Committees, and
- whether the Rules Committees should be provided with information or advanced warning of impending legislative changes?

3.234 The Committee completed a thorough examination of the position of Rules Committees in other jurisdictions, and then made a number of recommendations. Each of the above issues identified by the Committee will be examined separately by the Commission.

(I) *Ad hoc nature of administrative support available to the Rules of Court Committees*

3.235 Currently, secretariat support to each of the Rules Committees is provided by the Registrar of the Supreme Court, the County Registrar of the City and County of Dublin and the Deputy Clerk of the Dublin District Court. As was noted by the Committee on Court Practice and Procedure, these officers have full time roles in the courts, and are fully occupied in these roles.³⁰⁸

3.236 If section 45 of the *Civil Law (Miscellaneous Provisions) Bill 2006* is enacted, a secretariat providing administrative, clerical and secretarial support will be provided by a member of the Courts Service to the Rules Committees. It would be very beneficial if, as expected, the same individual acts as secretary to all three of the Courts Rules Committees.

3.237 The Commission is aware that since late 2006 a professional drafter has been appointed to act in respect of all three Courts Rules Committee. No provision has yet been made for a support unit within the Courts Service that would assist the Rules Committees in their tasks. The establishment of such a unit was recommended by the Committee on Court Practice and Procedure.³⁰⁹

³⁰⁸ Committee on Court Practice and Procedure *Twenty Eighth Interim Report The Court Rules Committees* (September 2003) at 16.

³⁰⁹ Committee on Court Practice and Procedure *Twenty Eighth Interim Report The Court Rules Committees* (September 2003) at 42.

3.238 The Commission welcomes the proposal of the formal provision of administrative, secretarial and clerical support to the Courts Rules Committees. It is the view of the Commission that this support is long overdue and further that it will benefit the Courts Rules Committees greatly.

(II) *Lack of formal provision for co-ordination or liaison between the different Rules Committees*

3.239 There is no provision for any co-ordination or liaison between the different Rules Committees, whether in relation to the approach taken in respect of procedures required in different jurisdictions by the same piece of legislation so as to avoid duplication of effort (though instances of duplication have occurred on an *ad hoc* basis) or for the purpose of fostering a common approach to the areas of litigation procedure where this might be considered desirable. It is often the case that legislation will affect all of the Courts in a similar manner. In such instances, one set of rules could be drafted and incorporated by the three Rules of Courts Committees.

3.240 The Fennelly Group was convinced of the need for a comprehensive and coherent code of rules of criminal procedure. The Group was of the opinion that such an aim could be achieved by the existing rules-making arrangements, with appropriate liaison between the three jurisdiction-based Rules Committees.

3.241 The Committee on Court Practice and Procedure labelled as deficient the current lack of liaison between the Rules Committees. The Committee recommended that a more formal liaison should occur between the Committees. They also recommended that each Committee keep the other Committees apprised of their work in progress.³¹⁰ One way in which this could be achieved would be to amend section 75 of the *Courts of Justice Act 1936* so as to expand the requirement for each of the Committees to meet individually at least once a year, to include a joint meeting of all three Committees. The criteria set out in section 75 could also be amended so as to allow for consideration by all Committees on a joint basis of the issues relating to proper procedure in the courts and the law affected or administered in each of the courts.

(III) *Whether the jurisdiction based model of Rules Committees was the most appropriate model for this jurisdiction*

(aa) *Ireland*

3.242 It is the view of the Commission that this is the most controversial issue that it has considered regarding the Rules Committee of the Courts. The current model in this jurisdiction is based on the need for a Rules

³¹⁰ Committee on Court Practice and Procedure *Twenty Eighth Interim Report The Court Rules Committees* (September 2003) at 46.

Committee for each level of the courts which deals with Rules within the gamut of each of the relevant courts. As will be discussed below, the approach taken in other jurisdictions increasingly recognises the benefit in dividing the Rules Committees based on civil and criminal jurisdiction and not on the basis of the individual courts as is the case in this jurisdiction.

3.243 The Committee on Court Practice and Procedure examined the Irish jurisdictional approach to the Courts Rules Committees in the light of developments in other jurisdictions. The Committee was of the view that a separate committee for each jurisdiction is the most appropriate, efficient and effective system for Ireland. The Committee decided that the current system enables the Rules Committees to draft rules for court procedure allowing for the level of complexity with which the different jurisdictions deal.³¹¹ The Committee's final recommendation in this regard was influenced by its recognition of the expertise that each of the Committees has established in dealing with the practice and procedure of each court.³¹² The Committee did, however, acknowledge that the Irish approach could lead to duplication of work particularly when each of the Rules Committees is devising rules under the same newly-introduced Act. Further, the Committee noted that the Irish approach could cause discrepancies between the rules of each Court. The Committee took the view that proper liaison between each of the Rules Committees may be a suitable compromise.

(bb) Position in other jurisdictions:

England and Wales:

3.244 The approach taken in England and Wales to Rules Committees has changed in recent years. Prior to these changes, the Rules Committees in England and Wales were jurisdiction-based. It is now the case that the Rules Committees are based on the separate areas of court litigation as a whole, in relation to all courts. For example, there is now a Civil Procedure Rules Committee that has jurisdiction in respect of the Rules of the Court of Appeal (Civil Division), High Court and County Courts.

3.245 The Civil Procedure Rules Committee was established under the *Civil Procedure Act 1997* in order to implement the recommendations made by Lord Woolf regarding Rules Committees, among other things.³¹³ The Civil Procedure Rules Committee replaces the old Superior Courts and County Courts Rules Committees. There are separate arrangements in place

³¹¹ Committee on Court Practice and Procedure *Twenty Eighth Interim Report The Court Rules Committees* (September 2003) at 39.

³¹² Committee on Court Practice and Procedure *Twenty Eighth Interim Report The Court Rules Committees* (September 2003) at 40.

³¹³ Woolf *Access to Justice Final Report* (1996 Stationery Office) at 101.

for rules in relation to insolvency and family law,³¹⁴ and the Magistrates' Courts Rules Committee continues to have jurisdiction over the drafting of rules regarding the civil jurisdiction of that court.

3.246 The *Constitutional Reform Act 2005* provides for the abolition of the appellate jurisdiction of the House of Lords and for the establishment of a new Supreme Court of the United Kingdom.³¹⁵ Section 45 of the Act, which has been commenced, provides that the President of the Supreme Court may make rules governing the practice and procedure to be followed in the Court. Until a President is appointed, the Senior Law Lord is empowered to exercise the rule-making power.³¹⁶

3.247 Until recently, rule-making authorities for criminal courts in England and Wales were court jurisdiction based. The Rules Committees concerning the criminal jurisdiction of the courts have been amended in a similar fashion to their civil law counterparts. Following the 2001 Auld Review,³¹⁷ the Criminal Procedure Rules Committee was established in June 2004. This Committee was given the responsibility formerly exercised by the Magistrates' Courts Rules Committee and the Crown Court Rules Committee as they related to criminal proceedings. Its main responsibility is to make rules of procedure for all criminal courts in England and Wales, up to and including the Court of Appeal (Criminal Division). Section 69 of the *Courts Act 2003* establishes the Criminal Procedure Rule Committee and sets out the functions and remit of the Committee. A new set of rules, the Criminal Procedure Rules 2005, are now in place in substitution for the former Magistrates' Courts Rules and the Crown Court Rules.³¹⁸ By and large, these rules are a restatement of the former court-based rules.

New Zealand:

3.248 The Rules Committee of the New Zealand Courts is a statutory body and was established by section 51C of the *Judicature Act 1908*. This

³¹⁴ Section 75 of the *Courts Act 2003*. The Family Procedure Rules Committee was appointed in January 2004 when section 77 was brought into force. The Committee can only make Family Law Procedure Rules in respect of matters for adoption, including appeals and the enforcement of an order made in such proceedings. See SI 2005/2744 articles 2(1), 2(2)(a).

³¹⁵ Section 23 of the *Constitutional Reform Act 2005* (chapter 4) which awaits initial commencement.

³¹⁶ SI 2006/227. The section was commenced by SI 2006/228 and came into force on 27 February 2006.

³¹⁷ *Auld Review of the Criminal Courts of England and Wales* (Stationery Office October 2001)

³¹⁸ The Criminal Procedure Rules 2005 are available on the Department for Constitutional Affairs website www.dca.gov.uk.

Rules Committee is the sole rule-making committee in New Zealand and has responsibility for civil procedure and rules in each of the country's three main courts: the Court of Appeal, the High Court and the District Court; and also for criminal proceedings in the Court of Appeal and the High Court.³¹⁹

3.249 The 1908 Act provides that the Governor General in Council, with the concurrence of the Chief Justice and two or more members of the Rules Committee, may make rules regulating the procedure of the High Court, Supreme Court and Court of Appeal.³²⁰ Neither the Rules Committee nor the Government can unilaterally make rules. The ambit of the Rules Committee extends to both civil and criminal procedure in the High Court and Court of Appeal.

3.250 The power of the Rules Committee to participate to make rules for the district courts is set out in section 122(1) of the *District Courts Act 1947*, which provides that the Governor General in Council, with the concurrence of the Chief District Court Judge and two or more members of the Rules Committee, may make rules regulating the practice and procedure of the court when exercising its jurisdiction pursuant to the *District Courts Act 1947*. This means that the Rules Committee is vested with the power to make rules in civil proceedings and criminal proceedings relating to indictable and electable offences. The Rules Committee is not permitted to make rules for procedure outside the 1947 Act. In such cases, the Rules are regulated by the Governor General.

Northern Ireland:

3.251 Currently, separate codes of procedure exist for each level of the civil justice system and are contained in rules that are the responsibility of the Supreme Court (Court of Judicature) Rules Committee³²¹ and the County Courts Rules Committee.³²² The Committees are similar in that they are both creatures of statute and both consist of members of the judiciary and both branches of the legal profession. There is no common membership of these Committees, although it is possible for the professional members to be

³¹⁹ The Rules Committee was established by section 51B of the *Judicature Act 1908*. Its responsibility for rules of court is contained in section 51C of the *Judicature Act 1908* and section 122 of the *District Court Act 1947*.

³²⁰ Section 51C of the *Judicature Act 1908*.

³²¹ The Supreme Court (Court of Judicature) Rules Committee was established by section 54 of the *Judicature (Northern Ireland) Act 1978* chapter 23.

³²² The County Court Rules Committee was established by section 46 of the *County Courts (Northern Ireland) Order 1980* SI 1980/397 (NI3). See also Civil Justice Reform Group *Review of the Civil Justice System in Northern Ireland-Interim Report* (Civil Justice Reform Group Belfast April 1999) at paragraph 10.84.

members of both Committees.³²³ The issue of the future of the Rules Committees in Northern Ireland was considered by the Civil Justice Reform Group in its Interim and Final Reports.

3.252 With regard to the criminal courts in Northern Ireland, the Committees are again court based in nature. The rules for the Crown Court are provided for by the Crown Court Rules Committee.³²⁴ Rules for the Magistrates' Courts in Northern Ireland are drafted by the Magistrates' Courts, who then pass the rules onto the Lord Chancellor, who bears ultimate responsibility for putting forward the rules.³²⁵

3.253 The Civil Justice Reform Group of Northern Ireland recognised that there is sometimes value in retaining different procedures, but overall the Group felt that the desirability of uniformity in the civil courts outweighed this value. The Civil Justice Reform Group saw clear benefits in having a unified rule-making body for civil rules. It was of the opinion that such an innovation would lead the way towards a more consistent approach to rule-making throughout the civil courts, where initiatives could be applied simultaneously. The Group was of the opinion that the establishment of a unified rule-making body would enable discussion to more effectively focus on procedure as a whole rather than concentrate on individual courts and in so doing, would ensure maximum consistency between the levels. Accordingly, the Group stated that its preferred option was that future procedural rules for civil courts be made by a unified body known as the Civil Procedure Rules Committee.³²⁶

3.254 In its Final Report, the Civil Justice Reform Group made the following comments:

“The Group recognises that separate rules for the Supreme Court and County Court have enabled procedures to be designed and adapted so as to ensure that the workings of each court are appropriate for the requirements of that court. Equally, however, separate codes inevitably result in different methods being adopted, and different forms being prescribed, at different levels of the civil justice system to achieve what is essentially the same

³²³ Civil Justice Reform Group *Review of the Civil Justice System in Northern Ireland-Final Report* (Civil Justice Reform Group Belfast June 2000) at paragraph 10.84.

³²⁴ As established by section 53 of the *Judicature Act (Northern Ireland) Act 1978*.

³²⁵ Section 13 of the *Magistrates' Courts (Northern Ireland) Order 1981* SI 1981/1675 (NI 26).

³²⁶ Civil Justice Reform Group *Review of the Civil Justice System in Northern Ireland-Interim Report* (Civil Justice Reform Group Belfast April 1999) at paragraph 10.92.

objective, arguably creating unnecessary complexity, confusion and expense for practitioners and litigants.³²⁷

3.255 The Commission finds the above comment a very accurate reflection of both sides of the debate on the issue of whether the Rules Committees in this jurisdiction should remain jurisdictionally based.

3.256 Despite these recommendations, the Rules Committees in Northern Ireland continue to be jurisdictionally based. The Crown Court Rules Committee is entrusted to make rules for the Crown Court and its membership consists of members of the judiciary and practising lawyers.³²⁸ Provision has been made for the Crown Court Rules to be given effect only if the Lord Chancellor gives such permission, but the relevant section awaits commencement.³²⁹ Section 54 of the *Judicature (Northern Ireland) Act 1978* establishes the Supreme Court (Court of Judicature) Rules Committee and section 55 makes provision for the ambit of its rule-making capacity.

(IV) *Whether a system of public inquiry in relation to proposed rules should be initiated and or should meetings of Rules Committees be in public*

3.257 Generally, there is no public consultation in Ireland with respect to proposed Rules of Court. However, it is possible for the Rules Committee to obtain advice or a report from expert individuals when specific expertise is required. The meetings of the Rules Committees are held in private, with no opportunity for public input.

3.258 The Committee on Court Practice and Procedure was satisfied that a system of public inquiry in relation to the proposed rules is not appropriate. The Committee was of the view that such a practice would be costly and would have little or no benefit to the process. Instead, the Committee recommended that the current working method of the Rules Committees should continue, with the benefit of appropriate consultation with relevant institutions and persons, and the provision of information.³³⁰

3.259 In England and Wales, members of the public are permitted to attend meetings of the civil and family procedure rules committees, once permission of the committees is obtained.³³¹ Further, before making any

³²⁷ Civil Justice Reform Group *Review of the Civil Justice System in Northern Ireland-Final Report* (Civil Justice Reform Group Belfast June 2000) at paragraph 10.88.

³²⁸ Section 53 of the *Judicature (Northern Ireland) Act 1978*, chapter 2.

³²⁹ Section 53A of the *Judicature (Northern Ireland) Act 1978* chapter 2 as inserted by section 15(2) of the *Constitutional Reform Act 2005*, chapter 4

³³⁰ Committee on Court Practice and Procedure *Twenty Eighth Interim Report The Court Rules Committees* (September 2003) at 40.

³³¹ Gold “Hot Ticket” (2006) 156 NLJ 594.

rules, the Committee is obliged to consult such persons as it considers appropriate.³³² In the recent past, in the United Kingdom, a public consultation took place in relation to the Supreme Court Rules for the new Supreme Court of the United Kingdom.³³³ The purpose of this consultation is to give effect to the duty of the President of the Supreme Court to consult on the Rules.³³⁴ Interested parties were invited to submit comments and suggestions on the draft rules and practice directions.

3.260 The Commission is aware that the minutes of the Rules Committees of the courts in Northern Ireland are placed on the Courts Service of Northern Ireland website.³³⁵

3.261 In the United States, the meetings of the Judicial Conference Standing Committee are open to the public, and proposed amendments are available to the public in advance of the meetings. Additionally, the public meetings are held in various different locations across the United States.³³⁶

3.262 It is arguable that the need for public consultation is lessened once consultation with appropriate relevant institutions and persons takes place. It is worth considering the further option of allowing for written submissions to be submitted from the public to the Rules Committees, on specific rules that are pending drafting due to newly enacted legislation.

(V) *Whether the Rules Committees should act subject to general policy objectives*

3.263 The Rules Committee in this jurisdiction are not subject to any guiding principles or policy objectives in their drafting of Rules. The sole criterion to be employed by the Rules Committees is that contained in section 75(2) of the *Courts of Justice Act 1936*, which states that the Committees must be independent in their functioning and report annually to the Minister on the changes that they consider should be made in practice, procedure and administration, “with a view to the improvement of justice”.

³³² Section 1(6) of the *Civil Procedure Act 1997* and section 45 of the *Constitutional Reform Act 2005*.

³³³ Judicial Office of the House of Lords Consultation *Paper on Draft Supreme Court Rules* 10 January 2007 available at www.parliament.uk/judicial_work/judicial_work.cfm

³³⁴ Until the President of the Supreme Court is appointed, it is the Senior Lord Justice of Appeal in Ordinary who acts as President of the Supreme Court for the purposes of this section. SI 2006/228.

³³⁵ See www.courtsni.gov.uk

³³⁶ See www.uscourts.gov

Other Jurisdictions

3.264 In the United States, the Judicial Conference is required by statute to “carry on a continuous study of the operation and effect of the general rules of practice and procedure.”³³⁷ The Conference is authorised to recommend amendments and additions to the rules to promote (a) simplicity in procedure, (b) fairness in administration, (c) the just determination of litigation and (d) the elimination of unjustifiable expense and delay.

3.265 A wide duty is prescribed to the New Zealand Rules Committee under section 51(c) of the *Judicature Act 1908* which provides that rules are to be made “for the purposes of facilitating the expeditious, inexpensive and just dispatch of the business of the Court of otherwise assisting in the due administration of justice.” The Law Commission of New Zealand recommended that the rules of court be drafted with the following aims: “clarity and simplicity of language, proportionality of procedure and enhancing access to justice for all citizens”.³³⁸

3.266 In the United Kingdom, the *Civil Procedure Act 1997* provides that the power to make rules must be “exercised with a view to securing that the civil justice system is accessible, fair and efficient.”³³⁹ This is reinforced by part 1.1 of the Civil Procedure Rules for England and Wales which establishes the “overriding objective” for the rules of “enabling the court to deal with cases justly”. In addition, the Committees must also make rules that are “both simple and simply expressed.”³⁴⁰ The Criminal Procedure Rule Committee is required to give due attention to ensuring that the criminal justice system is accessible, fair and efficient, and that the rules are both simple and simply expressed.³⁴¹ The rule making power of the Supreme Court rules in the United Kingdom must be exercised with a view to securing that:

“(a) the court is accessible, fair and efficient, and (b) the rules are both simple and simply expressed.”³⁴²

3.267 The Committee on Court Practice and Procedure recommended that legislation should be introduced to provide for general policy objectives

³³⁷ 28 USC section 331.

³³⁸ Law Commission of New Zealand *Delivering Justice for All: A Vision of New Zealand Courts and Tribunals* (NZLC R 85 2004) at 199. See also Law Commission of New Zealand *Seeking Solutions Options for Change to the New Zealand Court System* (Preliminary Paper 52 December 2002 Wellington) at 140.

³³⁹ Section 1(3) of the *Civil Procedure Act 1997*.

³⁴⁰ Section 2(3) of the *Civil Procedure Act 1997*.

³⁴¹ Section 69 of the *Civil Procedure Act 1997*.

³⁴² Section 45 of the *Constitutional Reform Act 2005*.

for the Courts Rules Committees, and that these objectives should include the following: (a) rules should be drafted to enable a simple court process; (b) rules should be drafted using plain language; (c) rules should be drafted with view to keeping cost of litigation down; (d) rules should encourage expedition and discourage delay; (e) rules should enable the development of case management; (f) rules committees should, where practical, regularly review the rules of the courts; and (g) rules committees should where possible enable the development of IT and e-courts. The Working Group on a Courts Commission recommended that the Rules Committees should be enabled to be active vehicles for introducing improvements in the Courts system.

3.268 The Legal Costs Working Group recently examined the issue of whether it is necessary for an overriding objective to be followed when rules of courts are being applied by courts. The Group found that the existing procedural rules that allow the courts to minimise delays are being underused.³⁴³ In order to alleviate such delays, the Group recommended that consideration be given, if necessary in primary legislation, to formulating a principle that each court should allocate an appropriate share of its resources to individual cases, after considering the needs of other cases.³⁴⁴ The view has recently been expressed that the most effective manner in which to introduce such procedural change is by way of amendment to the rules of court rather than by primary legislation.³⁴⁵ The Commission agrees with this contention as it is common in other jurisdictions for policy objectives to be included in the rules of court.

3.269 The Commission agrees that the Rules Committees should be placed in a position to further the efficiency and justness of the rules of courts. In this regard, the Commission was influenced by the overriding objective contained in the *Civil Procedure Act 1997* and the recommendation made by the Legal Costs Working Group. The Commission welcomes the detailed policy objectives recommended by the Committee and Court Practice and Procedure, and advocates that they be implemented in legislation. The Commission also feels that more overarching principles by which the rules of court should be interpreted should be included in legislation. The Commission believes that suitable overarching principles are simplicity in rules, ensuring accessibility and efficiency in the courts system.

³⁴³ Working Group on the Legal Costs Working Group *Report of the Legal Costs Working Group* (Pn A5/1816 Stationery Office 2005) at 56.

³⁴⁴ Working Group on the Legal Costs Working Group *Report of the Legal Costs Working Group* (Pn A5/1816 Stationery Office 2005) at 57.

³⁴⁵ Legal Costs Implementation Advisory Group *Report of the Legal Costs Implementation Advisory Group* (Pn A7/0027 Stationery Office 2006) at 23.

3.270 *The Commission provisionally recommends that the following guidelines be included in legislation regarding the Rules Committees of the Court:*

- (a) rules should be drafted to enable a simple court process;*
- (b) rules should be drafted using plain language;*
- (c) rules should be drafted with a view to keeping the cost of litigation down;*
- (d) rules should encourage expedition and discourage delay;*
- (e) rules should enable the development of case management;*
- (f) the rules committee should where practical review regularly the Rules of the court;*
- (g) the rules committee should where possible enable the development of IT and e-courts.*

3.271 *The Commission provisionally recommends that the following overarching guidelines should be included in legislation regarding the Rules Committees of the Court:*

- (a) simplicity in rules;*
- (b) ensure accessibility of rules; and*
- (c) efficiency in the courts system.*

(VI) Should lay persons sit on the Rules Committees

3.272 As can be seen from the members of the Court Rules Committees of the different courts in Ireland, there is no opportunity for lay persons to be members of the committees. However, it is common for advisory groups to be used where necessary. In some cases, these groups include non-lawyers.

3.273 The Civil Rules Committee in England and Wales consists of lawyers and lay persons. Section 2(2) of the *Civil Procedure Act 1997* provides that the Rules Committee shall include individuals with knowledge of consumer affairs and persons with experience in the lay advice sector. This followed a recommendation from Lord Woolf that such people would be an invaluable asset to the Rules Committees and would ensure public confidence in its work. The Criminal Rules Committee in England and Wales consists of representatives of all of those involved in the working of the criminal courts - the judiciary, the legal profession, the police and representatives of the wider community. Currently, the Committee has two representatives of voluntary organizations: one of the National Association for the Care and Rehabilitation of Offenders (NACRO) and one of the National Association of Victims' Support Schemes.

3.274 The rule-making body for the Supreme Court in the United Kingdom must consult certain bodies named in the Constitutional Reform Act 2005, including:

- the General Council of the Bar of England and Wales;
- the Law Society of England and Wales;
- the Faculty of Advocates of Scotland;
- the General Council of the Bar of Northern Ireland;
- the Law Society of Scotland; and
- the Law Society of Northern Ireland.

3.275 Similarly, in New Zealand, the Chief Justice can appoint up to ten non-legal individuals to sit on the Rules Committee. In New South Wales, the representatives of consumer groups can sit on the court rules committees.

3.276 The Committee on Court Practice and Procedure recognised that other jurisdictions have increasingly legislated for the inclusion of lay members on the Rules Committees. The Committee on Court Practice and Procedure recommended that the Minister for Justice should consider the introduction of legislation to allow for the appointment of a lay person to each Court Rules Committee.³⁴⁶ It also recommended that the Rules Committees should make more information available on the rules that they are drafting, be open to submissions and hold more consultations. The Committee hoped that these changes would enable more successful lay participation in the Rules Committees. It is of interest to note that in 1930, the Joint Committee on The Courts of Justice Act 1924 recommended that the 1924 Act be amended to allow for the inclusion on the Committee of two persons not being members of the legal profession to represent the general public. These individuals would be nominated by the Minister for Justice.³⁴⁷

(VII) Provision of information/advance warning of legislative changes

3.277 Currently, there is no provision for advance warning to the Rules Committee of proposed primary or secondary legislation. The proposed legislation may require new rules of court or amendment to the existing rules. The Committees' lack of awareness of proposed legislation can prevent them from drafting new rules in sufficient time to coincide with the legislation coming into effect. This lacuna can cause undue delay in the drafting of rules of court.

³⁴⁶ Committee on Court Practice and Procedure *Twenty Eighth Interim Report The Court Rules Committees* (September 2003) at 53.

³⁴⁷ Report of the Joint Committee on the Courts of Justice Act 1924 (Stationery Office 1930) at lix.

3.278 The Committee on Court Practice and Procedure recommended that such information be provided to the Rules Committees. It suggested the setting up of a support unit concerning legislation regarding rules or any potential amendment of the rules, specifically for this purpose. The Committee also was of the view that it would be of benefit for provision to be made for formal contact between the Oireachtas and the Rules Committees in relation to proposed legislation that may require new or amended rules of court. The Committee also felt that it would be of great benefit if, when drafting the rules, the Rules Committees retained expertise for research and other assistance from other sources, such as academics.³⁴⁸

3.279 The Commission notes the recommendation of the Committee on Court Practice and Procedure, as it is in the interests of efficiency that the Rules Committees be fully apprised of pending legislative development. The Commission welcomes submissions on this issue.

(7) Criminal Procedure: summary trials of indictable offences and the right of election

(a) Ireland

3.280 This section examines in some detail the issue of summary trial of indictable offences, with particular emphasis on the right of election. Given the extensive debate on the issue of right of election in the United Kingdom and resultant developments, the Commission has outlined this in detail. In some respects, this is a re-examination of the issue adequately highlighted and discussed by the Fennelly Group.

3.281 Under Article 38 of the Constitution no one can be tried on a criminal offence without a jury save in three circumstances. The most common of these is the case of minor offences which can be tried in the District Court without a jury.³⁴⁹ However, some indictable offences which are non-minor in nature can also be tried by the District Court once certain criteria have been met. Should such offences be tried in the District Court there is no jury and it is the District Judge who alone decides the case. However, in certain instances the accused has the right to elect for a trial by jury, thereby overruling the Director of Public Prosecution's choice of court in which the offence will be tried. In this section the Commission examines these 'either way' offences and compares such offences with the experience of other jurisdictions on this topic.

³⁴⁸ Committee on Court Practice and Procedure *Twenty Eighth Interim Report The Court Rules Committees* (September 2003) at 48.

³⁴⁹ It has been determined that a defendant who is prosecuted in the District Court in a summary manner is not entitled to be tried by a jury. *The State (McEvitt) v Delap* [1981] IR 125.

3.282 The jurisdiction of the District Court in criminal matters can be described as three fold. First, there are offences described as summary in nature over which the District Court as a court of summary jurisdiction has exclusive jurisdiction.³⁵⁰ Second, in certain circumstances, the District Court has jurisdiction over indictable offences if they are minor in nature. These indictable offences triable summarily are known as ‘either-way offences’ and can be determined by the District Court when the following three criteria are met:

- the court is of the opinion that the facts proved or alleged constitute a minor offence fit to be tried summarily;
- the accused, on being informed of his right to be tried by a jury does not object to being tried summarily; and
- the Director of Public Prosecutions consents to the accused being tried summarily for the alleged offence.³⁵¹

3.283 The list of offences which are ‘either way’ in nature is contained in First Schedule to the *Criminal Justice Act 1951*. The Act allows for the Minister to add any indictable offence to the list contained in the Schedule, however, no Minister has ever invoked this section.³⁵² Instead, a number of offences have been added to the list by statute, for example section 7(7) of the *Criminal Law Act 1997* added the offence of impeding the apprehension or prosecution of a person believed guilty of an arrestable offence pursuant to section 7(2) of the 1997 Act to the Schedule.

3.284 Third, it is increasingly common practice for the statute creating an offence to provide that the offence may be triable either summarily or on indictment at the discretion of the Director of Public Prosecutions. These offences are known as ‘hybrid offences’. An example of such an offence is that of threat to damage property contained in section 3 of the *Criminal Damage Act 1991* which provides:

³⁵⁰ Section 33 of the *Courts (Supplemental Provisions) Act 1961* provides that the jurisdiction vested in the District Court existing at the time of the Act was transferred to the current District Court. Section 77 of *The Courts of Justice Act 1924* provides that the District Court shall have the jurisdiction which was vested in a Justice or Justices of the Peace sitting at Petty Session. Justices at Petty Sessions exercised summary jurisdiction and Acts such as the *Petty Sessions Act 1851* and *Summary Jurisdiction Act 1851* are still relevant to the District Court as successor to the Courts of Petty Sessions.

³⁵¹ Section 2 of the *Criminal Justice Act 1951*.

³⁵² Section 2(1)(b) of the *Criminal Justice Act 1951* and Working Group on the Jurisdiction of the Courts *The Criminal Jurisdiction of the Courts* (Pn237 May 2003) at 57.

“A person who without lawful excuse makes to another threat, intending that that other would fear it would be carried out-

- (a) to damage any property belonging to that other person or a third person, or
- (b) to damage his own property in a way which he knows is likely to endanger the life of that or a third person

shall be guilty of an offence and shall be liable-

- (i) on summary conviction to a fine not exceeding €1,269.74 [£1,000] or imprisonment not exceeding 12 months or both, and
- (ii) on conviction on indictment, to a fine not exceeding €12,697.38 [£10,000] or imprisonment for a term not exceeding 10 years or both.”

3.285 Either way’ offences can be differentiated from so called ‘hybrid offences’. ‘Hybrid offences’ are offences where the Director of Public Prosecutions has the sole discretion to decide whether the offence is tried summarily. The decision of the DPP is subject to the right of the District Judge to refuse jurisdiction if he is of the opinion that the matter is not suitable to be dealt with in a summary manner.³⁵³ It has been held that in hybrid offences the choice of the method of prosecution is a matter to be decided by the prosecution and the accused person does not have the right to choose between the two methods of disposal of the case.³⁵⁴ It appears that

³⁵³ Mr Justice Charleton in *Reade v Reilly* [2007] 1 ILRM 504 held in unequivocal terms, that this duty continues until conviction. Mr Justice Charleton stated at page 515:

“Article 38.5 of the Constitution provides that persons accused of criminal offences have a right to be tried by a jury, except where the case is one subject to military law, where it is within the jurisdiction of a Special Criminal Court or where it is a minor offence. In the first instance, modern statutes which create an offence and give an option of different penalties on summary disposal or disposal on indictment require the Director of Public Prosecutions to decide on the mode of trial. That decision is always subject to judicial scrutiny. The duty of insuring that Article 38 of the Constitution is implemented in the trial of offences rests with every judge sworn to try criminal cases. Even if a judge in the District Court takes a preliminary view that the papers he has before him or her discloses a minor offence, the court is still under a constitutional imperative to insure that the case is tried with a jury should it emerge on a further perusal of the facts, or on hearing the evidence at the actual trial itself, that the case involves a non-minor offence. That duty continues up to the point of conviction, at which time the power to decide that an offence being tried summarily is not a minor one is spent.”

³⁵⁴ *The State (Clancy) v Wine* [1980] 1 IR 228. See also *Attorney General (O'Connor) v O'Reilly* Unreported High Court 29 November 1979 Finlay P.

the primary factor taken into account by the DPP's office in deciding whether the offence should be dealt with in the District Court is whether the sentencing options available to the District Court are adequate to deal with the alleged complaint.³⁵⁵ In 2005, the District Court disposed of 302,134 summary offences and 41,374 indictable offences.³⁵⁶

3.286 Thirdly, for the sake of completeness it is worth noting that if the accused pleads guilty to most indictable offence, the case may be referred to the District Court for sentencing with the consent of the Director of Public Prosecutions.³⁵⁷ If this occurs, the District Court's maximum power of sentencing is a fine not exceeding €1,270 and or imprisonment of a term not exceeding 12 months.³⁵⁸

3.287 Section 4(1) of the *Criminal Justice Act 1951* as amended by section 17 of the *Criminal Justice Act 1984* sets out the maximum sentences for either way offences as being a term of imprisonment not exceeding 12 months or a fine not exceeding €1270 or both a fine and imprisonment.

3.288 Most newly created criminal offences in this jurisdiction are hybrid in nature. The Fennelly Group noted that the current system is inconsistent; thus all theft and fraud offences include a right of election for an accused,³⁵⁹ whereas a person charged with offence against the person has no such right.³⁶⁰ To further strengthen this argument, the Fennelly Group compared very similar offences: first section 19 of the *Criminal Justice (Public Order) Act 1994* which provides for the offence of assaulting a peace officer in the execution of his duty and secondly section 41 of the *Criminal Justice Act 1999* which creates the offence of harming, threatening or menacing persons assisting An Garda Síochána, jurors or witnesses. The latter offence has is hybrid in nature, providing no right of election whereas the former offence confers such a right.³⁶¹

³⁵⁵ Director of Public Prosecutions *Statement of General Guidelines for Prosecutions* (2006) at paragraph 13.9.

³⁵⁶ Annual Report of the Courts Service (2005) at 89.

³⁵⁷ Section 13 of the *Criminal Procedure Act 1967* as amended by the *Criminal Justice Act 1984*. Section 13 contains an list of offences to which the procedure can never apply.

³⁵⁸ Section 13(3)(a) of the *Criminal Procedure Act 1967*.

³⁵⁹ Section 53 of the *Criminal Justice (Fraud and Theft Offences) Act 2001* re-enacted the right of election for all theft and fraud offences regardless of the gravity of offence.

³⁶⁰ Working Group on the Jurisdiction of the Courts *The Criminal Jurisdiction of the Courts* (Pn237 May 2003) at 63.

³⁶¹ Working Group on the Jurisdiction of the Courts *The Criminal Jurisdiction of the Courts* (Pn237 May 2003) at 59-60.

3.289 A right of election exists for serious offences under the *Criminal Justice (Theft and Fraud Offences) Act 2001*, such as aggravated burglary and robbery, yet serious assault offences such as possession of an offensive weapon are hybrid in nature. As such this appears not to be based on any coherent policy. People under the age of 18 years have a right of election in every case of summary prosecution of an indictable offence. The Fennelly Group was of the opinion that this inconsistency offends against basic principles of fairness and justice that accused persons should be treated equally by the criminal justice system.³⁶²

3.290 One possible reason advanced for the increase in the use of hybrid offences over either way offences is a belief that

“the right to seek trial by jury has been abused in that it has been used as a tactic for evading prosecutions where it is decided by Director of Public Prosecutions that the cost of a trial by jury would be excessive.”³⁶³

3.291 Additionally, of itself it must be acknowledged that the cost of jury trials is far in excess of cases dealt with summarily in the District Court. Further, summary trials are more efficient as they involve the use of fewer resources and come to a conclusion in a speedier manner than offences tried on indictment. The Fennelly Group stated that a number of regulatory bodies empowered to prosecute statutory offences had informed them that they may be prevented from prosecuting such offences due to the cost of prosecution if there was an election for trial by jury.³⁶⁴ On this basis, the Fennelly Group recommended that in all cases where summary trial or jury trial are optional, the accused should be entitled to opt for a jury trial.³⁶⁵ The Group recognised that certain indictable offences triable summarily might not have a right of election. In such cases, the Group declared that there is a need for a consistent policy to be implemented so that the current inconsistency is avoided.

(b) Debate on either way offences in the United Kingdom

3.292 In the United Kingdom there has been considerable debate on the viability and feasibility of either way offences. It is fair to say that this debate has centred on the right of election aspect of these offences. The James Committee completed an examination on the allocation of cases

³⁶² *Ibid* at 75

³⁶³ Richard Bruton TD Dáil Debates Volume 440 9 March 1994.

³⁶⁴ Working Group on the Jurisdiction of the Courts *The Criminal Jurisdiction of the Courts* (Pn237 May 2003) at 62.

³⁶⁵ *Ibid* at 76.

between the Magistrates' Courts and the Crown Court.³⁶⁶ At the time of the Report, both hybrid and either way offences were in existence. The first discussion of the issue was completed by the James Committee who recommended there be a single category of intermediate offences triable either on indictment or summarily and that accused have a right of election in all of these cases.³⁶⁷ The Committee took the view that the distinction between either way offences and hybrid offences at the time of the Report was untenable and the Committee "could see no justification in principle for according defendants a right to jury trial in respect of some of them but denying in respect of others."³⁶⁸

3.293 On the basis of the Committee's recommendation of an intermediate category of offences triable either summarily or on indictment, the Committee then considered who or a combination of whom, would be best placed to decide on the forum for such offences. The Commission has found this discussion very beneficial given the similar position in this jurisdiction to intermediate offences to the situation in the United Kingdom at the time of the Report. The Committee rejected the idea of the Magistrates' Court alone being vested with the power to decide on the forum for such cases. They accepted that the right of election given to a defendant in either way offences was sufficiently important to the judicial system to garner support from the public and accordingly could not be replaced by a decision either by the prosecution or the court.³⁶⁹ Finally, the Committee rejected the idea that the decision rest solely with the prosecution. They reasoned that it would not be beneficial "for the authority that has investigated the offence, apprehended the accused and decided what offence should be charged to decide also the mode of trial."³⁷⁰ Accordingly they recommended that the prosecution to apply either for trial on indictment or summarily as they are in the best position to evaluate the gravity of the offence. The defendant

³⁶⁶ James Committee *Report of the Interdepartmental Committee on the Distribution of Criminal Business between the Crown Court and the Magistrates' Court* (Cmnd 6323 HMSO 1975).

³⁶⁷ James Committee *Report of the Interdepartmental Committee on the Distribution of Criminal Business between the Crown Court and the Magistrates' Court* (Cmnd 6323 HMSO 1975) at 35.

³⁶⁸ James Committee *Report of the Interdepartmental Committee on the Distribution of Criminal Business between the Crown Court and the Magistrates' Court* (Cmnd 6323 HMSO 1975) at 30.

³⁶⁹ James Committee *Report of the Interdepartmental Committee on the Distribution of Criminal Business between the Crown Court and the Magistrates' Court* (Cmnd 6323 HMSO 1975) at 30.

³⁷⁰ James Committee *Report of the Interdepartmental Committee on the Distribution of Criminal Business between the Crown Court and the Magistrates' Court* (Cmnd 6323 HMSO 1975) at 23.

charged with an intermediate offence would be provided with an absolute right to elect for trial on indictment and make representations that he be tried summarily. The final decision as to the forum for intermediate cases would lie with the court, after having considered a number of factors.

3.294 These recommendations were enacted in the *Criminal Law Act 1977* and later amalgamated into the *Magistrates Court Act 1980*. Section 16 of the 1980 Act provides that the offences listed in the First Schedule to the Act can be tried either summarily or on indictment. Offences included in that schedule include public nuisance, assault causing bodily harm, perjury in judicial proceedings and arson. The defendant in either way offences has an unfettered right to elect for trial at the Crown Court, or to opt for a summary trial of the matter in the Magistrates' Court. The maximum sentence a magistrates' court can impose is 6 months, or in the case of more than one offence, 12 months.³⁷¹ The Magistrates' Court decides on whether the offence is suitable for summary trial or trial on indictment after hearing representations from the accused and the prosecution.³⁷² The matters to which the Magistrates' Court is to have regard when making its decision are

- the nature of the case;
- whether the circumstances make the offence one of a more serious character;
- whether the punishment which the magistrates' court has the power to impose is adequate; and
- any other circumstances which appear to the court to make the offence suitable to be tried in one way or another.³⁷³

If the magistrates decide that the offence is suitable for summary trial they must inform the accused of his right to elect for a trial by jury.

3.295 After these enactments a later change of opinion began to emerge. For example, the Runciman Committee recommended abolishing the defendant's right of election of jury trial.³⁷⁴ Instead, the Committee envisaged the defendant having a right to make representations to the court as to the mode of trial. The main reason given by the Committee for its recommendation was the need for a "more rational distribution of cases between the cases between the higher and lower courts".³⁷⁵ The Runciman

³⁷¹ Section 32 of the *Magistrates' Courts Act 1980* (chapter 43).

³⁷² Section 19 of the *Magistrates' Courts Act 1980* (chapter 43).

³⁷³ Section 19(3) of the *Magistrates' Courts Act 1980* (chapter 43).

³⁷⁴ Report of the Royal Commission on Criminal Justice (Cm 2263 HMSO 1993)

³⁷⁵ Report of the Royal Commission on Criminal Justice (Cm 2263 HMSO 1993) at 89

Committee was influenced by the principle that the mode of trial should be determined objectively by the system and not subjectively by the defendant.³⁷⁶ They further stated that they did “not think that defendants should be able to choose their court of trial solely on the basis that they think they will get a fairer hearing at one level than the other”. A similar view was expressed in a later report which stated that defendants were engaged in an “improper manipulation of the criminal justice system”.³⁷⁷ This report again followed the recommendations of its predecessors in arguing that defendants should no longer be able to overrule the decision of a magistrates’ court to retain jurisdiction of a case, by invoking their right of election of trial by jury.

3.296 The Runciman Committee recommended that in either way offences, the decision as to the mode of trial “should rest on a variety of relevant factors including the gravity of the offence, the past record, if any, of the defendant, the complexity of the case, and its likely effect on the defendant (including the likely sentence) if there is a conviction.”³⁷⁸ The Commission agrees largely that these criteria are suitable to assist a court in its determination of the forum for trial. However, the Commission is concerned with the inclusion of the past criminal record of the accused in such criteria. While the Commission acknowledges that such a factor can have an ultimate bearing on a sentence being imposed, it should not affect the forum for trial.

3.297 In 1999 and 2000 the British Government introduced Bills to Parliament which proposed to remove the right of a defendant to elect for trial in the Crown Court in either way offences. The Criminal Justice (Mode of Trial) (No. 1) Bill 1999 and the Criminal Justice (Mode of Trial) (No. 2) Bill 2000 attempted to give the sole function of deciding the mode of trial of summary offences to magistrates. The Bills proposed that in making his or her decision, the magistrate would have regard to the nature of the case and any relevant circumstances of the offence. If the provisions came into force, it was expected that 18,000 defendants would lose their right to elect to a trial by jury.³⁷⁹ The Bills were withdrawn after they were defeated at the committee stage in the House of Lords.³⁸⁰ The arguments in favour of the

³⁷⁶ Zander “Lord Justice Auld’ Review of the Criminal Courts A Response” (November 2001) available at www.lse.ac.uk/collections/law/staff/zander/auld_response_web.pdf

³⁷⁷ Narey *Review of Delays in the Criminal Justice System* (Home Office 1997) chapter 6.

³⁷⁸ Report of the Royal Commission on Criminal Justice (Cm 2263 HMSO 1993) at 88.

³⁷⁹ “A Law unto itself” (2002) *The Lawyer* 18.

³⁸⁰ The Criminal Justice (Mode of Trial) (No. 1) Bill 1999 was introduced in the House of Lords in November 1999. It reached Committee stage but was withdrawn following much criticism. The Criminal Justice (Mode of Trial) (No. 2) 2000 was re-

Criminal Justice (Mode of Trial) Bills 1999 and 2000 were based on a belief that defendants were utilising the criminal justice system to their benefit by electing for trial in Crown Court as a delay mechanism, and the extra cost in crown trials. The 1999 and 2000 Bills were premised on the belief that delay and expense could be avoided by directing more either way offences to Magistrates Courts.

3.298 Lord Auld in his Review of the Criminal Justice System proposed that either way offences would be allocated to the right level of court according to statutory criteria such as the seriousness of the offence and the circumstances of the defendant.³⁸¹ He proposed that if there was no dispute, the allocation of the decision would be for the Magistrates' Division, but if there were a disagreement as to allocation, the District Judge would decide after hearing submissions from both sides. Auld's proposals also envisaged the demise of the defendant's right of election in either way offences. He also recommended that if the current court structure was to remain in place, the defendant would also lose the right of election. In such instances, the allocation would be the responsibility of the magistrates' court alone and exercisable where there is an issue as to venue by a District Judge.³⁸²

3.299 Finally, the Home Office completed its White Paper on *Justice for All* in 2002.³⁸³ The Home Office concluded that the right of election of the accused to the Crown Court should remain. However, the Home Office expressed concern with abuse of the right of election by defendants who elect for trial by jury in the Crown Court as they believe the protraction of the process may cause the prosecution of the offence with which they are charged to be abandoned. The Home Office expressed the view that it is desirable to reduce the number of cases sent by magistrates' to the Crown Court unnecessarily as the Crown Court imposes a sentence that could have been imposed in the Magistrates' Court.³⁸⁴ The view of the Home Office that the right of accused to elect for trial in the Crown Court should be maintained has remained the law, so despite the many cries for its abolition the right of election is still part of the English legal system.

introduced by the British Government to the House of Commons. It was passed by the House of Commons, but was defeated in the House of Lords and withdrawn.

³⁸¹ Auld *Review of the Criminal Courts of England and Wales* (Stationery Office October 2001) at 280-1.

³⁸² Auld *Review of the Criminal Courts of England and Wales* (Stationery Office October 2001) at 282-3.

³⁸³ Home Office *White Paper Justice for All* (Cm 5563 2002)

³⁸⁴ *Ibid* at 73.

(c) Scotland

3.300 In Scotland, the accused has no right to elect for trial by jury; instead the choice of court is entirely a matter for the prosecution.³⁸⁵ The only offences over which the prosecution has no jurisdiction to determine forum are murder and rape which are automatically designated to the High Court. The decision of the prosecution on the venue for the trial is final and unappealable.

(d) Northern Ireland³⁸⁶

3.301 In general summary offences are triable in the magistrates' courts, although the Magistrates' Courts (Northern Ireland) Order 1981³⁸⁷ provides that a defendant may elect for trial by jury if the potential sentence is in excess of 6 months' imprisonment. This right of election is subject to certain restrictions for specified offences.³⁸⁸ These offences are generally subversive in nature and include firearms and explosives offences.

3.302 Certain offences which are triable on indictment can be tried summarily once the consent of the prosecution and the defence is obtained.³⁸⁹ In addition, the magistrate must think it "expedient to deal summarily with the charge" and to that end he or she must have regard to:

- (i) "any statement or representation made in the present of the accused or on behalf of the prosecution or the accused;
- (ii) the nature of the offence;
- (iii) the absence of the circumstances which would render the offence one of a serious character; and
- (iv) all other circumstances of the case (including the adequacy of the punishment which the court has power to impose)".

The list of indictable offences which can be tried summarily contained in the second schedule of the Order and includes, *inter alia*, assault causing actual

³⁸⁵ Gordan "Allocating Crime for Trial in Scotland" (2003) 3(1) Judicial Studies Institute Journal 16 at 20.

³⁸⁶ McCollum "Allocating Crime for Trial in Northern Ireland [2003] 3(1) Judicial Studies Institute Journal 10.

³⁸⁷ Number 1675 (NI 26).

³⁸⁸ Section 29 of the Magistrates' Courts (Northern Ireland) Order 1981.

³⁸⁹ Section 45 of the Magistrates' Court (Northern Ireland) Order 1981.

bodily harm and common assault; threats to kill, unlawful carnal knowledge of a girl under 17, assisting offenders and indecent assault on a male.

3.303 There are certain other offences which can be tried summarily or on indictment and the decision as to the mode of trial in such offences rests solely with the prosecution.

(e) New Zealand

3.304 Offences which have a maximum punishment of more than 3 months but not in excess of 14 years can be tried summarily and or by jury upon the election of the accused. The list of indictable offences which can be tried summarily includes offences such as unlawful assembly; riot, incest, aggravated assault, robbery and arson.³⁹⁰

3.305 The Law Commission of New Zealand was dissatisfied by the manner in which the prosecution is able to influence the way in which a charge will proceed through the courts by determining whether the offence will be tried summarily or on indictment. For that reason the Law Commission of New Zealand recommended that the distinction between summary offences and indictable offences be abolished.³⁹¹ Accordingly they recommended that a defendant have a right of election in all offences, apart from where the defendant pleads guilty.

(f) Discussion

3.306 First, it is beneficial to consider whether the proposal of the Law Commission of New Zealand that the distinction between summary offences and indictable matters should be abolished and a right of election available in all cases is a vital option for this jurisdiction. The Commission feels that this recommendation would be impractical and make it difficult to predict with any certainty on the level of cases which would come before the criminal courts. Additionally as the New Zealand court system is two tier in nature, the Law Commission of New Zealand's recommendation is more practical to apply for the New Zealand court system. The Law Commission of New Zealand is patently in agreement with the contention that trial by jury is in the public interest.³⁹²

3.307 The Commission has considered whether it would be beneficial to abandon the use of 'either way offences' completely, thereby obviating the current inconsistency between hybrid and either way offences. The

³⁹⁰ Part I of the First Schedule to the *Summary Proceedings Act 1957* (no 87 of 1957).

³⁹¹ Law Commission of New Zealand *Simplification of Criminal Procedure Legislation: an Advisory Report to the Ministry for Justice* (Study Paper 7 January 2001) at 5.

³⁹² Law Commission of New Zealand *Simplification of Criminal Procedure Legislation: an Advisory Report to the Ministry for Justice* (Study Paper 7 January 2001) at 6.

Commission had concluded that the right of election is a right which could not be easily abandoned given the inherent value of trial by jury to both the accused and to the general public. The Commission is mindful of the fact that hybrid offences are no longer part of the British legal system.

3.308 The Commission has considered whether a workable definition of the types of offences which should attract the right of election should be considered. For example, crimes of dishonesty such as larceny can be objectively perceived to be morally culpable offences and conviction of such offences can prevent a person holding certain positions. It could be argued that such offences should be either way in nature. However, the Commission does find such an argument persuasive as it considers that there are numerous other offences such as serious assault or sexual offences which are serious in nature and carry a similar social stigma as dishonesty type offences. At present, sexual assault offences such as defilement of a child under the age of 15 or the defilement of a child under the age of 17 are either way offences³⁹³ whereas almost all assault are hybrid offences. The Commission is of the opinion that it is impracticable to devise a rule concerning the type of offences should attract a right of election. The Commission is also concerned that the present division between offences which attract a right of election and those which do not could offend the constitutional importance of right to a trial by jury. The Commission welcomes submissions on this issue.

3.309 A further matter to be considered is whether all summary cases where the accused could be imprisoned for any period should provide the accused with a right of election for trial by jury. It is arguable that the recommendation of the Fennelly Group that all offences which can be tried summarily or on indictment be 'either way' offences is too expansive a proposition. A dissenting view to this recommendation was expressed by the Chief Prosecution Solicitor that this recommendation includes regulatory type offences where there is no real need for a right of election to be available as most of these offences are punishable only by a fine. If the accused was vested with the right to elect for trial by jury for all offences where imprisonment is a possibility as a penalty, this would exclude regulatory type offences which generally impose a fine as a punishment with no possibility of imprisonment. This recommendation would be consistent with the previous recommendation by the Commission in its Consultation Paper on Minor Offences:

³⁹³ Section 4 of the *Criminal Law (Sexual Offences) Act 2006*.

“it is the Commission’s contention that the right to a jury trial should be as widely available as possible and particularly so when prison sentences are likely to be imposed.”³⁹⁴

The Commission has noted that Northern Ireland provided a summary offence has a six month or greater imprisonment as a possible punishment, a right of election is available to the accused. The Commission has considered this proposition but given the severe penalty of imprisonment has determined that the right of election should attach to any offence where an accused is potentially liable to a term of imprisonment.

3.310 The Commission is aware of views expressed on the idea of the right of election being abused by defendants. The Commission acknowledges that a more in-depth consideration of this issue is beyond the scope of this Consultation Paper. The Commission has considered whether the imposition of a sanction in costs against a defendant would be a suitable method to ensure that blatant abuse of the right of election would be curtailed. The Commission is of the view, similar to that taken by the James Committee,³⁹⁵ that if an accused has a right to elect for trial by jury, it would be wrong to penalise him or her by way of costs for exercising that right, irrespective of his or her reasons for so electing. The Commission is also aware that often an accused will make such a decision after legal advice.

3.311 The Commission invites submissions on whether the right of election should extend to all indictable offences triable summarily where a prison sentence can be imposed.

(8) *Jurisdiction of the Courts-Criminal: Allocation of Cases to Circuit Court and Central Criminal Court*

(a) *Introduction and jurisdiction of criminal courts in indictable matters*

3.312 This part of the chapter is concerned with the allocation of cases between the Circuit Court and Central Criminal Court in criminal matters. As there are now only limited rules for the transfer of cases between the courts, the jurisdiction of the Circuit Court and Central Criminal Court is rigid. In this section, the Commission examines whether the current allocation of the cases between the two courts can be justified objectively.

³⁹⁴ Law Reform Commission *Consultation Paper on Penalties for Minor Offences* (LRC-CP 18-2002) at 39.

³⁹⁵ James Committee *Report of the Interdepartmental Committee on the Distribution of Criminal Business between the Crown Court and the Magistrates’ Court* (Cmnd 6323 HMSO 1975) at 33.

To this end, the criminal jurisdiction of a number of jurisdictions in indictable matters is examined.

3.313 It is fair to say that this part of the chapter is a reconsideration of this issue in similar terms to that undertaken by the Fennelly Group. The Commission acknowledges the useful recommendations made in this regard by the Fennelly Group and wishes to re-highlight these with a hope that reform may emerge from this action.

3.314 The jurisdiction of the Circuit Court in criminal matters is provided by section 25(1) of the *Courts (Supplemental Provisions) Act 1961* which states that the Circuit Court has and may exercise every jurisdiction as to indictable offences for the time being vested in the Central Criminal Court.³⁹⁶ However, this apparent carte blanche is pared back significantly by section 25(2) of the 1961 Act which creates several exceptions to section 25(1) including murder and treason.³⁹⁷ As a result the jurisdiction of the Central Criminal Court is as follows:

- Murder, attempted murder and conspiracy to commit murder;
- Piracy;
- All offences of being an accessory before or after the fact;
- Treason;
- The offence of usurpation of the functions of the government pursuant to section 6 of the *Offences Against the State Act 1939*;
- Certain offences under the *Geneva Conventions Act 1962*;³⁹⁸
- Genocide;³⁹⁹
- Rape, aggravated sexual assault and attempted aggravated sexual assault or aiding, abetting, counselling or procuring the offence of

³⁹⁶ Section 11 of the *Courts (Supplemental Provisions) Act 1961* provides that the High Court when exercising its criminal jurisdiction is to be known as the 'Central Criminal Court'.

³⁹⁷ Rape, aggravated sexual assault and attempted aggravated sexual assault as defined in the *Criminal Law (Rape) (Amendment) Act 1990* were all transferred to the exclusive jurisdiction of the Central Criminal Court by the 1990 Act. Prior to this Act rape cases were tried in the Circuit Court, though they could be transferred to the Central Criminal Court under the former transfer mechanism pursuant to section 6 of the *Courts Act 1964*. This follows a recommendation from the Law Reform Commission that rape cases should be dealt with in the Central Criminal Court and not the Circuit Court. See Law Reform Commission *Consultation Paper on Rape* (December 1987) and Law Reform Commission *Report on Rape and Allied Offences* (LRC 24-1988).

³⁹⁸ Section 3(4) of the *Geneva Conventions Act 1962*.

³⁹⁹ Section 2(4) of the *Genocide Act 1973*.

aggravated sexual assault or attempted aggravated sexual assault or of incitement to the offence of aggravated sexual assault or conspiracy to commit any of the foregoing offences;⁴⁰⁰

- Offences under the *Criminal Justice (United Nations Convention against Torture) Act 2000*;⁴⁰¹
- The offence of murder under section 2 of the *Criminal Justice (Safety of United Nations Workers) Act 2000* or an attempt or conspiracy to commit such an offence;⁴⁰²
- Offences under sections 6 and 7 of the *Competition Act 2002*, or attempts to commit or conspiracy to commit such offences.⁴⁰³

3.315 The remainder of indictable offences, excluding those which are dealt with in the District Court or the Special Criminal Court are allocated to the exclusive jurisdiction of the Circuit Court. By comparison with the District Court, the Circuit Court and Central Criminal Court hears relatively few cases, but these cases are longer in duration and more complex in nature than those disposed of by the District Court.⁴⁰⁴ In practice, the Central Criminal Court deals with murder and rape cases as the other criminal matters within its jurisdiction are relatively uncommon offences. The Circuit Court deals with a far wider range of criminal matters.

3.316 As has been discussed above,⁴⁰⁵ there is now no method of transferring a case to the Central Criminal Court from the Circuit Court or vice versa. All that remains is a strict provision allowing for the transfer of a case from one Circuit to another once certain conditions are met. Therefore the jurisdiction of the Circuit Court exercising its criminal jurisdiction and the Central Criminal Court are absolute with no opportunity to transfer a case up or down in the court hierarchy should the need arise.

3.317 The former Chief Justice, Mr Justice Keane put forward the argument that there is no reason why the High Court (Central Criminal

⁴⁰⁰ Section 10 of the *Criminal Law (Rape) (Amendment) Act 1990*.

⁴⁰¹ Section 5(4) of the *Criminal Justice (United Nations Convention against Torture) Act 2000*.

⁴⁰² Section 7 of the *Criminal Justice (Safety of United Nations Workers) Act 2000*.

⁴⁰³ Section 11 of the *Competition Act 2002*.

⁴⁰⁴ In 2005, the Central Criminal Court disposed of 161 cases, the Circuit Court disposed of 4,321 cases and the District Court 343,508. See *Annual Report of the Courts Service 2005* (2005). Available at www.courts.ie

⁴⁰⁵ 2.237- 2.240 of this Consultation Paper.

Court)⁴⁰⁶ could not deal with major crimes such as manslaughter, fraud, robbery, importation of drugs and kidnapping all of which are currently before the Circuit Court. He was also of the view that there is no reason why murder and rape could not be heard before the Circuit Court.⁴⁰⁷ This view is echoed by the Law Commission of New Zealand. It recommended that the criterion for decisions is the significance of the offence, and not the complexity of the offence.⁴⁰⁸

3.318 The apparent lack of logic in the current system of allocation of cases between the Central Criminal Court and the Circuit Court was recognised by Mr Justice Carney writing extra-judicially when he stated

“as a matter of practical reality, the Central Criminal Court at the present time is exclusively trying murder and rape. This has the consequence that as a High Court Judge I cannot try a billion euro fraud case, not because it is above my jurisdiction, but because it is beneath it.”⁴⁰⁹

Mr Justice Carney also provided examples of complex criminal matters which cannot come before the criminal division of the Superior Courts under the present jurisdiction of the respective courts. These were:

- A billion euro fraud case;
- A prosecution in relation to senior members of any of the three branches of government relating to alleged criminal misconduct in the discharge of their functions of their office.
- Trans national money laundering cases.⁴¹⁰

The usefulness of providing these examples is that one can readily see the complexity of these matters, which are currently within the exclusive jurisdiction of the Circuit Court.

3.319 The current jurisdiction rules are sufficiently rigid to provide firmness in the criminal jurisdiction of the Central Criminal Court and Circuit Court. It can be said with complete certainty that all fraud cases are

⁴⁰⁶ It is worth noting that the 6th Interim Report of the Committee on Court Practice and Procedure recommended that the Central Criminal Court be known as “The High Court”. See the 6th Interim Report of the Committee on Court Practice and Procedure *The Criminal Jurisdiction of the High Court* (Stationery Office 1966 Pr 9168) at 6.

⁴⁰⁷ Keane “The Irish Courts System in the 21st Century: Planning for the Future” (2001) 6(6) Bar Review 321 at 326.

⁴⁰⁸ Law Commission of New Zealand *Seeking Solutions Options for Change to the New Zealand Court System* (Preliminary Paper 52 December 2002 Wellington) at 165.

⁴⁰⁹ Carney “What is coming down the tracks in Ireland” (2004) 8(2) Bar Review 76.

⁴¹⁰ *Ibid* at 77.

within the jurisdiction of the Circuit Court, while all rape cases are within the jurisdiction of the Central Criminal Court. However, this inflexibility can lead to cases of relatively low complexity coming before the Superior Courts. The rationale for the statutory allocation of criminal cases between the Circuit Court and the Central Criminal Court is based on a view as to the seriousness of the offence with no regard to the complexity of legal matters which may arise in any given case. Since 1993 the Director of Public Prosecutions has been vested with the power to appeal against the undue leniency of sentences. This safeguard can be said to militate against the fear that the transfer of more serious matters between the respective courts could result in more lenient sentences being imposed.⁴¹¹

3.320 It is worth noting that it was argued in the past that to exclude the trial of any criminal offence from the High Court amounted to a breach of Article 34.3 of the Constitution.⁴¹² This article of the Constitution states that the High Court shall be “invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal”. This argument has been found not to stand up to judicial scrutiny as the Supreme Court recognised that despite the reference to “full original jurisdiction”, the High Court is not the only court of First Instance as Article 34.3.4° provides “that the Courts of First Instance shall include Courts of local and limited jurisdiction”.⁴¹³

3.321 When the Commission proposed that rape offences be transferred to the exclusive jurisdiction of the Central Criminal Court, this recommendation was seen as forming what they hoped would be a “part of the process of returning a wider criminal jurisdiction to the High Court.”⁴¹⁴ This has not come to fruition as the jurisdiction of the Central Criminal Court today is largely the same as it was after the transfer of rape cases to its jurisdiction in 1990. The Commission took the view in that Report that “there is a strong case for transferring other serious crimes to the exclusive jurisdiction of the Central Criminal Court, including in particular kidnapping, fraud, crime involving the use of firearms or explosives and major drug offences.”⁴¹⁵ The main reason for this view was that at the time

⁴¹¹ Section 2(1) of the *Criminal Justice Act 1993*.

⁴¹² This view was expressed to the Committee on Court Practice and Procedure during its preparation of its Sixth Interim Report. The Committee decided not to express an opinion on this view, they merely mentioned that the view had been brought to their attention. Committee on Court Practice and Procedure *Sixth Interim Report The Criminal Jurisdiction of the High Court* (Pr 9168 1966) at 13.

⁴¹³ *Tormey v Ireland* [1985] IR 289. See also paragraphs 2.227-2.230 of this Consultation Paper.

⁴¹⁴ Law Reform Commission *Report on Rape and Allied Offences* (LRC 24-1988) at 20.

⁴¹⁵ Law Reform Commission *Report on Rape and Allied Offences* (LRC 24-1988) at 20.

of the Report the Central Criminal Court was in practice trying one offence, the offence of murder. The Commission regarded this as an unsatisfactory situation.

3.322 Bearing the above in mind, the Commission now proposes to examine a number of options for the allocation of indictable criminal matters⁴¹⁶ by using a number of examinations of the topic from other jurisdictions.

(b) New Zealand

3.323 The court structure in New Zealand is very different to this jurisdiction as it is two tier. That said, the division of criminal jurisdiction between the District Court and the High Court does provide a useful comparison given the two tier approach in this jurisdiction to indictable matters. The District Court exercises jurisdiction in both summary and indictable matters. The High Court is the superior criminal court deals with indictable matters. There are three bands of criminal offences:

- Band 1 which is the lowest band and is set out in Schedule 1A, Part 1 of the *District Courts Act 1947*. The offences in this band include offences such as aggravated robbery, perjury, riotous damage and arson. These offences are dealt with in the District Court.
- Band 2 also known as middle band offences which are listed in Schedule 1A, Part II of the *District Courts Act 1947*. Offences in this band include sexual violation, wounding with intent, sexual connection with a child under 12 or prostitution. These offences can be tried either in the District Court or the High Court and the decision on the venue for an individual case is determined solely by a High Court Judge. In making his or her decision, the High Court Judge is bound to have regard to the following matters:
 - (a) the gravity of the offence charged;
 - (b) the complexity of the issues likely to arise in the proceedings;
 - (c) the desirability of the prompt disposal of trials; and
 - (d) the interest of justice generally.⁴¹⁷

The decision of the High Court judge is made solely on the papers of the case, and there is no opportunity for submissions under the

⁴¹⁶ To be precise, in this jurisdiction indictable matters which have not been triable summarily or those which are not within the jurisdiction of the Special Criminal Court.

⁴¹⁷ Section 168AA(3) of the *Summary Proceedings Act 1957* number 87 of 1957.

procedure. If the High Court judge determines that the matter is more appropriate for the District Court, he or she will transfer the case to the District Court

- Band 3 consists of the most serious indictable matters where the maximum penalty is imprisonment for life or imprisonment for a term of 14 years. Offences in this band include murder, manslaughter, treason and other offences against the State and piracy.

3.324 In a middle band offence, a High Court Judge may, having considered the matter, transfer the case back for trial to the District Court which is the equivalent to the Circuit Court.

3.325 The Law Commission of New Zealand recommended that middle band offences should be abolished. The primary reason for this recommendation was concern that such offences were being dealt with in a different manner across New Zealand. The Commission found that the majority of middle band offences are dealt with in the District Court and this led to the suggestion that this should be recognised by a clean grant of jurisdiction.⁴¹⁸ Instead, they proposed that the High Court be vested with jurisdiction for a defined group of offences based on the seriousness and complexity of offending. They also recommended that there be a means of transferring cases from the Primary Criminal Court to the High Court in exceptional circumstances based on extraordinary circumstances.⁴¹⁹ It was their view that criteria set out for a transfer between the High Court and the District Court is not an appropriate manner in which to permit such a transfer. The Commission was anxious to avoid a disparity of types of cases transferred to the District Court depending on the High Court Judge who determined the issue. The Commission took the view that the criteria for transfer should be limited to truly exceptional circumstances in order to promote “certainty and clarity for the parties”.⁴²⁰

(c) *England and Wales: The Crown Court model*

3.326 Until 1971, the main criminal courts were the Courts of Assize and Quarter Sessions. The system was deemed inefficient as judges spent long periods of time travelling around court circuits in order to hear cases. The *Courts Act 1971* was enacted to establish the Crown Court as part of the

⁴¹⁸ Law Commission of New Zealand *Delivering Justice for All: A Vision of New Zealand Courts and Tribunals* (NZLC R 85 2004) at 176.

⁴¹⁹ Law Commission of New Zealand *Delivering Justice for All: A Vision of New Zealand Courts and Tribunals* (NZLC R 85 2004) at 175.

⁴²⁰ Law Commission of New Zealand *Delivering Justice for All: A Vision of New Zealand Courts and Tribunals* (NZLC R 85 2004) at 180.

Supreme Court of Judicature and abolish the Courts of Assize and Quarter Sessions.⁴²¹

3.327 Currently in England and Wales, the Crown Court tries all indictable crime. In effect, the Crown Court is a national court trying all indictable offences. Cases are allocated using relevant and practical criteria. The division of offences into classes and the type of Judge permitted to hear certain offences is contained in a Practice Direction.⁴²² Any High Court Judge, Circuit Judge, Recorder or Deputy Judge may sit in the Crown Court. Two High Court Judges preside on each Circuit, and are responsible for the administration and distribution of work on Circuit. The class of offence will establish whether a case is sent to the Crown Court with the High Court judge, or the lower judge. There are three classes of offences:

- Class One offences are classified as the most serious offences. This class includes offences such as murder, manslaughter, treason, piracy and genocide, or attempts or conspiracy to commit any of the offences contained in class one. These offences must be heard by a High Court judge but can be heard by a Circuit Judge, or a Deputy High Court Judge or a Deputy Circuit Court Judge if authorised by the Lord Chief Justice to try murder or attempted murder and the Presiding Judge has released the case for trial by such a judge.
- Class Two offences include sexual offences such as rape, incest or sexual intercourse with a girl aged under 13 or attempts or conspiracy to commit the offences in Class Two. Class two offences are tried by a High Court Judge unless released to a judge with a ticket that authorises that Judge to deal with such offences.
- Class Three are offences which are outside classes 1 or 2. These offences are can be tried by a High Court Judge once consent of a Presiding Judge is obtained or by the Presiding Judges, a Circuit Judge, a Deputy Circuit Judge or a Recorder.

3.328 Lord Justice Auld in his review of the criminal courts recommended that the Crown Court and the magistrates' court be replaced with a unified Criminal Court.⁴²³ This unified Criminal Court would consist of three divisions:

- The Crown Division constituted as the existing Crown Court with jurisdiction over all indictable only matters and the more serious either way offences allocated to it;

⁴²¹ Sections 1 and 3 of the *Courts Act 1971*.

⁴²² The Consolidated Criminal Practice Direction (HMCS 2007) at 26-27 and 47-48.

⁴²³ *Auld Review of the Criminal Courts of England and Wales* (Stationery Office October 2001) at 270.

- The District Division constituted by a judge, normally a District Judge or Recorder, and at least two magistrates to exercise jurisdiction over a mid range of ‘either way’ offences of sufficient seriousness to merit up to two years’ custody;
- The Magistrates’ Division constituted by a District Judge or magistrates to exercise their present jurisdiction over all summary matters and the less serious ‘either way’ offences allocated to them.

3.329 However, Lord Auld’s proposal for a unified Criminal Court has not come into force and the Crown Court is still the court in place with jurisdiction over indictable matters in England and Wales.

(d) *South Australia*

3.330 The South Australia judicial system is three tier in nature. The Magistrates Court is vested with jurisdiction in matters where the penalty imposed is a fine, a prison sentence of up to two years, a good behaviour bond or a community service order. The District Court has jurisdiction to try a charge of any offence except treason or murder or attempts or conspiracy to commit either of these offences. The District Court and Supreme Court have substantially the same criminal jurisdiction. The Supreme Court of South Australia is the superior court of South Australia and exercises original and appellate jurisdiction. Much like the Central Criminal Court in this jurisdiction it has exclusive jurisdiction in cases of murder and treason. Apart from those criminal matters within the jurisdiction of the Magistrates’ Court or Supreme Court of South Australia, criminal cases are allocated accorded to graduated categories, with the opportunity for defence and prosecution to say into which category the case falls. There are four categories of criminal cases.

- Category 1 in which the case must be tried by a Supreme Court Judge and the accused arraigned in the Supreme Court.
- Categories 2 and 3 can be tried in either court, but category 2 preferably goes to Supreme Court (because of their complexity, or other appropriate reason), and category 3 normally goes to the District Court.
- Category 4 is preferably always heard before a District Court Judge.

3.331 In all but category 1 cases, the presiding Supreme Court or the District Court Judge will ask for counsel’s view on the appropriate court for the trial. These views are recorded, and the presiding Judge may also record his or her own view. In practice both sides suggest a category and the Presiding Judge makes a final decision as the venue for the trial of the offence.

(e) Fennelly Report

3.332 The issue of jurisdiction in indictable matters was considered in detail by the Fennelly Group in its report. The Commission has benefited hugely from this detailed consideration of the issue. The Fennelly Group considered a number of possible options for reforming the current system of allocation of cases between the Circuit Court and the Central Criminal Court. Briefly these options were as follows:

1. *The establishment of a National Court based on the Crown Court model of England and Wales*

3.333 The notion of the establishment of such a court in this jurisdiction by amalgamating the two courts with indictable jurisdiction into one is not a new one. The Programme for Government of 2002 mooted it as an objective of the document:

“As part of the general reform of the courts system, the existing criminal jurisdiction of the Circuit Criminal Court and the Central Criminal Court will be merged into one nation-wide indictable crimes court of which all Circuit Court judges and High Court judges will be members.”⁴²⁴

3.334 The Fennelly Group found this model to be unduly complex, given the complicated rules governing the allocation of cases to particular judges. On the other hand the Fennelly Group recommended the model for reconciling rule on allocating cases locally to circuits and assigning a trial judge of appropriate rank. However, the Fenelly Group concluded that although the model was attractive in theory, its practical operation would cause significant difficulties. The main difficulty with the operation of a National Court identified by the Fennelly Group was the development of a set of rules to allocate cases within the court.

3.335 On that basis the Fennelly Group decided against recommending the establishment of a National Court. The Group was impressed by the idea of a flexible mechanism for allocation of cases to the court and venue best placed to ensure a fair and expeditious disposal of a case.⁴²⁵

2. *Retention of current system, but with additional resources for the Central Criminal Court*

3.336 The Fennelly Group recognised that additional resources for the Central Criminal Court were much needed. However, the Fennelly Group

⁴²⁴ An Agreed Programme for Government between Fianna Fáil and the Progressive Democrats (June 2002) at 25.

⁴²⁵ Working Group on the Jurisdiction of the Courts *The Criminal Jurisdiction of the Courts* (Pn237 May 2003) at 142.

recognised that maintaining the status quo but providing additional resources to the Central Criminal Court would not be sufficient to provide for the proper allocation of cases between the Circuit Court and the Central Criminal Court.

3. *Retention of existing system but provide for the Central Criminal Court to sit outside Dublin*

3.337 The Fennelly Group noted that there was no legislative bar to the Central Criminal Court sitting outside Dublin. Since that report the Central Criminal Court has sat in various locations around the country including Mayo, Cork and Limerick.

4. *Confer jurisdiction over all indictable crime on the Circuit Court, thereby removing the need for the Central Criminal Court.*

3.338 This option was briefly discussed but the Group concluded that to deprive the High Court of all criminal jurisdiction would be “a questionable and unjustifiable frustration of the clear objective of the Constitution in giving full original jurisdiction to the High Court in all matters, civil and criminal.”⁴²⁶

5. *Rearrange the allocation of jurisdiction*

3.339 This option would be similar to the existing system but with changes to the type of offences within the jurisdiction of the Circuit Court and Central Criminal Court.

6. *Retain the status quo but with arrangements put in place for the transfer of cases*

3.340 The current position as to transfer of cases between the Circuit Court and Central Criminal Court ignores the fact that frequently difficult or important points of law arise in the Circuit Court, and such cases cannot be transferred.

3.341 The Fennelly Group considered that the best option for allocation was to preserve the separate jurisdictions of the Circuit Court and Central Criminal Court, but with new arrangements for transferring cases within the Circuit Court and the Central Criminal Court.⁴²⁷

3.342 The Fennelly Group acknowledged that another feasible mechanism is to give the Director Public Prosecutions the power to designate the Court, much like his pre-existing power under the *Offences*

⁴²⁶ Working Group on the Jurisdiction of the Courts *The Criminal Jurisdiction of the Courts* (Pn237 May 2003) at 142.

⁴²⁷ Working Group on the Jurisdiction of the Courts *The Criminal Jurisdiction of the Courts* (Pn237 May 2003) at 142.

Against the State Act 1939 to have cases returned for trial to the Special Criminal Court. However, the Director of Public Prosecutions informed the Fennelly Group he would be unwilling to act alone, and that he believes that the Court should make any such decision after hearing submissions from the DPP.⁴²⁸

3.343 The Fennelly Group took the view that the special and rare offences traditionally conferred on the Central Criminal Court, such as genocide and treason, should remain exclusively assigned to that court and in no circumstances should jurisdiction in such matters be conferred on the Circuit Court.⁴²⁹ The Fennelly Group considered rape and murder cases as separate to the special jurisdiction of the Central Criminal Court. The Fennelly Group considered that the blanket assignment of rape cases to the Central Criminal Court does not serve the public interest. The Group expressed similar sentiments with regard to the offence of murder. On that basis, the Group recommended that on the return of a rape or murder case to the Circuit Court there should be a hearing at the earliest opportunity upon notice to the Director of Public Prosecution and the accused. In deciding whether the case should remain in the Circuit Court or be transferred for trial to the Central Criminal Court the Judge should have regard to the following:

- (a) the nature of the case and the facts alleged;
- (b) the degree of gravity or complexity of the case, having regard to those facts;
- (c) the views of the complainant (in the case of murder, the views of the relatives of the deceased);
- (d) the convenience of the parties and of witnesses;
- (e) where appropriate, the need to preserve the anonymity of the complainant/accused having regard to sections 7 and 8 of the *Criminal Law (Rape) Act 1981*, as amended by section 17(2) of the *Criminal Law (Rape)(Amendment) Act 1990*;
- (f) any risk of prejudicial publicity;
- (g) any risk of intimidation of witnesses or jurors; and
- (h) the objective of an expeditious trial.

3.344 In other cases (that is, not the special cases remaining within the jurisdiction of the Central Criminal Court, or murder or rape) the Director of Public Prosecutions or the accused would be entitled to apply on Notice to the Court no later than 14 days following the return for trial for an order

⁴²⁸ Working Group on the Jurisdiction of the Courts *The Criminal Jurisdiction of the Courts* (Pn237 May 2003) at 143.

⁴²⁹ Working Group on the Jurisdiction of the Courts *The Criminal Jurisdiction of the Courts* (Pn237 May 2003) at 144.

transferring the case to the Central Criminal Court, in which case the Judge would have to consider the same criteria as above.

3.345 If this hearing was introduced, the expectation would be that murder and rape cases would normally be transferred for trial to the Central Criminal Court. At the same time there may be cases even of murder where it is agreed between the prosecution, defence and relatives of the victim that a trial in the Circuit Court would be more convenient and expeditious. In cases of rape, the most important issue is to preserve the anonymity of the complainant. Rape and murder would be transferred unless the circumstances and all of the views of the parties led to the conclusion that they should be tried in the Circuit Court.⁴³⁰

(f) Discussion

3.346 The New Zealand approach to the allocation of cases to its highest court with original jurisdiction in criminal matters is based on the severity of punishment. That is to say, if an offence has a punishment of life imprisonment or in excess of 14 years then it is within the exclusive jurisdiction of the High Court. The majority of offences within the exclusive jurisdiction of the Central Criminal Court are punishable by life or up to 14 years. For example, murder carries an automatic life sentence and sexual assault committed to a child carries a maximum sentence of 14 years. It is clear that the offences within the exclusive jurisdiction of the Central Criminal Court carry potentially high sentences given the seriousness of the offences. Although the most recent offences added to the jurisdiction of the Central Criminal Court relating to breaches of competition law have the lowest term of imprisonment of any of the offences designated to the Central Criminal Court, the offences also provide for a heavy fine.⁴³¹ The Commission agrees with the following argument put forward by the Law Commission of New Zealand:

“The touchstone for determining how a case proceeds through the courts will in the main be the maximum penalty that can be imposed for the offence with which the defendant is charged.

⁴³⁰ Working Group on the Jurisdiction of the Courts *The Criminal Jurisdiction of the Courts* (Pn237 May 2003) at 144-6.

⁴³¹ Section 8 of the *Competition Act 2002* provides that the penalty under section 6(1) of the Act (that is an offence involving an agreement, decision or concerted practice) for an undertaking on indictment is a fine of up to €4,000,000 or 10%, whichever is the greater, of the turnover of the undertaking, and in the case of an individual a fine of up to €4,000,000 or 10% of the turnover of the individual whichever is greater and or to imprisonment for a term not in excess of 5 years. For offences pursuant to section 6 (excluding section 6(1)) and section 7 of the Act, the penalty on indictment is a fine not exceeding whichever of the following amounts is the greater €4,000,000 or 10% of the turnover of the undertaking.

Maximum penalties reflect how comparatively seriously society views different crimes, and provide a suitable basis for determining how the cases should be handled.”⁴³²

3.347 The Commission notes that murder and treason are commonly vested in the court of the highest original criminal jurisdiction in other jurisdictions. The Commission notes the recommendation of the Fennelly Group that the rare offences within the exclusive jurisdiction of the Central Criminal Court, such as treason and genocide, should remain there. The Commission believes the recommendation of the Fennelly Group that there be a hearing to determine in which court a rape or murder case should be heard is a suitable compromise. With regard to other indictable matters, the Commission adheres to the recommendation of the Fennelly Group that the option of transfer be available once an application is made to the court and the court applies the same criteria as it would were the offence that of rape or murder.

3.348 The Commission has examined the criteria used in determining a whether a case should be transferred in New Zealand and that recommended by the Fennelly Group. The Commission has concluded that the criteria advocated by the Fennelly Group are broader. The Commission acknowledges that it is vital for the victim or his or her family in the case of murder to be allowed to make submissions.

3.349 The Commission notes that these aspects of the Fennelly Group Report are currently (July 2007) under consideration by Government. On that basis the Commission does not propose to make any recommendations on this issue in this Consultation Paper.

⁴³² Law Commission of New Zealand *Simplification of Criminal Procedure Legislation: an Advisory Report to the Ministry for Justice* (Study Paper 7 January 2001) at 7.

CHAPTER 4 A MODEL FOR A MODERN COURTS ACT

A Introduction

4.01 In this Chapter, the Commission sets out a model for a modern consolidated Courts Act providing for the jurisdiction of the Courts. To this end, the Commission has garnered significant assistance from a number of publications.¹ Further, the Commission has based the discussion in this Chapter on an examination of the Courts Acts in a number of other jurisdictions.

4.02 The Commission considers that this project provides an ideal opportunity to develop a workable draft of a modern Courts Bill for this jurisdiction. Currently, the jurisdiction of the courts is set out in a large number of Acts, including almost 60 since the establishment of the State in 1922. It is clear that the sheer number of Acts relating to the jurisdiction of the courts in this jurisdiction has made it difficult to establish with certainty the exact model used in the Courts Acts in this jurisdiction. The various Courts Acts enacted since 1922 deal with each Court on an individual basis, rather than a thematic approach, which is the approach taken in a number of jurisdictions.

4.03 During the completion of this Consultation Paper, it became apparent to the Commission that it would be useful to devise a new model of a Courts Acts setting out parts and divisions into which the new Act could be divided. The Commission approached this in a three step manner. First, the Commission completed a consolidation of relevant provisions of pre and post 1922 Acts relating to the jurisdiction of the courts. Secondly, the Commission examined these provisions with a view to possible reform of a number of provisions. Finally the Commission examined the provisions and devised a scheme for a modern Courts Bill. The Commission devised this

¹ Queensland Law Reform Commission *A Bill to Consolidate, Amend and Reform the Supreme Court Acts and Ancillary Acts Regulating Civil Proceedings in the Supreme Court* (Report No 32 1988), Law Commission of New Zealand *Preliminary Paper: The Structure of the Courts* (NZLC PP4 1987), Law Commission of New Zealand *Report: The Structure of the Courts* (NZLC R7 1989), Australian Law Reform Commission *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903* (Discussion Paper 64 2000), Australian Law Reform Commission *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903* (Report No 92 2001).

scheme by completing a comparative analysis of legislation relating to the courts of a number of jurisdictions, with a view to ascertaining the models in place in those jurisdictions. The development of a suitable scheme for a new Courts Act in this jurisdiction also necessitated an examination of the exact type of provisions that are sufficiently connected with the jurisdiction of the courts to merit their inclusion in the Act.

4.04 In summary, in this Chapter the Commission examines the approach taken to the scheme of Courts Acts in this jurisdiction. The Commission has also completed a comparative analysis of the approach taken to Acts regulating the jurisdiction of the courts in a number of other comparable jurisdictions. Finally the Commission sets out a suitable scheme for a new Courts Act, and explains why certain material is excluded from the draft Courts Bill appended to this paper.

B Courts Acts and relevant literature

(1) Ireland

4.05 The first, and most striking observation regarding the current state of Acts relating to the jurisdiction of the courts is the sheer volume of Acts and their ensuing complexity. From its examination of post-1922 Acts relating to the jurisdiction of the Courts, the Commission has determined that there have been 56 ‘Court Acts’.² In addition, there are a number of pre-1922 provisions that are relevant to the modern Courts.³

4.06 The main difficulties caused by the large number of Courts Acts are three fold. First, subsequent amendments, repeals and reforms of provisions are not reflected in primary legislation. Secondly, the large number of Acts has made it an arduous task to decipher what model of Courts Acts is in place in this jurisdiction. Thirdly, and most pertinently, it is complex to access the law on the courts. For example, to establish the complete civil jurisdiction of the District Court, it is necessary to have regard to 6 separate Acts and 14 separate provisions of these Acts.⁴

4.07 From its examination of the Courts Acts in this jurisdiction, the Commission has concluded that the approach taken is court-based. This stems from the development of the court system in this jurisdiction, which

² See section D of this Chapter of the Consultation Paper.

³ See the Acts listed at the end of Chapter 2.

⁴ Sections 77 and 81 of *The Courts of Justice Act 1924*, section 17 of the *Courts of Justice Act 1928*, sections 29, 20 and 31 of the *Courts of Justice Act 1953*, section 33 of the *Courts (Supplemental Provisions) Act 1961*, sections 2 and 23 of the *Family Law (Maintenance of Spouses and Children) Act 1976* and section 8, 9, 11, 12 and 15 of the *Courts Act (No. 1) 1981*.

used the pre-1922 British-based court system as its starting point. The two main Acts relating to the jurisdiction of the courts in this jurisdiction, the *Courts of Justice Act 1924* and the *Courts (Supplemental Provisions) 1961*, deal with the jurisdiction and ancillary matters of the Superior Courts, the Circuit Court and the District Court on an individual basis.

4.08 It is clear that the core Courts Acts in this jurisdiction are:

- The *Courts of Justice Act 1924* (which contains provisions on the jurisdiction of the District Court and provisions relating to the judiciary in general),
- The *Courts Officers Act 1926* (which establishes a large number of the officers of the courts and contains other relevant provisions relating thereto),
- The *Courts (Establishment and Constitution) Act 1961* (which establishes the courts in this jurisdiction),
- Finally, the *Courts (Supplemental Provisions) Act 1961* (which makes provision, among other things, for qualifications of judges, court officers, and jurisdiction of the courts. The majority of this core Act is still in force).

4.09 The Commission will now move on to provide an outline and analysis of the approach to the Courts Acts in a number of jurisdictions.

(2) *England and Wales*

4.10 The approach taken to the jurisdiction of the courts in England and Wales is more thematic in nature than is the case in this jurisdiction. To be precise, the relevant Acts deal with one particular aspect of the jurisdiction of the courts, for example the constitution of the courts, in one part of an Act with sub-divisions reflecting each individual court. The primary Act relating to the jurisdiction of the courts is the *Supreme Court Act 1981*.⁵ This Act is a consolidation of the previous Judicature Acts in that jurisdiction, in particular the *Judicature Acts 1873 to 1910* and the *Supreme Court of Judicature (Consolidation) Act 1925*.⁶ This Act makes provision for the jurisdiction of the Court of Appeal, High Court and Crown Court. The Act is divided into six parts:

- Part 1: Constitution of Supreme Court. This part makes provision for the constitution of the Court of Appeal, High Court and Crown Court. This includes matters such as the number of judges of each of the respective courts, appointment of judges, qualifications for

⁵ 1981 chapter 54.

⁶ 1925 chapter 49.

appointment as judges, segregation of the courts into divisions, precedence of the judges and salaries of judges.

- Part 2: Jurisdiction. This part provides for the jurisdiction of each of the courts on an individual basis. This includes the simple jurisdiction of each of the courts, jurisdiction in appeals, case stated and costs. Provision is made for the continuance of the concurrent administration of law and equity.⁷ The position of appeals in the Act only relates to the Courts that are constituted by the Act, that is the Court of Appeal, High Court and Crown Court. The two other courts in this hierarchy, the County Court and the Magistrates' Court are dealt with in separate Acts and accordingly, appeals in respect of these courts are provided for in those Acts.
- Part 3: Practice and Procedure. This part provides for matters such as the distribution of business, sittings and vacations and composition of the court. This part is sub-divided based on each of the courts. A number of provisions in relation to the Rules of Court are also located in this part, although the majority of such provisions are now in the *Civil Procedure Act 1997* and the *Courts Act 2003*.
- Part 4: Officers and Offices. This section provides for the appointment of a number of officers of the court. This includes appointment of certain officers, abolition of certain offices, deputies and temporary appointments of officers and tenure of officers. More detailed provisions as to qualification for appointment of each of the officers of the Supreme Court are outlined in the Second Schedule to the Act.
- Part 5: Probate Matters and Causes.
- Part 6: Miscellaneous provisions. This part is mainly procedural in nature.

4.11 The jurisdiction of the two inferior courts in England and Wales are provided for in individual stand-alone Acts, the *County Courts Act 1984*⁸ and the *Magistrates' Courts Act 1980*. These Acts provide, among other things, for the jurisdiction of each of those courts, judges for those courts, procedure, and appeals. Further provisions relating to the courts in general, such as the rules committees of the courts, are contained in the *Courts Act 2003*.⁹

⁷ Section 49 of the *Supreme Court Act 1981*.

⁸ Chapter 28.

⁹ Chapter 39.

(3) Singapore

4.12 The primary Act regulating the jurisdiction of the superior courts in Singapore is the *Supreme Court of Judicature Act 2003*.¹⁰ The scheme of this Act follows a similar approach to that taken in this jurisdiction given that it is a strict court-based approach. The jurisdiction, constitution, composition and appeals of the Supreme Court of Singapore, High Court of Singapore and Court of Appeal of Singapore are contained in each of the parts dealing with each individual court. Part 6 of the Act, which makes provision for officers and offices of the courts, is general in nature and is not court jurisdiction-based. This part provides for the appointment of officers of the Courts and powers and duties of those officers. The qualifications necessary for a number of officers of the Supreme Court of Singapore are provided for in the *Legal Profession Act*.¹¹ The rules of court committee for the courts under this Act are laid out in part 7 of the Act, which provides for miscellaneous provisions.

(4) New Zealand

4.13 Legislation relating to the jurisdiction of the courts in New Zealand is set out over a number of Acts. Primarily, these are individual Acts dealing with each of the courts in the court hierarchy on an individual basis. As these Acts deal with each of the courts in general terms and are not entirely related to the jurisdiction of the respective courts, the Acts contain provisions relating to areas of the courts that fall beyond the scope of a courts act in this jurisdiction. Accordingly, it is common for the Acts to contain provisions setting out detailed procedure concerning a particular aspect of the court business. For example, section 54B of the *Judicature Act 1908* provides for the circumstances in which a jury can be discharged. Notwithstanding this observation, each of these Acts is examined in order to ascertain relevant provisions for a consolidated Courts Act in this jurisdiction.

4.14 The primary Act providing for the jurisdiction of the courts in New Zealand is the *Judicature Act 1908*, which makes provision for the High Court and Court of Appeal of New Zealand. The Act is divided into three parts the first two of which are court-based parts and relate to the jurisdiction of the High Court and Court of Appeal respectively. Part 1 of the Act is dedicated to provisions relating to the jurisdiction of the High Court and connected matters. Matters included in this part are:

- Constitution of the High Court;
- Qualifications of judges;

¹⁰ Cap. 322. This chapter of 1999 is a revised edition of the 1969 Act chapter 24.

¹¹ Cap. 161

- Functions of the Chief High Court Judge;
- Salaries and allowances of judges;
- Age of retirement of judges;
- Jurisdiction of the High Court;
- Officers of the court. This part of the Act makes it clear that officers of the courts are appointed under the *State Sectors Act 1988*,¹² which deals with State employees generally.¹³
- Rules of court committee.

4.15 Provisions relating to appeals are contained in part 2 of the Act which is exclusively dedicated to the Court of Appeal. Part 3 is concerned with rules and provisions of law in judicial matters generally. To be more precise, this part deals with matters of procedure.

4.16 The Supreme Court of New Zealand is established as the final court of appeal by the *Supreme Court Act 2003*.¹⁴ In order to establish the Court, the Act formally removes the previous position of the Judicial Committee of the Privy Council as the final court of appeal in that jurisdiction.¹⁵ The Act provides for the following matters in its first part:

- Establishment and jurisdiction of the Supreme Court
- Leave to appeal to the Court
- Constitution of the Court
- Powers and judgment of Court
- Administrative provisions such as salaries of judges and appointment of officers.

4.17 The jurisdiction of the District Court of New Zealand is contained in two Acts: the *District Courts Act 1947*¹⁶ and the *Summary Proceedings Act 1957*.¹⁷ The latter Act is solely concerned with the criminal jurisdiction

¹² 1988 Number 20.

¹³ Section 27 of the *Judicature Act 1908*.

¹⁴ Number 53 of 2003.

¹⁵ Section 3(1)(c) of the *Supreme Court Act 2003*.

¹⁶ Number 16 of 1947. The family law courts are a division of the District Court, provisions relating to the jurisdiction of the family law courts are contained in the *Family Law Courts Act 1980* (number 161 of 1980) and the *Family Proceedings Act 1980* (number 94 of 1980).

¹⁷ Number 87 of 1957.

of the District Court. The first part of the *District Court Act 1947* contains provisions relating to:

- Constitution of District Courts
- Sittings of the Courts
- District Court judges, including the appointment and qualification of judges of the District Court, tenure of office and salaries and allowances.
- Officers of the District Court.

4.18 The second part of the Act makes provision for matters dealing with criminal jurisdiction in respect of indictable matters, and accordingly is procedural in nature. Part 3 of the Act sets out provisions regulating civil jurisdiction and transfer of proceedings. Part 4 is exclusively related to procedure. Part 5 of the Act regulates appeals in general, including the enforcement of appeals. Part 6 of the Act concerns the enforcement of judgments generally. The final part of the Act, Part 7, sets out a number of miscellaneous matters including matters that are to be subject to District Court Rules, immunity of judges, and repeals and savings. The *Summary Proceedings Act 1957* is very procedural in nature. However, it contains provisions relating to the jurisdiction of the District Court in criminal matters. The Act provides a number of sections regarding appeals from the District Court.

4.19 The Law Commission of New Zealand recommended that the two primary Acts regulating the jurisdiction of the courts, the *Judicature Act 1908* and the *District Courts Act 1947*, be consolidated into a single Act.¹⁸ The Law Commission devised a suitable scheme for a Courts Act and developed in detail the type of provisions to be contained in each part of the Act. These recommendations were not legislated for, and the *Judicature Act 1908* and the *District Courts Act 1947* remain separately in place. It is nevertheless the view of the Commission that the discussion of the Law Commission of New Zealand is a useful resource for the Commission in the context of this Consultation Paper. The Law Commission's scheme is examined in detail, given its similarity with this part of the Consultation Paper. The Law Commission of New Zealand proposed that the following parts be contained in its proposed Courts Act:

- Preliminary: this part would contain recurring phrases or words that require definition.

¹⁸ Law Commission of New Zealand *The Structure of the Courts* (NZLC R7 1989) at 193.

- The Courts. This part would continue or constitute the three courts of general jurisdiction in New Zealand.
- The Judges: The Law Commission of New Zealand envisaged that this part would contain provisions such as –
 - the number of judges,
 - qualification of judges,
 - method of appointment,
 - tenure of judges,
 - salaries,
 - provision for Chief Justice,
 - statement of powers of presiding judges, and
 - judicial immunity.
- Original Jurisdiction. The Law Commission of New Zealand recognised the importance of providing a saver of jurisdiction for each of the courts in that jurisdiction. The objective of such a saver was to provide that the jurisdiction of the relevant court was to remain as before the commencement of the Courts Act. They also envisaged the inclusion in this part of provisions relating to the transfer of proceedings.
- Appeal Jurisdiction. The Law Commission recommended that this section include provisions as to the number of judges sitting on appeal.
- Procedure. The purpose of this part was to complement those parts of the Act relating to Appeals and Jurisdiction. It is noteworthy that the Law Commission recommended that provisions regarding the Rules of Court should be placed in this part. It was recommended that further miscellaneous provisions as to costs and payment of interest should also be placed in this part.
- Court offices, officers and administration. The Commission recommended that the provisions in this part could be consolidated so as to provide for court offices, appointment of officers and conferral of powers on the officers.¹⁹
- Repeals, consequential amendments, savings and transition.

(5) *Queensland, Australia*

¹⁹ The Law Commission of New Zealand *The Structure of the Courts* (NZLC R7 1989) at 205.

4.20 In 1988, the Queensland Law Reform Commission completed a Report on the Consolidation of Legislation Regulating Civil Proceedings.²⁰ The Commission has examined legislation governing the jurisdiction of the courts in Queensland, owing to the completion of this Report. The purpose of this Report was the consolidation of a number of Acts relating to the jurisdiction and procedure of the Supreme Court of Queensland in civil proceedings.²¹ For that reason the Report is of relevance to the Courts Act consolidation undertaken by the Commission in this Consultation Paper. The Queensland Law Reform Commission set out the scheme of a new consolidated Supreme Court Act as follows:

- Part 1: Savings and transitional: The Commission was of the opinion that it was necessary to include provisions relating to the following matters in this part:
 - the effect of the new Act on existing Acts, rules and jurisdiction of the court;
 - the confirmation in office and of the appointment of judges and officers of the court;
 - the effect of the new Act on pending proceedings;
 - the effect of the new Act on statutory references to the courts in Acts anterior to the new Act.²²
- Part 2: Constitution of the Court. This part was to consist of a number of divisions:
 - continuance of the Supreme Court: The Commission noted the importance of providing for the continuance of the Supreme Court in the new consolidated Act in order for all references to the court in acts and regulations to continue to apply and further so as to ensure that the jurisdiction and practice of the court would not be altered by the consolidated Act.
 - constitution of the Supreme Court.
 - Judges of the Supreme Court. This Commission recommended that provisions for the appointment of judges and the Chief Justice, performance of the functions of judges, qualifications of judges,

²⁰ Queensland Law Reform Commission *A Bill to Consolidate, Amend and Reform the Supreme Court Acts and Ancillary Acts Regulating Civil Proceedings in the Supreme Court* (Report No 32 1988).

²¹ Queensland Law Reform Commission *A Bill to Consolidate, Amend and Reform the Supreme Court Acts and Ancillary Acts Regulating Civil Proceedings in the Supreme Court* (Report No 32 1988) at 3.

²² *Ibid* at 6.

number of judges, and tenure of judges and certain provisions relating to judicial salaries be placed in this part of the consolidated Act.

The Commission was cognisant of a recommendation made to it during the preparation of its Report that judicial salaries and pensions may be more properly dealt with in separate legislation. The Commission did, however, include a general section on judicial salaries in the Act relating to the payment of a salary while acting as a judge and stating the fund from which the salary was to be paid.

- Part 3: Jurisdiction and powers of the court. This part set out the jurisdiction of the Supreme Court and related powers. It is of relevance to this jurisdiction that a provision allowing law and equity to be provided is contained in this part. The Commission recommended that separate sections be included to allow for the rules of equity to prevail in all courts and for damages to be awarded in relation to or in substitution for an injunction.
- Part 4: Distribution of business of the court. This part regulates the number of judges sitting in each court for particular actions, provisions for a court of appeal, incapacity of a judge, districts and circuits.
- Part 5: Officers of the Court. The Commission proposed that all legislation relating to the officers of the court should be included in the consolidated Supreme Court Act.
- Part 6: Procedure.
- Part 7: Execution of judgments and orders.
- Part 8: Prerogative proceedings.
- Part 9: Rules of Court.
- Finally, it was suggested that a schedule be provided for at the end of the Bill which would set out a list of the repealed provisions.

4.21 The *Supreme Court Act 1991*²³ was enacted after the Queensland Law Reform Commission's Report. It has amalgamated the previous Supreme Court of Queensland Acts into a single Act which provides for the jurisdiction of that Court. The scheme of the *Supreme Court of Queensland Act 1991* is as follows:

- Part 1: Preliminary. This part includes the short title of the Act, and interpretation.

²³ Number 68 of 1991.

- Part 2: The Court. This part is divided into a number of divisions, which are as follows:
 - jurisdiction and composition of the court;
 - divisions of the court;
 - provisions relating to judges generally. This includes matters such as seniority, retirement of judges and temporary judicial office holders; and
 - judicial registrars.
- Part 3: The Court of Appeal. This part is divided into a number of divisions, which are as follows:
 - composition jurisdiction and powers;
 - judges of appeal: this includes the appointment of judges, appointment of President, additional judges of appeal, powers of judges of appeal and remuneration of judges of appeal.
- Part 4: The trial division;
- Part 5: Removal and remission of proceedings;
- Part 6: Appeals to the Court of Appeal.
- Part 7: Provisions applying to the Supreme Court, District Court and Magistrates Courts. This part is divided into a number of divisions which are concerned about matters such as:
 - removal of proceedings from one level of court to another;
 - orders; and
 - enforcement.
- Part 8: Alternative Dispute Resolution processes.
- Part 8A: Use of video link facilities.
- Part 9: Rules of court and practice directions for the Supreme Court, District Court and Magistrates Courts.
- Part 10: Miscellaneous. This includes a provision as to the finances and staffing of the courts;
- Part 11: Transitional Provisions includes a provision relating to the effect of the Act on part heard proceedings and leave to appeal granted before the establishment of the Court of Appeal.

- Schedule 1 to the Act provides for the subject matters for rules of court.

4.22 The other courts in the court hierarchy of Queensland, the District Court and the Magistrates Court, have separate Acts providing for their jurisdiction.²⁴

(6) Australia

4.23 Although the Australia court structure is federal in nature, there is an overarching Act, the *Judiciary Act 1903*²⁵ which makes provision for the exercise of the judicial power of the Commonwealth. It also provides for the High Court of Australia which is the final court of appeal for Australia.

4.24 The Australian Law Reform Commission reviewed the *Judiciary Act 1903*²⁶ in order to determine whether the Act applied “the most appropriate arrangements for the efficient administration of law and justice”²⁷.

4.25 Broadly speaking the Commission examined the purpose of the Act in order to ascertain if it was providing adequately for the administration of law and justice. The Commission determined that the overarching purpose of the Act was to provide for the allocation and exercise of the judicial power of the State. They recommended that any provisions in the Act which did not come within the ambit of the purpose should be relocated.

4.26 The Commission found a similar difficulty to this jurisdiction regarding the location of jurisdictional provisions being fragmented, whereby some provisions relating to a topic are located in one Act and other provisions relating to the same topic are located in another Act.²⁸ To alleviate this difficulty and to ensure accessibility of legislation, the Commission recommended that each court be constituted by a dedicated Act of Parliament. The Commission then provided guidance as to the scheme of such Acts, and recommended that the following matters be provided for in each Act:

- Establishment of the court;

²⁴ *District Court of Queensland Act 1967 and Magistrates Act 1991.*

²⁵ 1903 number 6.

²⁶ Australian Law Reform Commission *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903* (Discussion Paper 64 2000), Australian Law Reform Commission *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903* (Report No 92 2001).

²⁷ Australian Law Reform Commission *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903* (Report No 92 2001) at 15.

²⁸ *Ibid* at 690.

- Definition of original and appellate jurisdiction
- Powers of the court appropriate for the administration of justice;
- Practice and Procedure;
- Framework for its finance and management.²⁹

4.27 It is also of relevance to this Consultation Paper that the Australian Law Reform Commission recommended that provisions regulating appeals from one court to the other be located in the Act establishing the court to which the appeal is brought.

(7) Northern Ireland

4.28 The primary piece of legislation for the courts in Northern Ireland is the *Judicature (Northern Ireland) Act 1978*. The Act is the equivalent to the *Supreme Court Act 1981* in England and Wales given that it makes provision for the constitution and related matters of the Supreme Court of Judicature of Northern Ireland and the Crown Court in Northern Ireland. The remaining courts in Northern Ireland, the County Courts and the Magistrates' Courts are established and maintained by statutory instrument.³⁰

4.29 In most parts of the *Judicature (Northern Ireland) Act 1978*, the chapters of the Act are based on one individual court, with matters such as the jurisdiction of such court and related matters contained in this chapter of the Act.

4.30 The Act is divided into eleven parts and these are as follows:

- Part 1: Constitution of the Supreme Court of Judicature of Northern Ireland. This part sets out the High Court, Court of Appeal and Crown Court for Northern Ireland, qualification of judges of the High Court or Court of Appeal, judicial precedence, appointment of judges and tenure of office.
- Part 2: This part is dedicated to the High Court and provides for its general jurisdiction, damages, remittal of matters, injunctions, power of High Court to vary sentences on *certiorari*, jurisdiction of the High Court in matters relating to persons under a disability, jurisdiction in admiralty matters, power of the High Court to award interest on debts or damages.

²⁹ Australian Law Reform Commission *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903* (Report No 92 2001) at 692.

³⁰ The County Court (Northern Ireland) Order 1980 SI 1980/397 (NI 3) and the Magistrates' Courts (Northern Ireland) Order 1981 SI 1981/1675 (NI 26).

- Part 3: is dedicated to the Court of Appeal, and provides the jurisdiction of the court, composition of the Court and appeals to the House of Lords in particular cases.
- Part 4: The Crown Court. This part contains mainly procedural matters which are of relevance to the exercise of the jurisdiction of the Crown Court such as the issue of witness statements and the Court Rules Committee;
- Part 5 is concerned with practice, procedure and trials. This part is procedural in nature and contains provisions relating to issues such as sittings of High Court and Court of Appeal, the award of costs, taxation of costs, jury in civil actions and subpoenas in other parts of the United Kingdom;
- Part 6: deals with departments and officers of the courts. This part provides for the appointment and qualifications of statutory officers of the establishment of the Court Service of Northern Ireland and property held by officers.
- Part 7 provides for funds in court.
- Part 8 sets out matters related to rules of law in judicial matters generally. This provides for matters such as damages in lieu of in addition to specific performance or injunction, relief from ejection and an evidential matter namely, the withdrawal of privilege against incrimination of self or spouse in certain proceedings.
- Part 9 makes certain provisions for inferior courts such as appointment and assignment of county court judges and resident magistrates and the qualifications necessary for a county court or deputy county court judge.
- Part 10 sets out miscellaneous matters such as the appointment of justices of the peace, rights of audience in the High Court and Court of Appeal, election courts and official seals.
- Part 11 of the Act is concerned with interpretation and general matters such as the short title and commencement.
- There are 7 schedules to the Act and these are as follows:
 - Schedule 1: appeals to the House of Lords in certain criminal matters;
 - Schedule 2: departments of the Supreme Court,
 - Schedule 3: statutory offices,
 - Schedule 4: Superannuation of statutory offices

- Schedule 5: minor and consequential amendments
- Schedule 6: transitional provisions.
- Schedule 7: repeals

C Discussion and scheme of Courts Act for this jurisdiction

(1) General

4.31 At the outset, it was determined by the Commission given the nature of this project, that it was impracticable for the status quo vis-à-vis the Courts Acts to remain. The aim of this Consultation Paper is to provide a manageable, up to date and streamlined consolidated Courts Act. The Commission approached the development of a suitable and practical scheme for a consolidated Courts Act with the following core principles in mind:

- Accessibility
- Efficiency
- Simplicity
- Certainty

4.32 It has already been recommended by the Commission in the interests of certainty that the provisions of the *Courts (Establishment and Constitution) Act 1961* which establish the current courts are to remain outside the remit of the consolidated Courts Act.

(2) Approach to structure of the Courts Acts

4.33 The Commission considered it necessary to first examine the most logical approach for a Courts Act. The Commission has taken the view, based on its comparative analysis above, that there are three possible approaches to a Courts Act:

- First an individual Courts Act for each of the courts in this jurisdiction. This is the approach taken in New Zealand, which has an individual Act for each of the courts in the judicial hierarchy. This approach was recommended by the Australian Law Commission as a suitable solution to the fragmented nature of the jurisdictional provisions regarding the courts.
- Second, a consolidated Act with the jurisdiction and related matters of each court being in an individual part. That is to say that each of the parts would provide for particular matters relating to the each court, with each division of the part being exclusively concerned with one particular court. This is the approach taken in Singapore

and New Zealand. Similarly, this is the approach taken in the *Courts of Justice Act 1924*.

- Third, a consolidated Act taking a thematic approach where each part of the Act is concerned with a particular aspect of jurisdiction and relevant provisions for each court relating to that aspect are contained in individual division of each of the parts. This approach is similar to that in England and Wales, albeit that their Judicature Act is merely concerned with the superior courts. It is also very much on a par with the recommendation of the Law Commission of New Zealand and Queensland Law Reform Commission as to the suitable and most efficient structure of a Courts Act.

4.34 The Commission has concluded that the third of these options is the most appropriate for a new consolidated Courts Act. The Commission has come to this conclusion for two primary reasons: first a thematic approach allows for an easy comparison of provisions relating to each of the Courts to be undertaken. This may allow for development and reform of particular sections. Second, this approach is the most accessible and efficient of the three approaches as it allows for closely related provisions to be placed together. This may allow for consolidation of related sections.

4.35 *The Commission provisionally recommends that the consolidated Courts Act should have a thematic structure. The Commission provisionally recommends that each Part of the Act deal with a particular aspect of the jurisdiction of the Courts with each court being separately provided for, where applicable, in a division of the Part.*

(3) Purpose of the Act

4.36 The Commission has considered the appropriate purpose of the Courts Act in order to ascertain which provisions are suitable for inclusion in the Act. With pure consolidation of all provisions contained in relevant legislation, both pre-1922 and post-1922, the Courts Act would contain over 450 sections. The Commission has concluded that a number of these existing provisions are unsuitable for a modern Court Acts given their lack of relevance to the jurisdiction of the Courts. For example, there are a number of provisions which are procedural in nature and therefore it is arguable that they should remain outside the ambit of the Courts Act. The Commission is also conscious that particular provisions have been amended significantly by Acts which are not related to the Courts. For example, the provisions regarding judicial pensions have been amended by Acts which also deal with the pensions of Oireachtas members.

4.37 The Commission has been influenced by the Australian Law Reform Commission's finding that the overarching purpose of their Court Act was to provide for the allocation and exercise of the judicial power of

the State. It is the view of the Commission that it is necessary to examine the purpose of the three main Courts Acts in this jurisdiction: the *Courts of Justice Act 1924*, the *Courts (Establishment and Constitution) Act 1961* and the *Courts (Supplemental Provisions) Act 1961* in order to decipher the purpose of a Courts Act for this jurisdiction. From an examination of these Acts, it is clear that the primary purposes of these Acts are:

- The establishment and maintenance of the Courts;
- The administration of justice;
- To provide for the constitution of the courts,
- To provide for the jurisdiction of each of the courts,
- To provide for judges and officers of the court;
- To provide for matters necessary to supplement the courts.

4.38 The Commission believes that the objective for a Courts Act identified by the Australian Law Reform Commission, namely the provision for the allocation and exercise of the judicial power of the State is a suitable objective for a new Court Act. Regard must also be had to the provisions of the Constitution in this jurisdiction relating to the courts.

4.39 The Commission believes, however, that the objective for a Courts Act put forward by the Australian Law Commission requires further elaboration in order to devise a scheme for a Courts Acts in this jurisdiction. The Commission considers that it is necessary that the purpose of a Courts Act is to provide for the following matters:

- the administration of justice,
- constitution and jurisdiction of the courts,
- allocation of jurisdiction between the courts,
- management of the courts,
- judges and officers and of the courts.

4.40 *The Commission provisionally recommends that the purpose of the Courts Act is to provide for the allocation of exercise of the judicial power of the State, the administration of justice, constitution and jurisdiction of the courts, allocation of jurisdiction between the courts, management of the courts and judges and officers of the courts.*

(4) Outline of a consolidated Courts Act

(i) Introduction

4.41 In its development of an appropriate scheme for the consolidated Courts Acts, the Commission has considered it beneficial to utilise a logical

flow beginning with the constitution of the courts, moving onto jurisdiction and circuits and districts as the jurisdiction of the Circuit Court and District Court are limited by geographical boundaries, then appeals, judicial posts, officers of the court, administration of the courts, procedure and finally savers and miscellaneous. Accordingly, it is the view of the Commission that the scheme for a consolidated Courts Act should be as follows:

- Part 1: Preliminary and General
- Part 2: Constitution of Courts
- Part 3: Jurisdiction of the Courts
- Part 4: Circuits and Districts (as the jurisdiction of the Circuit and High Court are limited by geographical areas)
- Part 5: Appeals
- Part 6: Judicial posts
- Part 7: Officers of the Court
- Part 8: Administration of the Courts
- Part 9: Procedure
- Part 10: Savers and Miscellaneous

4.42 The Commission accepts that, ultimately, the new Court Bill will also provide for significant repeals of existing Courts Acts, both pre-1922 and post-1922. The Commission will deal in detail with this issue in the Report which it will publish on this project.

4.43 Each of these parts will now be considered separately with suitable provisions for each of the parts elucidated.

(ii) Preliminary and General

4.44 This part of the Act will provide for the title of the Act, commencement of the Act and interpretation of words or phrases which require definition. The Commission has consolidated section 3 of the *Courts of Justice Act 1924* and section 2 of the *Courts (Supplemental Provisions) Act 1961* into the interpretation section of the Draft Bill in the Appendix. A section dealing with repeals would ordinarily be placed in this part, and this will, as explained be included in the Commission's Report on this project.

(iii) Constitution of Courts

4.45 Given the omission of sections 1(1), 2(1), 3(1), 4(1) and 5(1) of the *Courts (Establishment and Constitution) Act 1961* from the Act, this part deals with the constitution of the courts alone. Common with the remainder of the parts of the consolidated Courts Act, each of the courts is dealt with in

a separate chapter of the part. The remaining subsections of sections 1, 2, 3, 4, and 5 of the *Courts (Establishment and Constitution) Act 1961* are placed in this part. Section 11 of the *Courts (Supplemental Provisions) Act 1961* which provides that the High Court when exercising its criminal jurisdiction is the Central Criminal Court is also contained in the chapter relating to the High Court. Section 34 of the *Courts of Justice Act 1936* which allows for the High Court to sit outside Dublin on circuit is also contained in the chapter concerned with the High Court, as is section 35 of that Act which provides for judges of the High Court on Circuit. The chapter relating to the District Court contains section 71 of the *Children Act 2001* which establishes that when the District Court is hearing matters relating to children it is to be known as the Children's Court.

4.46 This part also provides for the continuance of the courts in place prior to the Bill. The approach taken by the Commission in this regard is discussed in more detail in Chapter 2 of this Consultation Paper.

(iv) Jurisdiction of the courts

4.47 In this part of the Act, the entire original jurisdiction, civil and criminal, of each of the Courts is set out. Another possible approach to this part is to set out the entire jurisdiction of each of the courts. The jurisdiction of each of the courts is also extensively regulated by other statutes, and these provisions have been omitted from the Act. The sections which have been excluded from the Act are:

- Section 4 of the *Courts Act 1971* which extends the jurisdiction of the High Court under the *Lunacy Regulation (Ireland) Act 1871*³¹
- Section 28 of the *Courts Act (No. 1) 1981* which amends the jurisdiction of the courts in relation to compensation for mental distress in fatal injuries in the *Civil Liability Act 1961* and the jurisdiction of the courts in relation to the liability of an airline carrier in the event of the death of a passenger pursuant to section 18 of the *Air Navigation and Transport Act 1936*.
- Section 4 of the *Courts Act (No. 1) 1981* which extends the jurisdiction of the Circuit Court under the *Succession Act 1965*.
- Section 30 of the *Courts of Justice Act 1953* which extends the jurisdiction of the District Court in interpleader cases to which section 22 of the *Enforcement of Court Orders Act 1926* relates.
- Section 8 of the *Courts (No 1) Act 1981* which extends the jurisdiction of the District Court under the Hire-Purchase Acts 1946 and 1960. This section could also be suitable for repeal as the *Hire*

³¹ 34&35 Vic c 22.

Purchase Acts 1946 and 1960 were Second Schedule of *Consumer Credit Act 1995* repealed the 1960 and 1946 Acts in their entirety.

- Section 9 of the *Courts (No. 1) Act 1981* which extends the jurisdiction of the District Court under the *Rent Restrictions Act 1960*.
- Section 11 of the *Courts (No 1) 1981* which extends the jurisdiction of the Circuit and District Courts under the *Hotel Proprietors Act 1963*.
- Section 12 of the *Courts (No 1) 1981* which extends the jurisdiction of the Circuit and District Courts under the *Family Law (Maintenance of Spouses and Children) Act 1976*
- Section 15 of the *Courts (No 1) Act 1981* which extends the jurisdiction of the District and Circuit Courts under the *Guardianship of Infants Act 1964*.
- Section 59 of the *Courts of Justice Act 1953* which provides for the avoidance of doubt, that the jurisdiction under the Rent Restriction Acts 1946 to 1952 can be exercised by the District Court. This section could also be suitable for repeal as the *Rent Restrictions Acts 1946 to 1952* were repealed by section 5 and the First Schedule to the *Rent Restrictions Act 1960*.

4.48 The Commission has also placed a number of sections in this part which relate to the districts or circuits in which particular actions may be taken, given the close connection between the jurisdiction of these courts and their districts and circuits. For example section 178 of the *Criminal Justice Act 2006* provides for the exercise of jurisdiction by the District Court in criminal cases where difficulties have arisen regarding the district in which the crime was committed.

4.49 At the beginning of the part, there are three sections which are applicable to the jurisdiction of the courts in general.

4.50 A number of pre-1922 provisions which are relevant to the jurisdiction of the courts have been placed in this part. It is the view of the Commission that these sections are more than merely of historical.

4.51 The sections which propose to repeal the Court of Criminal Appeal and Court Martial Appeal Court and transfer their jurisdiction to the Supreme Court are included in this part. This has been done despite the Commission's understanding that they may never be enacted given the recent establishment of a Working Group to examine the establishment of Court of Appeal for both civil and criminal matters.

(v) Circuits and Districts

4.52 This part is closely related to the jurisdiction of the courts so it is for that reason it has been placed next to the part in the Act which is concerned with the jurisdiction of the courts. The provisions relating to the High Court on Circuit, Circuit Court and District Court and altering of circuits or districts or composition of circuits or districts, and assignment of judges to these are all placed into this part. A pre-1922 provision, section 31 of the *Civil Bill Courts (Ireland) Act 1851* is placed in this part as it allows for the Government³² to alter circuits.

(vi) Appeals

4.53 The Commission has decided to adopt the approach of the Australian Law Reform Commission to appeals by placing the appeals in the chapter of the court from which the appeals originate. The Commission determined that it would be more accessible for provisions relating to appeals to be placed in a part dedicated to the topic. It did, however, take into account the approach of the Judicature Act in England and Wales whereby appeals are placed in with the jurisdiction of the courts. Overall, from its examination of courts acts of other jurisdictions, the majority of these acts provide for a separate part for appeals.

4.54 A number of provisions which are procedural in nature, and which originate in non-Courts Acts, such as section 34 of the *Criminal Procedure Act 1967* are contained in this part in the interests of clarity and completeness. Thus it can be said with some degree of certainty that the entirety of provisions regarding appeals is contained in each chapter relating to each individual court. The provisions in relation to case stated are also placed in this part of the Act and like appeals *simpliciter* are contained in chapters relating to the court from which the case is stated.

4.55 A number of relevant pre-1922 provisions concerning the appeal by way of case stated mechanism from the District Court are also contained in the chapter of the part relating to the District Court.

(vii) Judicial Posts

4.56 A number of the jurisdictions discussed above, for example New Zealand and England and Wales include provisions relating to judges in a part relating to the jurisdiction of the courts. The Commission has determined that in the interests of clarity, it is more appropriate for certain

³² Civil Bill Courts (Ireland) Act 1851 (Adaptation) (No. 1) (SI 193 of 1992) and Civil Bill Courts (Ireland) Act 1851 (No.2) Order 1992 (SI 174 of 1992) enable the Government to exercise functions formerly exercisable by the Lord Lieutenant under section 31 of the 1851 Act.

provisions concerned with judicial posts to be placed in a separate part of the Courts Act. It is also noteworthy that the entire text of two sections of the *Courts (Establishment and Constitution) Act 1961* is contained in a chapter at the outset of the part on judicial posts dealing with provisions which are applicable to all levels of judges. In addition, the Law Commission of New Zealand recommended that a part devoted completely to Judges was an appropriate part to maintain in its proposed Courts Act.

4.57 The Commission determined that the following matters are appropriate matters for a part of the Courts Act, divided in chapters in respect of the Superior Courts, Circuit Court and District Court on judges of those respective courts:

- Precedence between judges;
- Qualifications of judges of each of the courts;
- Retirement age of judges of each of the courts;
- Mode of address of judges;
- Appointment of temporary judges
- Tenure of office of Judges

4.58 In this regard, the Commission was influenced by the proposal of the Law Commission of New Zealand that a Courts Act should include a part dedicated to judges and the contents of this part proposed by that Commission. For example, following on from the recommendations of the Law Commission of New Zealand, a chapter has been devised and placed into this part of the Courts Act which exclusively sets out provisions relating to presiding judges. This chapter is immediately followed by a chapter concerning the powers of the respective presidents of the courts.

4.59 The Commission has noted that a number of the provisions relating to the remuneration of judges have been amended by legislation which provides for the remuneration of Oireachtas members as a whole. On that basis, it is arguable that provisions relating to the remuneration of judges should remain outside of a Courts Act. The Commission has found the following comment by the Queensland Law Reform Commission to be of assistance:

“It is suggested that the details of the actual salary payable to judges and their pension and superannuation entitlements are more appropriately dealt with in legislation other than a Supreme Court Act. The provisions which may properly be included in

such an Act are those which are designed to ensure payment to a Judge of such salary as is fixed by Parliament.”³³

In addition, in England and Wales, pensions in respect of the judiciary are provided for and maintained in a separate Act to a Court Acts, the *Judicial Pensions Act 1981*.³⁴

4.60 These two closely connected arguments have been of assistance to the Commission’s conclusion that it is appropriate for provisions relating to the salaries, remuneration and pensions of the judiciary to be omitted from the consolidated Courts Acts.

4.61 For the sake of completeness, the following provisions have been excluded from the consolidated Courts Acts given that they are concerned with the salaries, remuneration and pensions of the judiciary:

- Section 1 of the *Courts (Supplemental Provisions) Act 1991* which sets out interpretation provisions for that Act. This Act was enacted to provide for superannuation benefits for members of the judiciary and certain court officers.
- Section 2 of the *Courts (Supplemental Provisions) Act 1991* which extends the definition of service in the Second Schedule of the *Courts (Supplemental Provisions) Act 1961*. This schedule to the 1961 Act sets out provisions relating to pensions of judges of courts.
- Section of 5 of *Courts of Justice Act 1953* which makes provision for expenses of judges,
- Section 46 of the *Courts (Supplemental Provisions) Act 1961* as amended by section 31 of the *Ministerial, Parliamentary and Judicial Offices and Oireachtas Members (Miscellaneous Provisions) Act 2001* which sets out provisions relating to the remuneration and pensions of judges. This section sets out the exact salary of each of the levels of judges in this jurisdiction and their pension provisions.
- Section 3 of the *Courts (Supplemental Provisions) Act 1991* which makes provision for reckoning of days in addition to completed days of service for the purposes of pensions;
- Section 4 of the *Courts (Supplemental Provisions) Act 1991* which makes provision for pensions to spouses and children of judges;

³³ Queensland Law Reform Commission *A Bill to Consolidate, Amend and Reform the Supreme Court Acts and Ancillary Acts Regulating Civil Proceedings in the Supreme Court* (Report No 32 1988) at 12.

³⁴ Chapter 20 of 1981.

- Section 5 of the *Courts (Supplemental Provisions) Act 1991* which makes provision for pensions on the early vacation of office and purchase of additional years ;
- Section 6 of the *Courts (Supplemental Provisions) Act 1991* which makes provision for a restriction on pensions;
- Section 7 of the *Courts (Supplemental Provisions) Act 1991* which provides that regulations relating to certain provisions under the Act must be laid before the Houses of the Oireachtas;
- Section 11 of the *Courts (Supplemental Provisions) Act 1991* which provides for payments and expenses of judges;
- Section 8 of the *Courts (No 2) Act 1997* which allows for a former presiding judge of any court to continue to be paid at the level of president of that court when they continue to sit on the court.;
- Section 46A of the *Courts (Supplemental Provisions) Act 1961* as inserted by section 32 of the *Ministerial, Parliamentary and Judicial Offices and Oireachtas Members (Miscellaneous Provisions) Act 2001* which provides that the remuneration of judges is to be adjusted automatically by reference to salary increases in the Civil Service.;
- Section 48 of the *Courts and Courts Officers Act 1995* which provides funds for training and education of judges;
- Section 2 of the *Courts of Justice and Court Officers (Superannuation) Act 1961* which provides for superannuation gratuities for and in respect of judges;
- Section 3 of the *Courts of Justice and Court Officers (Superannuation) Act 1961* which provides that the provisions in that Act apply to judges who held such posts immediately prior to the coming into force of the Act. This section is obsolete and is repealed for that reason.;
- Section 48(10)(b) of the *Courts (Supplemental Provisions) Act 1961* which provides that the references in certain provisions of the Court Officers Acts 1926-1951 shall include a reference to the *Courts (Supplemental Provisions) Act 1961*;
- Section 5 of the *Courts of Justice and Court Officers (Superannuation) Act 1961* which makes provision for the Act to apply to certain officers in place immediately before the Act. The section is suitable for repeal as it is spent.;

- Section 6 of the *Courts of Justice and Court Officers (Superannuation) Act 1961* which empowers that the Minister for Justice to make provisions for sections 3 and 5 of the Act which related to judges and court officers in place immediately prior to the coming into force of the Act. This section can be repealed as it is obsolete.;
- Section 7 of the *Courts of Justice and Court Officers (Superannuation) Act 1961* which provides for the surrender of pension of judges and certain court officers for pension of wife or dependent.;
- Section 8 of the *Courts of Justice and Court Officers (Superannuation) Act 1961* which allows change of certain superannuation payments out of the Central Fund;
- Section 9 of the *Courts of Justice and Court Officers (Superannuation) Act 1961* which makes provision for payments and expenses of Minister for Finance and sums received in respect of medical examinations;
- Section 6 of the *Courts (Supplemental Provisions) Act 1961* which states that the provisions of the Second Schedule of the Act shall apply to the pensions of judges of the Supreme Court and High Court;
- Section 1 of the *Courts (Supplemental Provisions) (No 1) Act 1968* which can be repealed as it is spent.;
- Paragraph 1 of the Second Schedule to the *Courts (Supplemental Provisions) Act 1961* which sets out definitions which apply to provisions in that schedule relating to pensions of judges of the High Court and Supreme Court;
- Paragraph 2 of the Second Schedule to the *Courts (Supplemental Provisions) Act 1961* which sets out a provision relating to the vacation of office by a judge of the Supreme Court or High Court on the grounds of infirmity or age;
- Paragraph 3 of the Second Schedule to the *Courts (Supplemental Provisions) Act 1961* which applies to judges of the Supreme Court and High Court in place as at the commencement of the *Courts of Justice Act 1953*. This can be repealed as it is spent.
- Section 19 of the *Courts (Supplemental Provisions) Act 1961* states that the provisions of the Second Schedule of the Act shall apply to the pensions of judges of the Circuit Court;

- Paragraph 4 of the Second Schedule to the *Courts (Supplemental Provisions) Act 1961* which sets out definitions which apply to provisions in that schedule relating to pensions of judges of the Circuit Court;
- Paragraph 5 of the Second Schedule to the *Courts (Supplemental Provisions) Act 1961* which sets out a provision relating to the vacation of office by a judge of the Circuit Court on the grounds of infirmity or age;
- Paragraph 6 of the Second Schedule to the *Courts (Supplemental Provisions) Act 1961* can be repealed as it is spent given that it relates to a judge of the Circuit Court in place at the time of the *Courts of Justice Act 1953*.
- Section 31 of the *Courts (Supplemental Provisions) Act 1961* which states that the provisions of the Second Schedule of the Act shall apply to the pensions of judges of the District Court;
- Paragraph 7 of the Second Schedule to the *Courts (Supplemental Provisions) Act 1961* which sets out definitions which apply to provisions in that schedule relating to pensions of judges of the District Court;
- Paragraph 8 of the Second Schedule to the *Courts (Supplemental Provisions) Act 1961* which sets out a provision relating to the vacation of office by a judge of the District Court on the grounds of infirmity or age;
- Paragraph 9 of the Second Schedule to the *Courts (Supplemental Provisions) Act 1961* can be repealed as it applies to a District Court Judge in place at the commencement of the *Courts of Justice Act 1953* and is therefore spent;
- Paragraph 10 of the Second Schedule to the *Courts (Supplemental Provisions) Act 1961* which provides that a District Court judge who vacates his or her position having completed 10 years' service or more and has not vacated such office on the grounds of infirmity or age is entitled to a pension.
- Section 1 of the *Courts (Supplemental Provisions) (Amendment) Act 1999* as it relates to pension provisions for specific cases and is spent.
- Section 2 of the *Courts (Supplemental Provisions) (Amendment) Act 1999* which provides that section 46(6) and 57(2) of the *Courts (Supplemental Provisions) Act 1961* which relate to abatement of pensions apply to the persons to whom the 1999 Act applies.

- Section 3 of the *Courts (Supplemental Provisions) (Amendment) Act 1999* which provides that certain payments are to be made from the Central Fund in relation to pension payments made to persons to whom the 1999 Act applies.
- Section 8 of the *Courts (No 2) Act 1997* which provides that the judicial remuneration of any former President of the Supreme Court, High Court, Circuit Court or District Court is maintained until judicial retirement.

4.62 *The Commission provisionally recommends that provisions relating to the salaries, remuneration and pensions of the judiciary be omitted from the consolidated Courts Acts.*

4.63 The first chapter of the part dedicated to judicial posts is concerned with provisions which relate to the judiciary as a whole.

4.64 The Commission has considered whether the provisions relating to the Judicial Appointment Advisory Board are suitable for inclusion in the Courts Acts. The Law Commission of New Zealand considered that a provisions relating to judicial appointments be included in a part exclusively dealing with judges in its model modern Courts Act. However, this is a short provision allowing for judges to be appointed by the Governor General, not a comprehensive set of provisions establishing a judicial appointment board.

4.65 It is noteworthy that the recent establishment of a judicial appointment commission for the appointment of judges for England and Wales was completed in an Act not exclusively designed as a Courts Act. Instead, the Judicial Appointment Commission was established pursuant to section 61 of the *Constitutional Reform Act 2005*.³⁵ The Commission has concluded that, given the exclusion of such provisions from the *Supreme Court Act 1981*, it is appropriate for the provisions in this jurisdiction which are concerned with the Judicial Appointment Advisory Board to remain outside the Courts Act.

4.66 *The Commission provisionally recommends that sections 12, 13, 14, 15, 16, 17, 18, 19, 20, 20A, 21 and 22 of the Courts and Court Officers Act 1995, which are concerned with the Judicial Appointment Advisory Board remain outside the ambit of the consolidated Courts Act.*

³⁵ 2005 chapter 4. The section was appointed by Article 2(b) of SI 2005/2505 and 2(a) of SI 2006/1014.

(viii) Officers of the Court

4.67 A part providing for officers and offices is a common provision in most of the Courts Acts from other jurisdictions.³⁶ Because such provisions in this jurisdiction relating to officers can be placed easily and neatly into a dedicated part, the Commission concluded that such a part is placed into the Courts Act. In addition, such a part acknowledges the significant role designated to the officers of the court.

4.68 A large number of the provisions still in force relating to the officers of the courts are contained in the *Courts Officers Act 1926*. That said, the nature and extent of powers of some officers, in particular those of the County Registrar and Taxing Master, have increased in recent times.

4.69 During its consolidation of legislation relevant to the Courts Acts, the Commission became aware of the large amount of provisions relating to the officers of the courts placed in schedules to a number of Acts, most particularly the eighth schedule to the *Courts (Supplemental Provisions) Act 1961*. The matters contained in this schedule include designation of certain officers as offices attached the Superior Courts, qualifications of the Master of the High Court, Taxing Masters and Registrar of Wards of Court and provision for the Central Office.

4.70 The Commission has decided that in the interests of accessibility it would be more efficient instead to place the relevant provisions in the body of a consolidated and modern Courts Act. However, given the large number of such sections it became necessary to consider whether they should all be included in the Act, and if some of these were to be omitted on what basis this could take place.³⁷ This task was greatly eased by examining the contents of the parts of the Acts from other jurisdictions which are concerned with officers of the courts. It became apparent to the Commission during this consideration that a main cause of the large number of sections in this part is related to the numerous different officers of the courts. It is the view of the Commission that none of the matters contained in this part of the Bill are extraneous.

4.71 As discussed above, the Courts Acts in Singapore does not contain provisions regarding the qualifications for its officers. Instead they are provided for in a separate act which deals with the legal profession in general. Similarly, the *Supreme Court Act 1981* sets out the qualifications

³⁶ In New Zealand, the *Judicature Act 1908* places provisions relating to the officers of the High Court in a part dedicated to the jurisdiction of the High Court. Provisions for officers of the District Court in New Zealand are provided for in part exclusively concerned with officers of the District Court in the *District Court Act 1947*.

³⁷ An initial consolidation of all sections, including those in schedules to Acts, relevant to the officers of the courts at all levels of the courts garnered 82 sections for this part.

necessary for appointment to a particular office in a separate schedule to the Act. It is also of relevance that the Law Commission of New Zealand recommended a streamlined part dealing with officers of the courts.

4.72 In the interests of consistency, given that provisions relating to judicial pensions and salaries have been excluded from the Courts Acts similar provisions for officers of the courts have also been excluded from the ambit of the Act. These sections are as follows:

- Section 66 of the *Court Officers Act 1926* which provides for salaries and expenses of officers of the court.
- Section 57 of the *Courts (Supplemental Provisions) Act 1961* which provides for a pension for the Master of the High Court, Taxing Master and County Registrar; and
- Section 4 of the *Courts of Justice and Court Officers (Superannuation) Act 1961* which sets out superannuation gratuities for and in respect of the Master of the High Court, Taxing Master and County Registrar.

4.73 The establishment of the current courts by virtue of the *Courts (Establishment and Constitution) Act 1961* necessitated a section in the *Courts (Supplemental Provisions) Act 1961* which provides a saver of position for the officers of the court in place for the former courts. As the Court Act proposed by this Consultation Paper will not require any courts to be established, then it is logical that no saver in respect of the court officers need be included in the Act. It for this reason that there is no need to place provisions similar to section 5(5) of the *Courts (Supplemental Provisions) Act 1961*, which provides a saver for officers of the court appointed to the pre-1961 Act to continue in office in the Act or section 31 of the *Court Officers Act 1926*, which abolishes the post and offices in place at the time of the Act, into the Courts Act. Likewise there is no requirement to have a provision similar to section 29 of the *Courts and Courts Officers Act 1926* which relates the transfer of property in the Act.

4.74 The first chapter of the part is concerned with provisions which are relevant to officers in general, for example section 31 of the *Court Officers Act 1926* which permits deputies officers to be appointed, is included in this part. The part is divided into separate parts for officers of the Superior Courts, the High Court on Circuit, Circuit Court and District Court respectively.

4.75 A provision has been removed from this part of the Act as it is obsolete. This is:

- Section 59(4) of the Courts (Supplemental Provisions) Act 1961 which provides for officers of the Cork Local Admiralty and Cork Local Bankruptcy Court. These courts have been abolished.

(ix) Administration of the Courts

4.76 This part is a miscellaneous part where matters relating to the administration of the courts on a macro level are placed. Matters such as the times and sittings of the courts are contained in this part.

(x) Procedure

4.77 It is necessary for some level of procedure to be contained in a Courts Act. However, to include all provisions relating to procedure of each of the courts would result in the Courts Act being an unmanageably large text. To this end, the Commission has determined that only matters of utmost necessity relating to procedure will be placed in a part of the Act dedicated to the topic.

4.78 The Commission has decided that given the procedural nature of the Rules of Courts which the Courts Rules Committees devise and draft, it is appropriate for the provisions regulating such Committees to be placed in this part of the Act. The Commission has noted that it is common in other jurisdictions to place such provisions in a separate part of their Courts Acts dedicated solely to the Rules Committees of the Courts. This division of the Courts Acts includes general provisions which relate to the Rules Committees of the Courts as a whole and then rules committees of each of the courts based on the jurisdiction of each of the courts.

4.79 The Commission has decided that the provisions relating to the remittal of action between courts are sufficiently procedural in nature to be included in this part of the Courts Acts. Equally, matters relating to payment of interest, court fees and costs are sufficiently relevant to the ancillary jurisdiction of the courts to justify their inclusion. In this regard, the Commission concurs with the Law Commission of New Zealand that provisions as to costs and payments of interest are suitable for inclusion in a Courts Act.

4.80 In relation to the matters set out in the general procedure, these provide for matters such as service of documents, power of procuring attendance of witnesses. The fundamental tenet of allowing law and equity to be concurrently administered in the High Court is also included in the chapter on the general provisions of the courts.

(xi) Judgments

4.81 The Commission considers that it is necessary for some provisions regarding judgments of the courts to be included in a Courts Act.

However, it is worth considering the extent of these provisions and their applicability to the jurisdiction of the courts.

4.82 There are three primary Acts which provide for the enforcement of courts orders in this jurisdiction: the *Enforcement of Court Orders Act 1926*, the *Enforcement of Court Orders Act 1926* and the *Enforcement of Court Orders Act 1940*. It is the opinion of the Commission that these provisions are best retained in Acts separate to the Courts Act.

4.83 The sections in this part of the Act are those which are necessary for the maintenance of meaningful judgments in the courts. It is for this reason that provisions relating to judgments and interest and the power of the courts to order interest on court awards and registration of decrees of the courts are placed in this part of the Act. Two provisions from the *Debtors (Ireland) Act 1840*³⁸, sections 26 and 27, which make provision for judgment debts and decrees of the courts are included in the section as they are relevant and also have been amended and restricted by other provisions of the Courts Act.³⁹

(xii) Savers and Miscellaneous

4.84 The Commission has been greatly assisted by the views expressed by the Queensland Law Reform Commission as to the exact nature of savings and transitional provisions for a new Courts Acts.⁴⁰

4.85 The Commission has concluded that, in the interests of clarity and certainty a saver provision similar in effect to the recommendations outlined by the Queensland Law Reform Commission be inserted into the Act to deal with the following situations:

- the effect of the new Act on existing Acts, rules and jurisdiction of the court;
- the confirmation in office and of the appointment of judges and officers of the court;
- the effect of the new Act on pending proceedings;
- the effect of the new Act on statutory references to the courts in Acts anterior to the new Act.⁴¹

³⁸ 3&4 Vic c 105.

³⁹ Section 23 of the Courts (No 1) Act 1981 provides that notwithstanding the provisions of sections 26 and 27 of the *Debtors (Ireland) Act 1840*, judgments not exceeding €190.46 will not carry interest, section 26 of the 1840 Act is further developed by section 47 of the *Courts (Supplemental Provisions) Act 1961* and section 20 of the *Courts (No 1) Act 1981* and section 27 of the 1840 Act is extended to certain orders of the Circuit Court by section 21 of the *Courts (No 1) Act 1981*.

⁴⁰ See paragraph 4.20 of this Consultation Paper.

4.86 Given that the Act does not re-establish or establish the courts in place at the time before the Act, and makes no substantive changes to these courts, it is arguable that there is no necessity for provisions similar in nature and scope to sections 48 and 49 of the *Courts (Supplemental Provisions) Act 1961* to be included in the Act. These provisions were necessitated by the establishment of the courts by the *Courts (Establishment and Constitution) Act 1961*. The provisions are in place to allow for enactments relating to the old courts, and the judges and officers appointed thereto, established by the *Courts of Justice Act 1924* and related Acts referring to these courts to apply to the new courts established by the *Courts (Establishment and Constitution) Act 1961*. Section 49 allows for the preservation of continuity of administration and enforcement of justice on the establishment of the new courts. Having considered this matter, the Commission has decided, for the reasons given by the Queensland Law Reform Commission, to include sections 48 and 49 of the *Courts (Supplemental Provisions) Act 1961* in the draft Courts Bill appended to this Consultation Paper. The inclusion of some form of saver provision in the final version of the new consolidated Courts Act will, no doubt, be a matter of importance for those involved in its final drafting.

4.87 A number of other sections which are miscellaneous in their nature and scope have also been placed in this chapter of the Act. The Commission attempted to allow for a small number of sections to be located in this part in order to maintain ease of access to sections. It is fair to say that the miscellaneous sections placed in this chapter were so diverse in nature that they could not be placed in any other part of the Act, but their inclusion was required in the Courts Act.

4.88 Following the recommendation of the Working Group on a Courts Commission, the Courts Service was established by the *Courts Service Act 1998*. The Commission has concluded that the principal provisions of the 1998 Act are not sufficiently related to the jurisdiction of the courts to merit inclusion in the Courts Bill. The Courts Service's remit includes management of the courts, supporting the judiciary, maintenance of court buildings and provision of information on the courts to the public. Employees of the Courts Service are not officers of the court. The 1998 Act provides that the Courts Service "may make proposals to the Minister in relation to the distribution of jurisdiction and business among the courts and matters of procedure...and designate court venues".⁴² The Commission has concluded that this section has a sufficient nexus with the jurisdiction of the courts to merit its inclusion in the miscellaneous part of a new Courts Act. It

⁴¹ Queensland Law Reform Commission *A Bill to Consolidate, Amend and Reform the Supreme Court Acts and Ancillary Acts Regulating Civil Proceedings in the Supreme Court* (Report No 32 1988) at 6.

⁴² Section 6(2)(g) and (j)

is also proposed that the Courts Service will also provide secretarial, administrative and clerical assistance to the Rules of Court Committees.⁴³

4.89 Section 30 of the 1998 Act which provides that the Chief Executive of the Courts Service is to be a member of each of the Rules Committees of the Courts is included in the draft Bill in a part concerned with the Rules of Courts Committees. The second schedule of the 1998 Act outlines the powers of the Minister for Justice which have been transferred to the Courts Service. These matters are related to the jurisdiction of the courts and are also retained in the Courts Bill. Finally, section 31 of the 1998 Act is retained and is placed in Chapter 3 of Part 7 which deals with officers of the Circuit Court as the section provides that the each County Registrar is transferred to the Courts Service upon its establishment.

4.90 The sections from the 1998 Act included in the Courts Bill are placed in the miscellaneous provisions part.

4.91 *The Commission provisionally recommends the provisions of the Courts Service Act 1998, with limited exceptions, remain outside the scope of the new Courts Act.*

(xiii) Schedule

4.92 The Working Draft of the Courts Bill contains a number of provisions from existing Schedules in the Courts Acts which have been incorporated into the body of the text. For example, the Second Schedule of the *Courts and Courts Officers Act 1995* which sets out orders which can be made by County Registrars is contained in Part 7 of the Draft Courts Bill which is concerned with officers of the court. Some provisions have not be included in any Schedule to the Draft, for example the Third Schedule of the *Courts (Supplemental Provisions) Act 1961* which provides for civil proceedings in which the jurisdiction of the High Court is conferred on the Circuit Court with quantitative limits and the judges of the Circuit Court by whom the jurisdiction is to be exercised is outlined. These will of course need to be incorporated in a final Courts Bill in the next phase of the project.

D List of Courts Acts since 1922

4.93 The Commission has deemed it appropriate to attach a list of all of the Courts Acts enacted in this jurisdiction since 1922. Not all of these Acts are still in force. However, this list demonstrates the large number of provisions on the statute book relating to the jurisdiction of the Courts. The benefits of a consolidation of these into a single Act, in particular when combined with the list of pre-1922 Acts referred to at the end of Chapter 2,

⁴³ This is a proposed insertion of a subsection (ga) into the section by section 45 of the *Civil Law (Miscellaneous Provisions) Bill 2006*.

above, are readily apparent. The following are the Courts Acts enacted since 1922:

Courts of Justice Act 1924
Courts of Justice Act 1926
Court Officers Act 1926
Courts of Justice Act 1927
Courts of Justice Act 1928
Courts of Justice (No. 2) Act 1928
Courts of Justice Act 1929
Courts of Justice Act 1931
Courts of Justice (No. 2) Act 1931
Courts of Justice Act 1936
Circuit Court (Registration of Judgments) Act 1937
Courts Officers (Amendment) Act 1937
Court Officers Act 1945
Courts of Justice (District Court) Act 1946
Courts of Justice Act 1947
Courts of Justice (District Court) Act 1949
Court Officers Act 1951
Courts of Justice Act 1953
Court Officers Act 1959
Court of Justice and Court Officers (Superannuation) Act 1961
Courts (Establishment and Constitution) Act 1961
Courts (Supplemental Provisions) Act 1961
Courts (Supplemental Provisions) (Amendment) Act 1962
Courts Act 1964
Courts (Supplemental Provisions) (Amendment) Act 1964
Courts (Supplemental Provisions) (Amendment) Act 1968
Courts (Supplemental Provisions) (Amendment) (No. 2) Act 1968
Courts Act 1971
Court Officers Act 1972
Courts Act 1973
Courts Act 1977
Courts Act 1979
Courts Act 1981
Courts (No. 2) Act 1981
Court-Martial Appeals Act 1983
Courts Act 1983
Courts Act 1985
Courts Act 1986
Courts (No. 2) Act 1986
Courts (No. 3) Act 1986
Courts Act 1988

Courts (No. 2) Act 1988
Courts Act 1991
Courts (No. 2) Act 1991
Courts (Supplemental Provisions)(Amendment) Act 1991
Courts and Courts Officers Act 1995
Courts Act 1996
Courts Act 1997
Courts (No. 2) Act 1997
Courts Service Act 1998
Courts (Supplemental Provisions)(Amendment) Act 1999
Courts (Supplemental Provisions)(Amendment) Act 2000
Courts and Courts Officers Act 2002
Courts and Courts Officers (Amendment) Act 2003
Civil Liability and Courts Act 2004
Courts and Courts Officers (Amendment) Act 2007.

E Conclusion

4.94 The Commission has concluded that it is possible to devise an appropriate scheme of a Courts Act for this jurisdiction and that such a scheme is suitable for its consolidated Courts Act. The Commission approves of a thematic approach to any such Act.

4.95 *The Commission provisionally recommends that the consolidated Courts Act should have a thematic structure. The Commission provisionally recommends that each Part of the Act deal with a particular aspect of the jurisdiction of the Courts with each court being separately provided for, where applicable, in a division of the Part.*

4.96 *The Commission provisionally recommends that the purpose of the Courts Act is to provide for the allocation of exercise of the judicial power of the State, the administration of justice, constitution and jurisdiction of the courts, allocation of jurisdiction between the courts, management of the courts and judges and officers of the courts.*

4.97 *The Commission provisionally recommends that provisions relating to the salaries, remuneration and pensions of the judiciary be omitted from the consolidated Courts Acts.*

4.98 *The Commission provisionally recommends that a thematic approach be taken to a consolidated Courts Act with each part of the Act reflecting a particular aspect and then sub-divided in relevant provisions for each of the Courts. The Commission provisionally recommends that a suitable scheme for a consolidated Courts Act is as follows:*

- *Part 1: Preliminary and General*
- *Part 2: Constitution of the Courts*

- *Part 3: Jurisdiction of the Courts*
- *Part 4: Circuits and Districts*
- *Part 5: Appeals*
- *Part 6: Judicial posts*
- *Part 7: Officers of the Court*
- *Part 8: Administration of the Courts*
- *Part 9: Procedure*
- *Part 10: Savers and Miscellaneous*

4.99 *The Commission provisionally recommends that provisions relating to the salaries, remuneration and pensions of the judiciary be omitted from the consolidated Courts Acts.*

4.100 *The Commission provisionally recommends that sections 12, 13, 14, 15, 16, 17, 18, 19, 20, 20A, 21 and 22 of the Courts and Court Officers Act 1995, which are concerned with the Judicial Appointments Advisory Board, remain outside the ambit of the consolidated Courts Act.*

4.101 *The Commission provisionally recommends that the provisions of the Courts Service Act 1998, with limited exceptions, remain outside of the Courts Act.*

4.102 *The Commission invites submissions on the proposed structure of a consolidated Courts Act outlined above and the suggested inclusion and exclusion of material in the Draft Bill attached as an Appendix to this Consultation Paper.*

CHAPTER 5 SUMMARY OF RECOMMENDATIONS

5.01 The provisional recommendations contained in this Paper may be summarised as follows:

5.02 The Commission provisionally recommends that sections 1,2,3,4 and 5 of the *Courts (Establishment and Constitution) Act 1961*, which concern the establishment of the existing courts, remain outside the ambit of the proposed consolidated Courts Bill in the interests of certainty. [Paragraph 2.63]

5.03 The Commission provisionally recommends that the proposed consolidated Courts Bill expressly provide for the continuation of each of the existing courts. [Paragraph 2.71]

5.04 The Commission provisionally recommends that section 52(2) of the *Courts (Supplemental Provisions) Act 1961* be amended to provide for an automatic right of appeal from the High Court to the Supreme Court in cases where the High Court has made a determination on a question of law referred to it from the District Court in the form of a consultative case stated. [Paragraph 3.24]

5.05 The Commission provisionally recommends that section 16 of the *Courts of Justice Act 1947* and section 38 of the *Courts of Justice Act 1936* should be amended to allow for a Circuit or High Court Judge to state a consultative case without a request from any of the parties to the proceedings. [Paragraph 3.33].

5.06 The Commission provisionally recommends that a uniform standard be applied by judges of the District, Circuit and High Courts in determining whether to accede to an application to refer a question of law to a higher court through the method of consultative case stated. The Commission provisionally recommends that the judge refer the question of law to the higher court unless he or she is of the opinion that the application is “frivolous or vexatious”. The Commission provisionally recommends that section 53 of the *Courts (Supplemental Provisions) Act 1961*, section 16 of the *Courts of Justice Act 1947* and section 38(3) of the *Courts of Justice Act 1936* be amended accordingly. [Paragraph 3.36]

5.07 The Commission provisionally recommends that legislative guidance be provided in section 52 of the *Courts (Supplementary*

Provisions) Act 1961, section 16 of the *Courts of Justice Act 1947* and section 38(3) of the *Courts of Justice Act 1936* as to the stage in proceedings at which a consultative case stated may be requested. [Paragraph 3.41]

5.08 The Commission provisionally recommends that the form of appeal by way of case stated procedure should be repealed and that the consultative case stated continue to be available from the District, Circuit and High Courts. [Paragraph 3.58].

5.09 The Commission provisionally recommends that a more general rule protecting the anonymity of the parties to proceedings be provided for exceptional cases currently outside the ambit of the *in camera* rule where the needs of justice dictate that the parties not be identified. The Commission provisionally recommends that a party should be enabled to make an application for such relief and that it should be at the discretion of the judge whether to grant the relief. The Commission considers that the public and media be permitted to attend and report on such proceedings but that the parties should not be identified. The Commission welcomes submissions on the criteria to be applied in such applications. [Paragraph 3.114]

5.10 The Commission provisionally recommends that detailed criteria should be drafted in order for a consistent policy to be maintained in respect of offences that are punishable by a fixed penalty. The Commission provisionally recommends that the criteria should include:

- i) Proportionality between harm and degree of culpability;
- ii) Recourse to the courts should be available at the behest of the accused;
- iii) The fixed penalty fine should be relative to other fixed penalty fines, depending on the seriousness of the offence;
- iv) Fixed penalties should only be available in relation to summary offences;
- v) Defendants should not face a term of imprisonment in default of payment of a fixed penalty. [Paragraph 3.137]

5.11 The Commission provisionally recommends that all civil appeals should be by leave of the court at first instance and where such leave is granted, civil appeals should be based on the transcript of the original trial and on the written submissions of the parties to the case. [Paragraph 3.177]

5.12 The Commission provisionally recommends that the leave procedure in criminal appeals be amended so that the trial judge is entrusted to ensure in advance of the leave hearing that the procedural aspects are satisfied, so that the Court of Criminal Appeal alone has jurisdiction to decide whether leave should be granted, and that the Court's decision is therefore based on written submissions only. The Commission also

recommends that section 5 of the *Criminal Procedure Act 1993* be amended so as to place all obligations concerning procedure on the Court of Criminal Appeal itself and not on the Registrar of the Court, and that the amended section 5 of the *Criminal Procedure Act 1993* be used by judges to exclude applications for leave to appeal that do not demonstrate any substantial ground of appeal. The Commission considers that if this section is used by judges in suitable cases, leave to appeal will be a more meaningful procedure and act as a filter for unmeritorious, wasteful or frivolous appeals. [Paragraph 3.200].

5.13 The Commission provisionally recommends that the monetary jurisdiction of the District Court and Circuit Court in civil matters be increased as recommended in 2006 by the Legal Costs Implementation Advisory Group. The Commission welcomes submissions as to the exact level of such increases, but believes that the increases contained in the Courts and Courts Officers Act 2002 should be considered in this exercise. The Commission adopts the recommendation of the Legal Costs Advisory Board that personal injuries matters be excluded from the jurisdictional increases. [Paragraph 3.214]

5.14 The Commission provisionally recommends that the following guidelines be included in legislation regarding the Rules Committees of the Court:

- (a) rules should be drafted to enable a simple court process;
- (b) rules should be drafted using plain language;
- (c) rules should be drafted with a view to keeping the cost of litigation down;
- (d) rules should encourage expedition and discourage delay;
- (e) rules should enable the development of case management;
- (f) the rules committee should where practical review regularly the Rules of the court;
- (g) the rules committee should where possible enable the development of IT and e-courts. [Paragraph 3.270]

5.15 The Commission provisionally recommends that the following overarching guidelines should be included in legislation regarding the Rules Committees of the Court:

- (a) simplicity in rules;
- (b) ensure accessibility of rules; and
- (c) efficiency in the courts system. [Paragraph 3.271]

5.16 The Commission invites submissions on whether the right of election should extend to all indictable offences triable summarily where a prison sentence can be imposed. [Paragraph 3.311]

5.17 The Commission provisionally recommends that the consolidated Courts Act should have a thematic structure. The Commission provisionally recommends that each Part of the Act deal with a particular aspect of the jurisdiction of the Courts with each court being separately provided for, where applicable, in a division of the Part. [Paragraph 4.35]

5.18 The Commission provisionally recommends that the purpose of the Courts Act is to provide for the allocation of exercise of the judicial power of the State, the administration of justice, constitution and jurisdiction of the courts, allocation of jurisdiction between the courts, management of the courts and judges and officers of the courts. [Paragraph 4.40]

5.19 The Commission provisionally recommends that provisions relating to the salaries, remuneration and pensions of the judiciary be omitted from the consolidated Courts Acts. [Paragraph 4.62].

5.20 The Commission provisionally recommends that sections 12, 13, 14, 15, 16, 17, 18, 19, 20, 20A, 21 and 22 of the *Courts and Court Officers Act 1995*, which are concerned with the Judicial Appointment Advisory Board remain outside the ambit of the consolidated Courts Act. [Paragraph 4.66]

5.21 The Commission provisionally recommends the provisions of the *Courts Service Act 1998*, with limited exceptions, remain outside the scope of the new Courts Act. [Paragraph 4.91]

5.22 The Commission provisionally recommends that a thematic approach be taken to a consolidated Courts Act with each part of the Act reflecting a particular aspect and then sub-divided in relevant provisions for each of the Courts. The Commission provisionally recommends that a suitable scheme for a consolidated Courts Act is as follows:

- Part 1: Preliminary and General
- Part 2: Constitution of the Courts
- Part 3: Jurisdiction of the Courts
- Part 4: Circuits and Districts
- Part 5: Appeals
- Part 6: Judicial posts
- Part 7: Officers of the Court
- Part 8: Administration of the Courts

- Part 9: Procedure
- Part 10: Savers and Miscellaneous [Paragraph 4.96]

5.23 The Commission invites submissions on the proposed structure of a consolidated Courts Act outlined above and the suggested inclusion and exclusion of material in the Draft Bill attached as an Appendix to this Consultation Paper. [Paragraph 4.102]