



Draft Agenda items for the

Review of the Administration of Civil Justice

President of the High Court
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Theme I – Rules and Procedures

1. Plain Language

- a. The use of plain modern language throughout the Court Rules will increase accessibility.¹ (*See also Theme V*)
- b. Uniform use of terms to promote clarity and understanding.²

2. Review Certain Rules

- a. The rules on tender and lodgement need to be reviewed. There are concerns that the time limits are impractical and do not allow for the updating of information to support a fully informed decision. Order 22 RSC also lacks clarity³.
- b. Expand the use of interrogatories without the requirement for leave of the court. They help to narrow down the issues and focus minds.
- c. Adopt a uniform approach to basic procedures across all court jurisdictions.⁴

3. Case Management and Listing

- a. Case management & progression needs greater promotion and facilitation. Properly employed, they have the potential to increase efficiency, save time and costs and reduce the demand on judicial resources. They would also lead to greater certainty in the scheduling of cases as only those cases which are going ahead on a day would be listed. The case progression procedure under the Circuit Court Rules is not being utilised to its full potential.
- b. Provide for sufficient time and resources for the writing and timely delivery of judgments.
- c. Greater delegation of non-contentious matters to Registrars and use of email to arrange non-contentious matters such as adjournments where the parties agree.
- d. The full implementation of S.I. No. 254 of 2016 Rules of the Superior Courts (Conduct of Trials) 2016 and S.I. No. 255 of 2016 - Rules of the Superior Courts (Chancery and Nonjury Actions and Other Designated Proceedings: Pre-Trial Procedures) 2016.
- e. Consider assigning a case to one judge for its duration so that familiarity with the case will lead to more efficient management of the case. This should particularly arise where specialist training has been provided for judges in the particular subject matter.
- f. Better management of adjournments with strict application of the rules in this regard.
- g. Progress the proposal to centralise the Liquidated Sum proceedings in one office (unless they become defended). This would remove a significant burden from the other court offices.
- h. Notification, communication and publication of listings and hearing dates (ie Legal Diary and similar) need to be improved and modernised across all courts, with better search facilities.

¹ For example, SI 475/2017, while envisaging service of court documents by email uses archaic language such as "thereof" and "forenoon".

² For example, plaintiff/claimant and defendant/respondent.

³ *Reaney & Ors -v- Interlink Ireland Limited (t/a D.P.D.)*[2016] IECA 238

⁴ For example, the new provision for the delivery of documents in the proceedings introduced by S.I. No. 475 of 2017 (Rules of the Superior Courts (Service) 2017) should be extended to all courts.

4. Clinical Negligence Actions

- a. Further improvements are required to the procedures that apply for clinical negligence actions with a view to the satisfactory resolution of these claims in a timely and cost effective manner. Consideration should be given to the recommendations set out in the Report of the Working Group on Medical Negligence and Periodic Payments (Modules 2 and 3).

5. Judicial Review

- a. Efficient Judicial Procedures are required both to protect the rights of applicants and to avoid unnecessary delays in the implementation of decisions or actions of the public bodies and regulators whose actions may be amenable to judicial review. Consideration should be given to measures designed to streamline the procedure for progressing and resolving judicial review applications.
- b. Such measures should include:
 - i. a review of the procedure for applying for or resisting judicial review (including any application for *ex-parte* relief),
 - ii. the introduction of more rigorous case management procedures and, most importantly,
 - iii. the allocation of significantly increased resources to the Courts Service to enable judicial reviews to be case managed and resolved more expeditiously. Case management could include provision for automatic directions which would only be varied on application to the court and which would be designed to ensure that judicial review applications are progressed and resolved as quickly as possible.

6. Review how hearings are conducted

- a. The practice of reading aloud the pleadings and affidavits at the start of each case is very time-consuming.
- b. Apply greater control to the time taken by advocates in court.
- c. Likewise the procedure for hearing judicial reviews should be streamlined. The time required for hearing judicial reviews and the cost of such proceedings could be significantly reduced both by additional case management and if the court was to routinely allocate time to review the pleadings, affidavits and written submissions before the hearing. The time allocated for oral submissions could then be reduced if the Court has had sufficient opportunity to read the papers in advance. Judicial resources would need to be provided to allow this to happen.

7. Judgments

- a. The delivery of judgments needs to be timely. To this end, greater resources are needed together with improved case management and scheduling.
- b. The communication and dissemination of judgments could be improved and modernised.

8. Measures to facilitate class actions

- a. There is a need for a dedicated process for “class actions”.

9. Revisit the funding of civil litigation

- a. Litigation funding should be revisited as expanded funding options can increase access to the courts.
- b. Further analysis is required on the extension of legal aid to provide greater access to civil justice.

10. Online eServices

- a. Proposals in respect of changes to rules and procedures impacted upon by increased use of technology are set out in Theme III.

Theme II – Discovery

This is one particular area of court process and procedure that is in need of serious reform, and the Society welcomes the priority provided to it by the Group.

1. General Discovery

- a. In the current ‘information age’, the existing rules on discovery are in need of urgent reform. This would include review of the tests of relevance and necessity.⁵

2. eDiscovery

- a. The vast nature of Electronic Stored Information (ESI) has rendered discovery very cumbersome and expensive. The law and rules on discovery need to evolve to address this issue.
- b. Technology Assisted Review (TAR) and other emerging technology-based approaches are growing in prominence in response to the expanding burden of discovery. Consideration needs to be given to ensuring equality of arms between litigants in such circumstances.

3. Discovery and Data Protection

- a. In the context of discovery and Data Protection and Freedom of Information statutory regimes, issues consistently emerge in the area of privilege, restrictions of access, listing of documents, duplication, cost etc.
- b. The Society welcomes consideration and analysis of rules as to how data and information requests are handled in the context of anticipated or existing litigation.

⁵ See also “Possible reforms to the Rules of the Superior Courts to reduce the time and cost of Discovery”, a discussion document prepared by the Commercial Lawyers Association of Ireland (CLAI), Discovery Sub-Committee (see www.clai.ie)

Theme III – eServices

1. The establishment of an eServices Liaison Group

- a. A liaison group should be established by the Courts Service for the purpose of ensuring early engagement with stakeholders (to include legal practitioners) in relation to the development of eServices. This liaison group should be guided by the following principles:
 - Advance eServices to promote greater access to justice, as well as to reduce the cost of its administration,
 - Promote early consultation with court users,
 - Ensure a consistent approach is applied across the eGovernment landscape, such as payment systems, user verification and authentication of digital documents.

2. The On-line Debt Recovery project

- a. The development of the Courts Service On-line Debt Recovery system was very promising but has failed to reach fruition. It has the potential to greatly improve efficiencies for users and the Courts Service.

3. eFiling

- a. The introduction and support of eFiling of all pleadings and Court documents across the various court jurisdictions is urgently required.⁶ The efficiencies and reputational benefit would place the Courts Service on a par with other jurisdictions, in respect of such services.
- b. As part of a coordinated plan with stakeholders, Court Rules should mandate eFiling of pleadings and increased use of digital documents, and further set out how practitioners are to prepare and file such documents.

4. Payment of fees and lodging of papers

- a. Legal practitioners and court users require a modern electronic method of payment of court fees, such as are available from other public bodies (CRO, Revenue, etc.). Such a payment method would enable practitioners to comply with their money-handling and accounting obligations under the Solicitors Acts.
- b. Existing paper based processes (e.g. stamping court documents, filing etc.) should be reviewed for digitalisation.

⁶ While a District Court Claim Notice can issue electronically, Order 40.4(3) of SI 17 of 2014 requires filing of the printed copy of the claim notice with the court office 'in person or by post'.

5. eLicensing

- a. Substantial work has been already invested in the eLicensing service, which will be of benefit to all users and should be completed as soon as possible. Such a service will significantly reduce costs and delays for the Courts Service, An Garda Síochána, Local Authorities and Applicants.

6. Online Consent adjournments

- a. An 'Online Consent Adjournment' system facilitating online applications for online consent and decisions, as well as applications for adjournments made in advance of matters being mentioned in Court, should be investigated and developed if feasible.

7. Digital Signatures

- a. The Courts Service should ensure that there is full consultation with the professional representative bodies for legal practitioners in relation to any systems which require the verification or authentication of legal practitioner identities or of electronic documents filed by legal practitioners.

8. Public access to pleading via the Central Office

- a. The Society urges parameters or a validation of a request for sight of pleadings to parties outside the actual litigation. A clear policy is required.

Theme IV – Promotion of ADR

The Mediation Act 2017 has been a welcome development, and its operation and effectiveness can be assessed more properly once it has become more embedded within practice.

1. Earlier promotion in litigation

- a. The Society recommends that ADR be encouraged at an earlier stage in the dispute process to the benefit of litigants, in terms of cost and speed, and to ease the demand on court resources. This could be done effectively alongside greater adoption of case progression and single judge oversight as recommended in Theme I.
- b. Greater emphasis on ADR at Circuit or District Court levels is recommended together with increased use of existing ADR provisions in the rules.

2. Increased educational initiatives

- a. Judges, legal professionals and lay litigants would benefit from additional and more regular emphasis on ADR developments and use.
- b. The rules should also contain a provision for the management of proceedings should a plaintiff become of unsound mind or develop cognitive impairment during the course of proceedings.

3. Application to particular types of dispute

- a. The Society believes that certain disputes by their nature are inherently suited to be resolved by mediation, rather than through the adversarial process of litigation. These might include Probate suits, whether under S117 of the Succession Act or otherwise. Shareholder disputes in the nature of actions for oppression under Section 212 of the Companies Act, 2014 might also benefit from such an approach.
- b. The Society does not favour the referral of such cases to mediation by the court on a mandatory basis but rather, where appropriate that these cases are case managed on a pilot basis so that the parties' lawyers might explain to the judge whether mediation has been considered and why it has not been undertaken.

Theme V – Vulnerable Court Users

The measures to be implemented for the increased efficiency and effectiveness of our justice system must also safeguard the rights of litigants and the public. To this end, it is important to protect and support the right of parties to litigation to good and sufficient legal representation by solicitors and barristers.

1. Safeguard the right to legal representation

- a. Concerns have arisen about the effectiveness of measures such as the Abhaile Scheme in providing the appropriate level of legal representation and advice that is required in complex possession cases, particularly in light of recent concerns about the handling of tracker mortgages.

2. Persons “under a disability”

- a. The language employed in the rules and legislation is archaic and often insulting (infant, lunatic).⁷ It needs to be respectful and inclusive and reflect our modern society’s standards.
- b. Greater protection is required for persons under a disability in the settling of claims prior to the issue of proceedings. Consider the introduction of procedures for approval of settlement offers prior to the issue of proceedings, as exist in England and Wales.
- c. Greater clarity would be welcome on (1) the appropriate choice of a next friend and (2) the onus and risks that attach to the next friend.
- d. Revision of the rules, procedures and practices to accommodate greater participation of persons under a disability in their own litigation (e.g. older children, persons with an intellectual disability, persons with a mental disorder). This would reflect the functional approach to capacity espoused by the Convention on the Rights of Persons with Disabilities and the Assisted Decision-Making (Capacity) Act 2015.

3. Investment of Funds

- a. Concern has been raised about the considerable costs attached to the investment of funds on behalf of persons under disability, particularly in light of poor investment returns. The system and procedure for investment of funds is in urgent need of review and it is noted that the Oireachtas Public Accounts Committee made a number of recommendations in this regard⁸.
- b. The investment of funds on behalf of children who are close to attaining their age of majority raises particular concerns due to the short investment period, and the costs involved in such investment. Proper provision is required to cover these situations.

⁷ In the Matter of Wards of Court and In the Matter of Francis Dolan [2007] IESC 26

⁸ Report on Wards of Court, July 2015, <http://www.oireachtas.ie/parliament/media/committees/pac/reports/PAC-Report-on-Wards-of-Court-July-2015.pdf>

4. Lay litigants – McKenzie friends

- a. The proliferation of McKenzie friends and the delays and cost this entails needs to be addressed within the Rules particularly in light of the right of access to proper legal representation and the need for efficiency and fairness in litigation⁹.

5. In support of universal access to Civil Justice

- a. Progress has been made in improving access to court buildings and services for persons with disability. Further consideration and action is required to ensure that our civil justice system adheres to the principle of universal access and effectively accommodates direct and indirect participation of everyone at all stages.