Department of Justice
An Roinn Dlí agus Cirt
Männystrie O tha Laa

A consultation on increasing the general civil jurisdiction of the county courts in Northern Ireland

Summary of consultation responses and next steps

November 2021

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Introduction

This report provides a summary of the responses received by the Department of Justice to a public consultation on increasing the general civil jurisdiction of the county courts in Northern Ireland.

The consultation sought the public's view as to whether improvements could be made to the efficient disposal of civil cases by increasing the general civil jurisdiction of the county courts from its current limit of claims worth up to £30,000. Our aim is to ensure, as far as possible, that cases are heard in the right court setting consistent with the complexity of the case. Two proposals were considered: an increase in county court jurisdiction to £60,000, with an increase in the jurisdiction of district judges to £20,000; or, an increase in the county courts jurisdiction to £100,000, with an increase for district judges to £35,000.

We also asked questions on a number of related issues including whether the jurisdiction of the small claims court should be increased to £5,000 from the current level of £3,000. We sought views as to whether clinical negligence cases should be reserved as a High Court only action, or whether the current county court jurisdiction of £30,000 should be maintained for this type of case. The consultation further asked whether county judges should be granted a statutory power to remove (i.e. transfer) cases from the county courts to the High Court where the county court is of the view that the case should be heard in the High Court. Currently only the High Court has the power to transfer cases in either direction. Finally we also asked whether the general civil jurisdiction in respect of defamation cases should be increased to £10,000.

The public consultation opened on 4 February 2021. A consultation paper, a regulatory impact assessment, and a number of screening assessments were published on the Department's web site, as well as on Citizen Space on the nidirect web site. The consultation closed on 30 April, although two organisations were granted a short extension to submit a response.

Eighteen responses were received and list of respondents is at **Annex A**.

The Department is grateful to all respondents for their interest in this consultation. The responses were collated and carefully considered. This paper summarises the responses and outlines the next steps.

Summary of Consultation Responses

Question 1: Which of the following options do you believe would help to create the most effective and efficient system for civil proceedings:

1) Increase in county court jurisdiction to £60,000, with an increase in the jurisdiction of district judges to £20,000; or,

2) Increase in county court jurisdiction to £100,000, with an increase in the jurisdiction of district judges to £35,000.

Option 1	**9**
Option 2	**4**
Neither or did not answer	**5**

Fifteen of the eighteen responses received provided specific views on this question. Nine respondents were in favour of Option 1, four favouring Option 2 and two preferred to maintain the current position.

A number of respondents referred to our methodology in estimating the potential movement of cases between court tiers should the county court jurisdiction be increased, which was based on the award in those cases where we know the final value. It was suggested that the Department had over-simplified the process and that we had not taken due account of case complexity which may often belie the final award in a case. Our consultation and Regulatory Impact Assessment were clear that we recognise that the value of a claim or settlement does not equate to complexity. Low monetary value cases, particularly clinical negligence and personal injury claims, may still involve considerations of legal or factual complexity. However, it is not possible to factor these considerations into our analysis: this type of information is not captured by the Integrated Court Operations System (ICOS) which is used by Northern Ireland Courts & Tribunals Service to process, record and analyse court business. Financial value of disposed cases provides the best available means of estimating impact.

Based on the consultation responses, we are minded to take forward an increase in the county court jurisdiction to £60,000, with an increase in the jurisdiction of district judges to £20,000 (Option 1). This was also the level recommended in the Gillen Review. Although not as an ambitious as Option 2, it is still a doubling of the current limit while not excessively diverting caseloads from the High Court, risking loss of expertise in that court. We also think it offers a sufficiently clear dividing line between

the jurisdictions of the High Court and county courts to provide clarity on the appropriate forum for proceedings.

In general, whether a respondent favoured Option 1 or 2, a number of key issues were identified which respondents believed would also have to be addressed alongside an increase in general civil jurisdiction. These include,

- improved and more robust pre-action protocols and pleadings, with the potential for implementation of sanctions for non-adherence;
- Alternative Dispute Resolution (ADR) processes to assist in earlier resolutions to avoid litigation where possible;
- the need for dedicated listings for civil cases, implementation of Civil Hearing Centres (or similar), and time set aside for multi-day hearings, particularly where more expert evidence is required;
- suitable, modern court accommodation; and,
- any judicial training requirements.

We are aware, and outlined in the consultation, that many of these issues would need to be addressed ***before*** any jurisdictional changes can be made and would require a co-ordinated approach with our partners and stakeholders particularly the judiciary. Any proposed change could potentially overburden the county courts if it is not properly planned, supported and resourced.

Many of these issues have, of course, also been complicated by the Covid-19 pandemic. The courts will need to tackle a backlog of more complex cases and it may take some time before court business returns to 'normal levels'. For that reason, we will not be increasing the general jurisdiction of the county courts in the current Assembly mandate. Any final decision on a change to the general jurisdiction will also be subject to a costed business case

We propose establishing a Working Group comprising membership from key justice partners which will be tasked to report on the practical implementation of an increase. This would ensure effective collaboration and co-ordination on all necessary changes. This includes, for example, changes to the county court costs regime which is the

responsibility of the County Court Rules Committee and which will likely be the subject of separate consultation. Changes to court practice and procedure may also be required and would also be taken forward by the Rules Committee and judiciary. There will also be legal aid implications and it would be necessary to make new provision for relevant cases to enable the reforms to operate successfully. We will engage with affected stakeholders, including the legal profession, before introducing new legal aid provisions, and will have regard to all applicable statutory criteria and legal obligations.

We recognise that judicial resourcing to support an increase in jurisdiction is also a pivotal issue: there is no merit in allocating more cases to the county courts if they are not resourced to deal with them. We outlined in our Regulatory Impact Assessment that district judges may have a considerable additional caseload under Options 1 & 2 and we will work with the Office of the Lord Chief Justice and Northern Ireland Courts & Tribunal Service to consider judicial allocations and administrative capacity.

We agree with the response from the Office of the Lord Chief Justice that amending the financial boundaries between the county courts and High Court cannot be considered in isolation, and would have to consider judicial responsibilities in managing criminal and family caseloads, as well as other demands on judicial resources such as the Historical Institutional Abuse Redress Board. We also note the response from JMK Solicitors, the Association of Personal Injury Lawyers, and the Law Society which were less supportive of an uplift in the district judge jurisdiction which may have a knock-on effect on the speed in which contested claims in the small claims court are disposed. APIL suggested specialist district judges to hear personal injury cases.

The proposed Working Group would also help to facilitate discussion on how best to implement structural change which might consolidate civil business into regional hearing centres. As part of a pilot exercise taken forward by the Office of the Lord Chief Justice prior to the pandemic, civil cases were being listed in a regional Civil Hearing Centre in Armagh which covers cases which would have previously been heard in Craigavon, Newry, Armagh and Dungannon. A second phase which would have added a second venue in Belfast in 2020, was postponed due to the Covid-19 pandemic. The rationalised civil business undertaken during the pandemic in hubs in

Downpatrick, Londonderry, Enniskillen and Armagh may also demonstrate further potential benefits of this type of approach.

We note that many respondents favoured the introduction of consolidated civil business in the county courts, including the Bar of Northern Ireland which did not support either Option and preferred instead to maintain the current jurisdiction. It noted feedback from its members which generally supported the operation of the pilot Armagh Hearing Centre. Input from the Working Group would also ensure that wider issues, such as potential regional hearing centres providing a venue for both civil and family business and potential access to justice issues, an issue raised by the Bar, would be considered as part of any discussion.

The Working Group will also be mindful of the wider Northern Ireland Courts and Tribunals Service Modernisation programme to ensure appropriate and accessible court accommodation, including for rural communities where the lack of broadband access impact on access to online facilities.

We noted the comments from Kennedys Law in relation to the potential for some plaintiffs to inflate damages to avoid fixed fees in the county courts. They suggested that a Northern Ireland equivalent to section 57 of the Criminal Justice & Courts Act 2015 should be implemented to tackle ‘fundamental dishonesty’. It is not apparent the extent to which dishonest claims are an issue in this jurisdiction. Ultimately this is primarily for the Department of Finance to consider as it is responsible for substantive civil law reform. We have made officials in that Department aware of this feedback to our consultation.

Question 2: Given that clinical negligence cases tend to be more complex than other tort actions, should the Department either:

1) **Reserve clinical negligence as a High Court only actions; or,**
2) **Maintain the current county court jurisdiction of £30,000 for clinical negligence claims only.**

Option 1	**7**
Option 2	**5**
Neither or did not answer	**6**

Twelve of the eighteen responses provided specific views on this question, with seven supporting reserving clinical negligence as a High Court action, five supporting the current upper limit for such claims being retained at £30,000, and one response favouring neither.

As our consultation and supporting documents noted, the monetary value of an award may not reflect its legal or factual complexity. This is particularly true with clinical negligence cases where there is often considerable complexity in establishing the facts of a case, with proceedings tending to be determined by expert evidence in terms of liability and level of damages. Currently, clinical negligence cases may be heard in the county courts or High Court depending on the value of the claim.

We noted in our consultation that the Gillen Review did not go as far as to suggest that such cases should be the reserve of the High Court. Instead it suggested that they should 'usually' be heard in the High Court, though they could be heard in the county courts if 'sufficiently straightforward'. Our view is that it would be challenging in practice to assign cases based on complexity in a system centred on financial jurisdiction, particularly when key issues in clinical negligence cases may not emerge until medical evidence has been exchanged. This point was also emphasised by the Bar of Northern Ireland.

Respondents in favour of reserving clinical negligence as strictly a High Court action noted that even in modest value cases, there are complex issues concerning liability, causation and damages that require more robust pre-action protocols, pleadings and judicial management to ensure that neither side is 'ambushed' during proceedings. These cases often need multi-day hearings which can be difficult to secure without interruption in the county courts. Some respondents also noted that, as a small

jurisdiction, expert witnesses may have to travel to Northern Ireland and may be less likely to travel to county court venues when civil cases may be adjourned as part of mixed lists with criminal and family cases.

Other respondents suggested it was prudent to keep some cases within the county courts given that that venue has a proven track record of dealing with lower value cases, such as dental claims. It was suggested that the county courts provide a more efficient means of settling such cases, with a quicker turnaround time than the High Court.

We noted the suggestion from JMK Solicitors and APIL that if Option 2 was progressed, a specific clinical negligence county court with specialised judges could be established to deal with such cases.

After considering the responses to the consultation, we are inclined to maintain the current county court jurisdiction of £30,000 for clinical negligence claims. Our understanding is that relatively few clinical negligence cases are issued in the county courts, and retaining the £30,000 limit for these claims would allow this tier to continue to hear claims for relatively low value claims, such as dental claims. All cases above £30,000 would be heard in the High Court which has well-established and effective processes, more readily allowing for multi-day hearings which better facilitate expert witness testimony. Indeed the Office of Lord Chief Justice recently undertook a targeted consultation on a revised Clinical Negligence Protocol and draft Experts Practice Direction prepared by the Law Society's Clinical Negligence Practitioners Group (CNPG).

However it is likely that any change of this nature would require changes to primary legislation, namely the County Courts (Northern Ireland) Order 1980 and would require a suitable legislative vehicle in the next Assembly mandate. This gives us an opportunity to consider this issue further, and the Working Group would be an appropriate vehicle to take a more in-depth analysis.

Question 3: Should the county court judges have a statutory power to remove cases from the county courts to the High Court?

Agreed	**9**
Did not agree	**7**
Neither or did not answer	**2**

In relation to giving county court judges a statutory power to remove cases from the county court to the High Court, we received sixteen responses with nine supporting the proposal and seven opposing it.

Currently only the High Court has the power to deal with remittal and removal applications. The county courts do not have the power to transfer cases to the High Court. The Gillen Review noted the current legislative position and recommended that county court and district judges should have the ability to remove cases to the High Court, with remittals remaining with the High Court.

Respondents who favoured the change suggested that this would provide an efficient process, with removals made in the same tier where the proceedings are pending. The Office of the Lord Chief Justice noted that the removal power should also rest with district judges in the county courts, and suggested that the tests for remittal and removal be changed so that the complexity or importance of a case would be taken into account in addition to its value. This view was shared by a number of respondents and this is an issue that could usefully be explored by the proposed Working Group. We also noted the suggestion from JMK Solicitors, while supporting the removal power, which proposed an alternative approach based on a system for appropriate allocation at the outset of a claim, such as the one in England & Wales. The Department did initially consider the merits of creating a single point of entry to the civil courts system under which a judicial officer holder would decide to which court tier the case should be allocated. The Gillen Review did not support such a proposal, and we remain of the view that introducing an initial allocation mechanism would be a significant departure from the existing civil justice system which, on the whole, works well, therefore, we did not explore this further.

The general response from those who did not favour change was that the current approach, where remittals are generally heard and administered by the Queen's Bench Masters, is already an effective and efficient process and provides a consistency of approach. The Association of British Insurers suggested that with an increase in general civil jurisdiction of the county courts, High Court Masters may have less business and would have additional capacity to deal with removal applications.

The Bar of Northern Ireland questioned whether the power is really required, noting that only a small number of cases are heard by the High Court (ranging from 48 – 60 between 2014 and 2019), and suggested that oral hearings for removal actions in the county court could create additional delays in some cases. It also sought further clarity on the appeals process for this new power. If a legislative amendment was considered appropriate, in terms of appeals, our initial expectation is that, in line with the Gillen Review, appeals would be paper exercises before a High Court judge with a discretion to order an oral hearing on request but further consideration would be given to this as part of any policy development for legislative change.

Based on the consultation responses received we are not yet persuaded of the need to prescribe the removal power in statute, which would require change to primary legislation (section 31 of the Judicature Act (Northern Ireland) Act 1978) and would not be implemented in the current Assembly mandate. This is an issue we plan to further consider through the Working Group.

Question 4: Should the jurisdiction of the small claims court be increased to £5,000?

Agreed	**11**
Did not agree	**5**
Neither or did not answer	**2**

Generally the responses to this question supported increasing the jurisdiction of the small claims court to £5,000 from the current level of £3,000.

Taking the responses into account and, subject to a business case, we are minded to take forward an increase in the small claims jurisdiction to £5,000 before the end of the mandate

We noted that some respondents suggested that the upper financial limit should be increased to £10,000 to bring the small claims court into line with England & Wales. Cases there are allocated to one of three 'tracks', with those valued at under £10,000 going to the small claims track. A lower limit of £1,000 applies to claims for personal injury and housing disrepair. The Department does not believe that £10,000 would be an appropriate level for the small claims court in Northern Ireland for a number of reasons. The tracks system uses different procedures than in this jurisdiction, such as case allocation and direction hearings, which would result in a considerable additional burden on administration and judicial time. There are also allowances in the small claims court in England & Wales for costs, expenses and expert reports. We noted that it currently takes less time for small claims to be disposed in Northern Ireland when compared to England & Wales. Over the past five years, the average disposal time here is around 22 weeks, compared to between 31 and 38 weeks in England & Wales. We do not support increasing jurisdiction to such a level that may risk the system becoming unduly slow.

A number of representatives from the insurance industry (Axa, Aviva, National Farmers Union Mutual, and the Association of British Insurers) responded positively to the question but contended that personal injury and road traffic claims below £5,000 should no longer be excluded from being heard in the small claims court. They argue

that other jurisdictions in the UK and Ireland are aiming to drive down the value of damages for minor and moderate injuries and the associated legal costs and that the small claims process is an effective means of doing so. They maintain that the ongoing exclusion of these cases has a negative impact on citizens, such as increased insurance premiums for motorists. We note the suggestion from the Forum of Insurance Lawyers Northern Ireland that the small claims court should consider these types of cases, but suggested that the upper financial limit should be set at a lower amount than consumer cases and other disputes as is the case in other jurisdictions.

We noted the view of some respondents from the insurance industry that in cases involving credit hire or credit repair, the plaintiff is legally represented as required under the terms of the credit hire contract. In many of these cases, it is argued, the dispute relates to financial loss rather than personal injury. In cases where there continues to be a dispute between the parties, appeals go to the High Court which is arguably not an effective use of High Court resources. AXA and Aviva both referred to the comments of Mr Justice McCloskey in *McAteer v Kirkpatrick* (2011) NIQB 52 that the County Court Rules Committee may wish to consider whether, in credit hire cases, there is any remaining justification for such claims continuing to be excluded from the small claims court.

The Rules Committee considered this issue as part of its consultation on a review of scale costs and practice and procedural changes in the county court in March 2016. It concluded that it should not act to bring road traffic accidents within the jurisdiction of the small claims court, noting that while the value of a claim may be relatively small, test cases or complex cases may arise. Where cases involve a personal injury there may still need to be a finding of liability in relation to insurance excess. The Committee also noted that the small claims court is more inquisitorial in nature and that the usual rules of evidence do not apply in that venue, meaning that there remained a strong rational for continuing to exclude these cases to ensure equality of arms and access to justice.

We remain of the view, as did the Gillen Review and County Court Rules Committee, that personal injury and road traffic cases should not be heard in the small claims court in Northern Ireland. Such cases are likely to involve additional administrative and

judicial resources. Where a claim has an element of personal injury, there is a likelihood of contested liability issues and the need for expert evidence, such as medical reports. This would risk complicating procedures and increasing the onus for legal representation, especially where insurance companies are involved, in a venue which is designed to be largely informal and accessible. We want to ensure that the small claims court is accessible to those who wish to represent themselves.

The county courts in Northern Ireland, in comparison to England & Wales, provide an efficient avenue to resolve cases, with relatively modest cost to the 'at fault' party. Furthermore, a lower-ends cost bracket was introduced in the county courts in 2017 for scale costs on awards of damages below £500.

The Forum of Insurance Lawyers Northern Ireland highlighted the launch in May 2021 of the Official Injury Claim portal developed by the Motor Insurers' Bureau on behalf of the Ministry of Justice in England & Wales. While there are no plans to bring a similar process into Northern Ireland at present, it will certainly help to inform how lower value claims of this type could be dealt with in the future in this jurisdiction.

We do not agree with the view expressed by APIL and JMK Solicitors that increasing the jurisdiction of the small claims court would have a significant effect on the workload of district judges. In our Regulatory Impact Assessment we estimated that, based on the 2019 Judicial Statistics, around 800 cases previously heard as civil bills in the county court could instead be heard in the small claims court. Because most of these cases are already disposed in the county court by district judges, most cases will simply be moving venue to the small claims court. It should also be remembered that most small claims are either disposed by way of default judgement (65% in 2019) or through a non-court disposal (25%), meaning the likely impact of increasing the jurisdiction of the small claims court is minimal.

The real impact on district judges would be an increase in their jurisdiction in the county courts to £20,000 if we increased the general civil jurisdiction to £60,000. The question of judicial allocations will be addressed through the Working Group highlighted in our response to the first consultation question.

We noted the response from the Law Society in relation to increasing the upper limit of claims to £5,000. It argued that this had the potential to have a negative impact some on individuals in receipt of legal aid, namely applicants for protection from harassment orders. Individuals may apply for a protection from harassment order where they have been subject to a course of conduct, of at least two occasions, which caused alarm or distress. As well as the possibility of criminal proceedings, a plaintiff may claim damages for anxiety caused by the harassment and any financial loss resulting from it.

Applications for damages currently issue as £5,000 civil bills in the county court, and the Law Society suggested that increasing the jurisdiction of the small claims court to £5,000 would potentially result in such applications being heard instead in the small claims court which would not be supported by legal aid. However we do not believe that increasing the jurisdiction of the small claims court would have any impact on individuals applying for a protection from harassment order. These are issued as a personal injury civil bill in the county courts, a category of case which is currently excluded from the small claims court, a position which we do not propose to change.

Question 5: Should the general civil jurisdiction in respect of defamation cases be increased to £10,000?

Agreed	**5**
Did not agree	**2**
Neither or did not answer	**11**

The consultation question on increasing the jurisdiction for defamation cases to £10,000 received only 7 specific responses, with five in favour of the change.

The Law Society, which gave the only detailed response, was in favour of an increase, but believed that £10,000 may be too high a figure. They pointed to the need for specialist training for district judges to deal with a range of interlocutory issues, such as interim injunction hearings, as well as general case management and a review of court rules. It was also noted that Northern Ireland has different legislative provisions than in England & Wales, including the availability of High Court jury trials.

Given the limited response on this question, we have yet not come to a view on whether the limit should be increased from £3,000 and may also wish to consider in the context of the Private Members Defamation Bill should it be enacted. This could be an issue usefully explored in the proposed Working Group.

Other issues

In considering our Human Rights Impact Assessment, JMK Solicitors and the APIL suggested that in relation to litigants funded by the Legal Services Agency Northern Ireland (LSANI), senior counsel would not be authorised to represent a plaintiff in the county court, while defendants will continue to do so, raising an inequality of arms.

Our assessment is that it is less likely that senior counsel would be authorised to represent litigants in the county courts than in the High Court. However, all decisions in relation to the authorisation of legal aid for senior counsel representation are guided by the facts of the individual case. It is important that those who are granted support through legal aid are adequately represented before the Court, but it does not mean that all parties are entitled to the same level of representation.

Next steps

As indicated in our response, we will establish a Working Group to further analyse the practical implementation of some of the key consultation questions in the next mandate, namely:

- An increase in the county court jurisdiction to £60,000, with an increase in the jurisdiction of district judges to £20,000;
- Maintaining the current county court jurisdiction of £30,000 for clinical negligence claims only;
- Whether county court and district judges should have a statutory power to remove cases from the county courts to the High Court; and,
- Whether the general civil jurisdiction in respect of defamation cases should be increased and, if so, to what level.

Progressing these issues in the next Assembly mandate provides the Department and its justice partners the necessary time to assess the practical impacts of these potential changes, as well as considering more generally the impact of Covid-19 on the volume of civil litigation. We want to ensure that proposed changes would fit in with the Northern Ireland Courts and Tribunals Service Covid Recovery Plan and that additional pressure is not brought to bear at a time when the courts are working through case backlogs.

Furthermore, any changes in these areas will precipitate other necessary amendments in terms of county court costs, court procedure and practice, and to legal aid payments and consequential changes to IT systems. The context of operating during the Covid pandemic also meant that the proposed Civil Hearing Centres were not operational. However, the rationalised civil business during the pandemic in hubs in Downpatrick, Londonderry, Enniskillen and Armagh may provide lessons as to how the county courts may operate to support an increase in general jurisdiction.

Likewise the pandemic has changed the wider context of the Northern Ireland Courts and Tribunal Service Courts Transformation and Modernisation programme, particularly in terms of accessibility of court accommodation and how digital technology is used to support access to justice. Department wants to ensure that the

structural issues highlighted in some responses to this consultation are more fully considered before bringing in change which, if not properly planned and supported, would mean a more inefficient system for citizens.

The Working Group would also be able to discuss a range of other key issues, such as judicial and administrative resources to support additional caseloads for county court and district judges, as well as necessary judicial training to support the judiciary hear more complex and higher value cases.

We do, however, subject to a business case, plan to progress secondary legislation, after consultation with the Lord Chief Justice, to increase the small claims jurisdiction from £3,000 to £5,000 in the current mandate.

As previously discussed, we have no plans to invite the County Court Rules Committee to consider amending the types of claims which are currently excluded from the small claims court, particularly personal injury and road traffic claims. Given that such claims may entail contested liability issues and medical evidence, such cases are likely to require more complex pre-action protocols and increase the likelihood that legal representation becomes the norm rather than the exception, ultimately undermining the informal and accessible nature of that court.