



THE BAR
OF IRELAND

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**SUBMISSION TO THE DEPARTMENT OF
JUSTICE ON THE GENERAL SCHEME OF THE
JUDICIAL APPOINTMENTS COMMISSION
BILL 2020**

January 2021

INTRODUCTION

The Council of The Bar of Ireland ('the Council') welcomes the opportunity to make submissions to the Minister for Justice and Equality on the General Scheme of Judicial Appointments Commission Bill 2020 ('the 2020 Bill'). The Council welcomes, in particular, the reduction in the number of members of the proposed Judicial Appointments Commission and the fact that the proposed body will be chaired by the Chief Justice. The Council approves of the requirement for serving judges to participate in the same application process as other candidates.

The Council provided detailed submissions on many of the proposed provisions in 2017 and in 2014 (see appendix A). There are many aspects of the 2020 Bill that take on board the suggestions then made, including the balance of lay to legal members of the Commission, the preference to have the Commission chaired by the Chief Justice, and the reduction of the number of people on the Commission. There are, however, a number of concerns about the current draft, which remain from 2017 and some new provisions which require some further observations. As the Minister has the benefit of previous submissions, the Council does not propose to repeat concerns previously raised, and instead will limit this submission to issues that have arisen in the 2020 Bill.

It is crucial that the judiciary maintains high standards of competency, impartiality and fairness, and that the public retains the utmost confidence in the judiciary. The judicial appointments process is a vital mechanism for ensuring that these objectives are achieved.

ADMINISTRATION OF THE COMMISSION

The Council repeats the submission that the establishment of a new separate body such as the Judicial Appointment Commission is costly and unnecessary when the current Judicial Appointments Advisory Board could be reorganised so as to perform the same functions as the proposed new Commission or alternatively administrative support functions could be shared with the Judicial Council. It is the Council's view that scarce resources are better used underpinning and supporting the judiciary in its functions.

MEMBERSHIP OF THE COMMISSION

The Council welcomes the reduction in the number of members of the Commission from 17 to 9 and agrees that a reduced number encourages consensus and aids decision making. However, it is of concern that neither the Chair of the Council of The Bar of Ireland nor the President of the Law Society are included as members of the Commission, resulting in no member of the Commission representing either of the professions from which candidates may be selected. This is in contrast to the Legal Services Regulation Act, 2015 which includes both the Chair of the Council and the President of the Law Society on the Advisory Committee for the grant of Patents of Precedents. The inclusion of both the Chair and President on that Committee arises from the fact that they are in a position to provide a more complete picture of attributes of applicants that come before that Committee. Appointment as a judge is a unique occupation and the skills required may not always be obvious on paper or indeed at interview. The Chair of the Council occupies a singular position in the administration of justice, leading a professional body, acting as a conduit as between the profession and the judiciary whilst still

remaining in professional practice. The Chair of the Council is uniquely informed to assist in a selection process, particularly where the role of Chair involves representing and interacting daily with members of the Bar whilst liaising with the judiciary. The Chair of the Council is acutely aware of the full set of skills required by an applicant for a judicial position to ensure excellence in that role, and most importantly is in a position to assist other member of the Commission in this regard. The Chair of the Council would be an asset to the Commission in that s/he would bring an additional perspective, insights and knowledge to the Commission in the way that the Attorney General brings a different perspective to judges and lay members.

The 2020 Bill proposes a *“new Procedures Committee of the Commission will prepare and publish statements setting out selection procedures, including interviews, and judicial skills and attributes having regard to several criteria”*. It is the Council’s view that the Chair of the Council of the Bar of Ireland would be in a position to greatly assist this Committee in its statutory role, and that exclusion of the Chair of the Council from this Committee would be a huge loss to the Committee.

COMPOSITION OF THE COMMISSION

While the 2020 Bill provides for an alternate to the Chief Justice sitting on the Senior Judicial Appointments Advisory Committee when a new Chief Justice is being appointed, no provision is made in the Bill for an alternate to the Attorney General when the Attorney General is in fact the applicant for the position of Chief Justice, President of the Court of Appeal and President of the High Court. The Council is of the view that where the Attorney General has recused her/himself as s/he is an applicant for such judicial office, an alternate should sit on the Committee. In such situations the expertise, advice, knowledge and skills of the Chair of the Council of The Bar of Ireland would be of particular benefit to the Commission. It is noted that where a member of the Commission seeks judicial office, that member shall not participate in the selection process, and that where such member does not participate, they may be substituted by a nominee of the Judicial Council. The Council submits that any such substitution should ensure that a judge is substituted by the next most senior judge from the relevant court, and a lay person be substituted by a lay person next on the panel of lay persons selected for appointment to the Committee by the Public Appointments Service.

SELECTION AND RECOMMENDATION

The Council submits that where there are sufficient suitably qualified candidates, the maximum number of persons recommended to the Minister should be 3 as opposed to 5 as is recommended in 2020 Bill. There is no rationale for recommending 5 people for one available role, particularly where the recommended candidates are not ranked.

As is evidenced by the long list of recommendations forwarded to the Minister in connection with previous judicial vacancies, many (if not all) applicants will have the requisite experience, competence and good character to satisfy the necessary conditions. The Council recommends that the Commission then undertakes an exercise of ranking such applicants on the basis of merit. This is particularly important if the proposed legislation does not reduce the long list from 5. The Council recognises that many of the candidates will rank almost equally in terms of merit and does not think it is necessary rank each candidate from 1 to 5, rather where candidates are of equal merit they may be ranked

equally.

The Council recognises that, under the Constitution, the executive retains the power to nominate judges for appointment by the President. The Council believes that only candidates recommended by the Commission should be eligible for appointment. However, the Bill provides that where the Commission cannot recommend any of the candidates or it can only recommend a lesser number of candidates, then it may provide to the Minister a statement of the name of each eligible person who made a relevant application. It is not clear why the Minister would receive such a list of names from the Commission, in circumstances where the Commission concluded, having conducted the selection process, that none or a lesser number of candidates were suitable for recommendation. It appears that the 2020 Bill envisages that the Minister would appoint a person not recommended by the Commission despite it having conducted, at great expense, a selection process. The Council does not believe that such a provision is necessary, and recommends that the position should be re-advertised if no suitable candidate applies for the position.

The Council welcomes the introduction of a process where judges must participate in the same selection process for appointment to a higher court as other candidates. However, the Council notes that appointments to international Courts are not covered by the 2020 Bill and submits that the Bill should include the nomination by the State to international judicial positions, including the EU, Strasbourg and international criminal courts. There is no rationale for treating this category of judges any differently from national appointments.

The Council welcomes the emphasis in the proposed provisions that the Commission's recommendations to the Minister will be based on merit, competence, probity, character and temperament.

The Council welcomes the inclusion of objectives relating to equality and diversity in the general scheme of the 2020 Bill. However, the wording in the general scheme of the 2020 Bill suggests that the equality objective, for example, will be viewed through the prism of the judiciary as a whole, rather than in individual Courts. To do so could allow for an over-representation of either men or women on Courts of local and limited jurisdiction with a corresponding under-representation on the Superior Courts. Such a situation would show that the judiciary as a whole is balanced but could nonetheless leave significant imbalances in particular Courts. Care should also be taken in the drafting of the equality provisions to ensure that a time does not come when an outgoing male judge can only be replaced by a man or where an outgoing female judge can only be replaced by a woman.

The Council welcomes the provision in Head 40 that, in making recommendations for appointment to the Superior Courts, the Commission must be satisfied that each person being recommended has appropriate knowledge of the decisions of the Superior Courts and has appropriate knowledge and experience of their practice and procedure. There is no similar requirement that persons being recommended for appointment to either the Circuit Court or the District Court should similarly have appropriate knowledge and experience of the practices and procedures of those Courts. The Council submits that such a stipulation should be included.

In previous submissions, the Council has said that it does not believe that any case has been made out

for the extension of eligibility for appointment to legal academics and that what constitutes a legal academic has been poorly defined. It has been further submitted that the inclusion of such a category is inconsistent with requirements for candidates to demonstrate experience and competence. Those previous submissions are repeated. In the case that provision is made for the inclusion of legal academics as a category of persons eligible for appointment, it is submitted that practice as a barrister or solicitor for a period of four years is an insufficient period within which to acquire and be able to demonstrate the necessary competence, probity, knowledge of decisions and knowledge of practice and procedure that will be required of applicants. It is submitted that the period of four years should be increased.

CONCLUSION

As the Council made a detailed submission in 2017 and 2014, this submission is limited to addressing key points.

The Council believes that if the foregoing matters were addressed, the 2020 Bill would be significantly strengthened. This, in turn, would ensure the judicial appointments process would continue to select judges with high standards of competency, impartiality and fairness which would ensure the continued public trust and confidence in the judiciary.

The Council is happy to provide further details on more technical and practical aspects should this be required at a later stage.



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*Submission by Council of The Bar of Ireland to the
Joint Committee on Justice and Equality on the
Scheme of Judicial Appointments Commission Bill
2016*

23rd January 2017

INTRODUCTION

The Council of The Bar of Ireland welcomes the opportunity to make a submission to the Joint Committee on Justice and Equality on the Scheme of Judicial Appointments Commission Bill 2016.

The Council of The Bar of Ireland agrees that there is a need for debate about the manner in which judicial appointments are made. The creation of a new structure, with a specific mandate to reduce executive discretion in the appointment process, on the basis of stated and transparent criteria, is to be welcomed.

The Council of The Bar of Ireland provided detailed submissions on these issues in 2014 (see appendix A). There are many aspects of the Bill that take on board the suggestions then made, including the reduction in the number of names to be submitted to the government, the reference to merit, and the explicit recognition of practical knowledge and experience. There are, however, a number of concerns about the current draft, which require some further observations.

Ireland has a long and respected tradition of judicial independence, integrity and expertise. It is crucial that the judiciary maintains high standards of competency, impartiality and fairness, and that the public retains the utmost confidence in the judiciary. The judicial appointments process is a vital mechanism for ensuring that these objectives are achieved. The judiciary must not only act independently, but must be seen to do so.

The Bill suggests that considerable state resources will be allocated to create a new statutory body, with a chief executive (and presumably staff and premises) and functions that go beyond the remit of judicial appointment (research and procurement are mentioned). Some care should be taken to ensure that the creation of a new state body is proportionate to the function for which it is created. The basis for this potential extra expenditure has not been identified in the Bill or in the debate preceding it. There are fewer than 150 judges in Ireland. In some years, less than 10 appointments are made. There is no evidence that the management of the existing system (undertaken by the Courts' Service) is problematic. Even if there were some justification for funding a new state body to carry out this work, consideration should be given to such a body sharing administrative support functions with the mooted judicial council. Scarce resources are better used underpinning and supporting the judiciary in its functions, for which resources have been diminished in recent years.

GUIDING PRINCIPLES

The core principles that should be at the forefront of any system of judicial appointments are independence, competence, integrity, diversity and accountability. The World Economic Forum Global Competitiveness reports consistently rank Ireland's judiciary as one of the most independent in the world¹ and any new appointment system must ensure that judicial independence is strengthened by a constitutionally appropriate process.

The Council of The Bar of Ireland is of the opinion that merit should be the sole criterion for judicial appointments and we welcome the recognition of the principle of appointment on merit in the draft

¹ The World Economic Forum Global Competitiveness Report 2014-2015 Ireland ranked no 6 in the World for the extent to which the judiciary is independent from influences of members of Government, citizens or firms

Bill. The Judicial Appointments Commission of England and Wales (JAC) Guidelines on merit include intellectual capacity, personal qualities, authority and communication skills, efficiency and an ability to understand and deal fairly which includes an awareness of the diversity of the communities which the courts serve. This last factor is significant as the current draft Bill requires consideration of gender diversity in particular but does not recognise that, as is now internationally accepted, diversity is an intrinsic component of merit. The Council of The Bar of Ireland's view is that justice is best served when the judiciary better represent the collective morals of society and when they, as a group, have wider perspectives and a broader experience of life. The inclusion of diversity as an element of merit enshrines its importance and moral legitimacy. While measures that increase diversity are to be welcomed, it is equally important that they are not seen as token gestures in this context but recognised as necessary qualifications for a truly authoritative and representative system of justice.

MEMBERSHIP OF THE COMMISSION

The presence of lay members on the Commission is to be welcomed and will contribute to the promotion of diversity. However the proposed Bill over-compensates for the perceived influence of political connections in making appointments by proposing a lay majority. The Council of The Bar of Ireland does not believe that the proposal to have the Commission composed of a majority of what is termed "*lay*" members, together with a lay chair, to be feasible. No rational explanation for this approach has been advanced

When considering lay people and their interactions with the professions in a statutory capacity, it is vital to make a distinction between the task of appointing and disciplining. While the regulatory arm of professions often includes a lay majority, this is restricted to professional practice and does not extend to the system for appointment.

The issue of appointment is one in which the specialised knowledge of the nominee, his /her abilities and all relevant factors pertaining to the appointment are uniquely within the knowledge of the judges and practitioners in the courts in question. That experience and knowledge should not be lost. It is vital that the Commission is comprised of experienced and qualified members with an in-depth working knowledge of the justice system and it can only function effectively with the membership of each of the Presidents of the Courts and if Chaired by the Chief Justice.

This would extend the membership to 13 comprised of 5 judicial representatives², 2 legal practitioners (one barrister, one solicitor) and 6 lay members.

With regard to the criteria for selection and appointment of lay members, there is no real safeguard as to how they must be appointed. The criteria identified are somewhat unorthodox (the reference to users of the criminal courts is an example), and there is no real clarity on the mechanism for their selection. The criteria are limited and could result in lay members with little or no knowledge or understanding of the operation of the Courts or the administration of justice.

² The Bill should include a provision that no judge that is due to leave office/retire should preside on the Commission which is selecting the candidates to replace his/her position

SELECTION AND RECOMMENDATION

The Constitution recognises that the executive retains the power to appoint judges. However, the Council of The Bar of Ireland believes that only candidates recommended by the Commission should be eligible for appointment. If, for constitutional reasons, this is unacceptable, then at the very least the government should be required to formally state why it appointed a person that was not recommended by the Commission. Retention of the current system (whereby the government must simply publish such a name in *Iris Oifigiúil*) is inconsistent with the stated aims of the Bill.

It is important that judicial appointments are politically neutral; however no person should be excluded from appointment to judicial office based on any previous involvement in party politics or because he / she has held a position in local or national government.

The Council of The Bar of Ireland welcomes the requirement for serving judges to participate in the same application process as other candidates.

The Council of The Bar of Ireland agrees that where there are sufficient suitably qualified candidates the maximum number of persons recommended to the Minister should be three. Consideration could be given to empowering the Commission, if it wishes, to rank the recommendations.

The Council of The Bar of Ireland previously voiced concerns about the fact that a system where internal judicial promotion is regarded as normal needs to be carefully considered. The various courts require different skills and appointments are specific to that court. In the vast majority of cases, a candidate is unlikely to be suitable to sit as a judge at all levels. Further, if a practice were to develop whereby judges were routinely promoted from one court to another (thereby creating an apparent separate judicial career path), the Council of The Bar of Ireland would have a concern that such a practice would have an adverse effect on the overall perception of the independence of the judiciary. This is more likely to be an issue in the lower courts.

JUDICIAL APPOINTMENTS COMMISSION STRUCTURE

It is worth examining whether it is necessary to establish a new statutory body with all the attendant expense to effect the desired reforms. The Council of The Bar of Ireland believes that in the interests of saving public monies in the short and long term and to enable the reforms to be introduced in early course, serious consideration should be given to seeking to effect the desired reforms by working within the existing structures established by the Act establishing JAAB and where necessary to amend this Act.

As stated, the structure of any new statutory body must be proportionate to the functions it will carry out. Therefore, a regulatory impact assessment should be conducted to underscore the resource requirements and budgetary impact of the establishment of a new office to fulfil a function that is currently undertaken by the Courts Service within existing budgets. There is no evidence that the management of the existing system is deficient.

In the alternative, consideration should be given to sharing the administrative burden with the proposed judicial council.

QUALIFICATIONS AND ELIGIBILITY

The Council of The Bar of Ireland does not believe that any case is made for the extension of appointments to an additional category of person (called “*legal academics*”) that is very vaguely defined. The inclusion of legal academic candidates is inconsistent with the requirement for candidates to demonstrate knowledge, experience and competence.

Head 21 is wholly appropriate as it includes a reference to the “*appropriate experience of the practice and procedure*” in the Superior Courts. Head 22 explicitly sets out requirements for candidates to have displayed in practice as a barrister or solicitor. It is the view of the Council of The Bar of Ireland that first-hand knowledge of the courts as an advocate either in his/her own capacity or in the capacity of instructing litigator is an essential requirement for judicial appointment.

To explicitly exclude legal academics from this requirement is contradictory to Heads 21 and 22 and does not serve the public interest. There is a vague reference in the explanatory memorandum to “*some other jurisdictions*”, without attempt to state where and whether such situations have worked to the benefit of the justice system. More importantly, there is no stated rational justification for this change of approach, nor is there a reference to any party having agitated for it.

The Bill also seems to exclude existing judges of the High Court and Court of Appeal from appointment to the Court of Appeal and Supreme Court, notwithstanding Head 26, which exclusion is probably unintended.

In terms of the new provision that District Court judges are qualified for appointment to the High Court, a further provision should be included to the effect that this is without prejudice to the necessity to satisfy the fundamental requirement set out in Head 21 that, in respect of an appointee to the High Court, the Commission must have regard in particular to the nature and extent of the practice of the person concerned in so far as it relates to his or her personal conduct of proceedings in the Superior Courts.

The Council of The Bar of Ireland believes that the Bill should include the nomination by the State to international judicial positions, including the EU, Strasbourg and international criminal courts.

The Council of The Bar of Ireland also queries the minimal requirement of 2 years continuous practice immediately preceding appointment. It would seem more appropriate that a longer continuous period of practice would be required to ensure current and relevant experience in practice immediately prior to appointment as a judge.

CONCLUSION

As the Council of The Bar of Ireland made a detailed submission in 2014, this paper is limited to addressing some key points. We are happy to provide further details on more technical and practical aspects should this be required at a later stage.

APPENDIX A

2014 Submission by the Council of The Bar of Ireland
on the Procedures for Appointment as a Judge



Bar Council of Ireland
Submissions on the Procedures for Appointment as a
Judge

30th January 2014

Executive Summary

- The Bar Council recommends that the project of reforming the procedure for judicial appointments should be coordinated and managed by an independent review group so as to ensure that the principle of judicial independence is respected.
- The Bar Council recommends that the Judicial Appointments Advisory Board (“JAAB” or the “Board”) should be the sole body for selecting candidates for judicial appointment, and the JAAB process should be followed for all judicial appointments, including elevation from lower to higher courts.
- The Bar Council recommends that Section 16(2) of the Courts and Courts Officers Act 1995 should be amended to provide that JAAB shall recommend a maximum of 3 persons for each judicial vacancy. JAAB should also be entitled to inform the Minister that there are no suitable candidates for a particular vacancy.
- The Bar Council recommends that the criteria contained in Section 7 of the Courts and Courts Officers Act, 1995, as amended by the Court and Courts Officers Act 2002, should be treated by JAAB as threshold requirements for recommendation for appointment to judicial office.
- The Bar Council recommends that JAAB should not be permitted to recommend a person for judicial appointment to the High Court or the Supreme Court unless that person “has an appropriate knowledge of the decisions, and an appropriate knowledge and appropriate experience of the practice and procedure, of the Supreme Court and the High Court”. The Bar Council further believes that personal conduct of proceedings whether as counsel or as a solicitor instructing counsel is and should be a fundamental requirement for judges in each of the jurisdictions.

- The Bar Council recommends that JAAB be required to rank candidates for judicial office in order of merit. The Board should be empowered to issue guidelines on the factors that it will take into consideration in assessing the merit of a candidate. Practical experience from the personal conduct of litigation would be essential to satisfy the merit criteria.
- The Bar Council recommends that improvements be made to the application form used by JAAB to enable candidates to demonstrate their compliance with Section 7 of the 1995 Act, as amended, and any guidelines on the assessment of a candidate's merit that are produced by JAAB.
- The Bar Council recommends that JAAB should set down guidelines for the content of references accompanying the application with a focus on the factors that will be considered in assessing the merit of the candidate.
- The Bar Council recommends that JAAB conduct interviews of candidates in order to assist the Board in selecting its short-list of three candidates for judicial appointment.
- The workload of JAAB is likely to increase substantially if it is to perform the additional recommended functions efficiently. The Bar Council believes that it is very important that the Board is adequately supported and funded to enable it properly to discharge these additional functions.
- The Bar Council recommends that all of the relevant statutory provisions governing eligibility for appointment as a judge and governing the functioning of the Judicial Appointments Advisory Board (as currently constituted or otherwise) be contained in one comprehensive Act of the Oireachtas.

Introduction

1. The Bar Council of Ireland very much welcomes the invitation to offer its views in relation to a proposed review of procedures for judicial appointments. The Bar Council shares the views of the Department of Justice and Equality (“the Department”) that there are legitimate concerns that the process of judicial appointments is currently not operating in a satisfactory manner and there is a need for reform both on a statutory level and in the manner in which the application and selection process is carried out in practice.

Nature of Review / Consultation Process

2. The Bar Council is concerned about the short time period that has been afforded for public consultation and the delivery of written submissions. The Bar Council recognises that the need for reform is urgent given that the Government intends that the new Court of Appeal will be operational by the end of this year. However, it is extremely important that the reforms implemented are well considered and robust. The long-term success of the new Court will largely be determined by the quality of the new judicial appointees. The Bar Council is anxious to ensure that the process for reviewing the procedures for appointment is carried out efficiently, but also properly.
3. The Bar Council submits that it would be far preferable that the process for reviewing the procedures for appointment of judges be carried out by an independent review group rather than by the Department. Such an independent study of the appropriate reforms would be consistent with the principle of judicial independence.
4. The Committee of Ministers of the Council of Europe has stressed that the procedure for the appointment of judges should be transparent and independent in practice:

“All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on

merit, having regard to qualifications, integrity, ability and efficiency. The authority taking the decision on the selection and career of judges should be independent of the government and the administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules. However, where the constitutional or legal provisions and traditions allow judges to be appointed by the government, there should be guarantees to ensure that the procedures to appoint judges are transparent and independent in practice and that the decisions will not be influenced by any reasons other than those related to the objective criteria mentioned above.”¹

5. The European Charter on the statute for judges goes further than the above recommendation, by providing as follows:

“In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.”²

6. In order to ensure that the process of judicial selection and appointment is not overly influenced by the concerns and interests of the Government, it is submitted that any review of the existing process should be conducted independently of the Department and of the Government albeit that it would report to the Minister.
7. In the alternative, the Bar Council submits that the Department should establish a Working Group to advise on the revision of procedures for appointment of members of the judiciary. A Working Group would have the advantage of considering the appropriate reforms within established terms of reference. The Working Group would

¹ Principle I.2.c of Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe

² European Charter on the statute for judges, Article 1.3.

produce a report within a short period of time, and there could thereafter be a short – but focused – public consultation on the elements of reform proposed. The publication of a working group paper or detailed discussion paper has been used in other jurisdictions such as Australia³ and the UK⁴ to great effect.

8. The public consultation process that has been initiated has the disadvantage that interested parties are not apprised of the changes that the Department is considering as part of its ongoing review and cannot therefore offer sufficiently focused recommendations or address specific issues raised by other interested parties.

9. The Bar Council very much hopes that the Department will consider its concerns in relation to the manner in which submissions are being invited. However, in the event that the Department is not inclined to modify the current mode of public consultation, the Bar Council has some observations and recommendations on the reform of the judicial appointment process, but these are necessarily of a preliminary nature and will require further elaboration.

The Role of the Judicial Appointments Advisory Board and the Principle of Judicial Independence

10. Ireland has a long and respected tradition of judicial independence, integrity and expertise. It is crucial that the judiciary maintains high standards of competency, impartiality and fairness, and that the public has utmost confidence in the judiciary. The judicial appointments process is a vital mechanism for ensuring that these objectives are achieved. The judiciary must not only act independently, but they must be seen so to do. Along with ensuring the continued excellence of the judiciary, it should be a central purpose of the judicial appointments process to dispel any public perception that judges are appointed through cronyism or political affiliations.

³ See Department of Justice, Reviewing the Judicial Appointments Process in Victoria, Discussion Paper, July 2010

⁴ See Department for Constitutional Affairs, Constitutional Reform: A New Way of Appointing Judges, Consultation Paper, July 2003. See also Ministry for Justice, Appointments and Diversity: A Judiciary for the 21st Century, Consultation Paper, November 2011.

11. In most common law countries, judges are appointed by the Executive. In Ireland, the Government has a constitutional role in the appointment of Judges in accordance with Articles 13.9 and 35 of the Constitution. However, the process for selection of judicial candidates varies across jurisdictions, with varying degrees of Executive involvement. In recent years, a number of common law countries have undertaken the task of reviewing and reforming the process by which judicial appointments are made so as to sufficiently respect the principle of judicial independence.

12. In the United Kingdom, for example, the Executive is responsible for making judicial appointments but as a result of reforms enacted in 2005, its role in the selection process has been curtailed. A Judicial Appointments Commission (“JAC”) now recommends candidates for most judicial offices in England and Wales. When making nominations for filling judicial vacancies for the courts of England and Wales, the JAC recommends a single candidate – solely on the basis of merit – to the Lord Chancellor. The Lord Chancellor then has three options: he may accept the recommendation, in which case the candidate's name is put to Her Majesty for appointment; he may reject the nomination if he considers that the candidate is unsuitable for appointment; or he may ask the JAC to reconsider the nomination if he considers that there is either insufficient evidence that the candidate is suitable or evidence that the person is not the best candidate on merit. If the Lord Chancellor rejects a candidate or asks the JAC to reconsider he must provide the JAC with written reasons for the request.

13. In South Africa, the President must appoint all judges (other than to the Constitutional Court) on the advice of the Judicial Service Commission.⁵ The Judicial Service Commission is an independent body which advises the government on any matter relating to the judiciary and is composed of representatives from the judicial, executive, and legislative branches along with representation from the legal profession and academia.

⁵ Article 174 of the Constitution of South Africa

14. In Canada, the federal appointments process also utilises judicial advisory committees which assess candidates. Professional competence and overall merit are the primary qualifications for judicial office. Committee members are provided with published Assessment Criteria for evaluating fitness for judicial office and either opt to recommend a candidate or indicate to the Minister that they are unable to recommend a candidate. There is no statutory or constitutional restraint on the Minister from appointing someone who has not been recommended by an advisory committee. However, successive ministers have undertaken not to appoint individuals who have not previously been recommended.⁶

15. In Australia, there is widespread use of advisory panels to recommend judges for appointment to the lower courts. However, as is the case in Ireland, in all Australian jurisdictions, the relevant Attorney-General retains the discretion to recommend for appointment whoever he or she chooses, subject to minimum statutory prerequisites and is not bound by any recommendations or advice of an advisory panel. In 2010, the Attorney General of the province of Victoria initiated an extensive consultation process on the review of the existing procedures.

16. The Committee of Ministers of the Council of Europe has stressed that ideally, the authority taking the decision on the selection and career of judges should be independent of the government and the administration and the authority itself should decide on its procedural rules. The Consultative Council of European Judges (the “CCJE”) has recommended that that every decision relating to a judge’s appointment or career should be based on objective criteria and be either taken by an independent authority or subject to guarantees to ensure that it is not taken other than on the basis of such criteria.⁷

⁶ See Canadian Bar Association Submission on the Federal Judicial Appointment Process, October 2005.

⁷ See Opinion no 1 (2001) of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on standards concerning the independence of the judiciary and the irremovability of judges.

17. In Ireland, the Judicial Appointments Advisory Board (“JAAB” or the “Board”) was established pursuant to the Courts and Courts Officers Act 1995 (the “1995 Act”) for the purposes of identifying persons and informing the Government of the suitability of those persons for appointment to judicial office. The Board recommends to the Minister suitably qualified applicants and the Government must have regard to those recommendations when advising the President on the making of a judicial appointment. However, the Government is permitted to advise the President to appoint any person who satisfies the minimum statutory criteria for appointment.

18. Under the current statutory framework, there are certain minimum eligibility requirements for appointment to the district, circuit and superior courts. These requirements are contained in the Courts (Supplemental Provisions) Act, 1961, as amended by the Courts and Courts Officers Act, 2002 (the “2002 Act”). For appointments to the High and Supreme Courts, the only necessary qualification is that the person *“is for the time being a practising barrister or a practising solicitor of not less than 12 years’ standing who has practised as a barrister or a solicitor for a continuous period of 2 years immediately before such appointment.”* For appointments to the District and Circuit Courts, that requirement is reduced to ten years’ practice. Where the Government advises the President in relation to the appointment of a person to judicial office outside the Judicial Appointments Advisory Board process, no further eligibility requirements are statutorily imposed.

19. As stated above, the Bar Council recognises that the Government has a constitutional role in the appointment of judges. However, it is submitted that in light of international best practices, and in order to ensure into the future that the excellence and independence of the Irish judiciary is maintained, the Government should consider whether JAAB should be the sole body and method for the *selection* of judicial candidates. The Bar Council is of the view that the Executive should retain a discretion in relation to which candidates recommended by the Board are ultimately appointed to office, but that only candidates recommended by JAAB should be eligible for appointment. The Bar Council further submits that the JAAB selection process (as

improved in accordance with the further suggestions outlined below) should be applicable in all circumstances, including cases where a judge is being elevated from a lower court to a higher court, and that consideration should be given to its application in the case of Supreme Court appointments.

The Procedures of the Judicial Appointments Advisory Board

20. The Bar Council recognises that the judicial appointment process must not only be independent and transparent, but also effective. One of the central goals of reform should be to ensure that only quality candidates are appointed to judicial office. If the Judicial Appointments Advisory Board (whether as currently constituted or otherwise) is to have a greater role in the selection of judicial candidates, the procedures and practices currently employed by the Board will have to be improved.

The Recommendation of Names to the Minister

21. Section 16(2) of the Courts and Courts Officers Act 1995 provides that where there is a judicial vacancy, JAAB shall *“submit to the Minister the name of each person who has informed the Board of his or her wish to be considered for appointment to that judicial office and the Board shall recommend to the Minister at least seven persons for appointment to that judicial office.”*

22. As pointed out in the invitation for public submission, specifying a minimum number of recommendations rather than a maximum number of recommendations may result in long lists of candidates being sent to the Minister for consideration. This effectively deprives JAAB of any meaningful role in the process of judicial selection, and undermines the principle of judicial independence which entails that the process for selection should be transparent and independent in practice.

23. The Bar Council submits that the 1995 Act should be amended so that JAAB shall recommend a maximum of three persons for each judicial vacancy. The Bar Council is also of the opinion that the persons recommended for each judicial vacancy should be ranked by the Board in order of merit. The assessment of the relative merit of judicial candidates is discussed in the following section.
24. The Bar Council submits that where there are sufficient suitably qualified candidates, the maximum number of persons recommended to the minister should be three. However, the Board should be permitted to indicate to the Minister that none of the applicants are suitable for appointment.
25. The Bar Council further submits that JAAB should recommend persons for a particular judicial vacancy, and the recommendation should not constitute a general recommendation of that person for judicial office. The Bar Council considers that there are important differences in function and required expertise between the District, Circuit and Superior Courts. The Board might be satisfied that an individual is suitable for recommendation to the higher courts but not the lower courts, or *vice versa*, with reference to their professional experience.
26. The Bar Council recognises that the involvement of the Executive in the appointment of the judiciary contributes an element of democratic legitimacy and political accountability to the process. However, it is submitted that an appropriate balance between accountability and respect for the principle of judicial independence will be achieved by the provision of a short-list of candidates to the Minister from which judicial vacancies will be filled.

The Judicial Appointments Advisory Board Criteria for Recommendation: Merit

27. Section 7 of the 1995 Act, as amended by the 2002 Act provides that when recommending the name of a person to the Minister, JAAB must indicate whether the person satisfies the relevant minimum eligibility criteria contained in the 1961 Act. Section 7 further provides that JAAB shall only recommend a person to the Minister if it is of the opinion that the person:

- (I) Has displayed in his or her practice as a barrister or a solicitor a degree of competence and a degree of probity appropriate to and consistent with the appointment concerned.
- (II) In the case of an appointment to the office of ordinary judge of the Supreme Court or of ordinary judge of the High Court, has an appropriate knowledge of the decisions, and an appropriate knowledge and appropriate experience of the practice and procedure, of the Supreme Court and the High Court.
- (III) Is suitable on the grounds of character and temperament,
- (IV) Complies with the requirements of section 19 of the 1995 Act (giving an undertaking to take training and educational courses)
- (V) Is otherwise suitable.

28. In determining whether factor (II) is satisfied, JAAB shall have regard in particular to *“the nature and extent of the practice of the person concerned insofar as it relates to his or her personal conduct of proceedings in the Supreme Court and the High Court whether as an advocate or as a solicitor instructing counsel in such proceedings or both.”*

29. The Bar Council considers that these provisions of the 1995 Act should be considered as threshold provisions. The Bar Council further believes that personal conduct of proceedings whether as counsel or as a solicitor instructing counsel, or both, is and should be a fundamental requirement for judges in each of the jurisdictions. Consequently, the 1995 Act may require amendment to specifically enumerate this requirement as one of the “threshold” requirements.

30. As is evidenced by the long list of recommendations forwarded to the Minister in connection with previous judicial vacancies, many applicants may have the requisite experience, competence and good character to satisfy these conditions. The Bar Council recommends that the Board then undertake an exercise of ranking such applicants on the basis of merit. This is in line with the Bar Council's recommendation that a maximum of three names per judicial vacancy be forwarded to the Minister. The Bar Council recognises that many of the candidates will rank almost equally in terms of merit, and does not think it is necessary to "seed" each and every applicant.

31. The JAAB should be empowered to issue guidelines on the factors that it will take into consideration in assessing the merit of a candidate. In the UK, the JAC has issued lengthy guidelines on the manner in which it will assess the merit of candidates. The Bar Council perceives this as a valuable exercise which will contribute to the transparency and fairness of the selection procedure.

32. The JAC guidelines on merit include the following:

Intellectual capacity

- High level of expertise in your chosen area or profession
- Ability quickly to absorb and analyse information
- Appropriate knowledge of the law and its underlying principles, or the ability to acquire this knowledge where necessary

Personal qualities

- Integrity and independence of mind
- Sound judgment
- Decisiveness
- Objectivity
- Ability and willingness to learn and develop professionally
- Ability to work constructively with others

An ability to understand and deal fairly

- An awareness of the diversity of the communities which the courts and tribunals serve and an understanding of differing needs.
- Commitment to justice, independence, public service and fair treatment.
- Willingness to listen with patience and courtesy.

Authority and communication skills

- Ability to explain the procedure and any decisions reached clearly and succinctly to all those involved
- Ability to inspire respect and confidence
- Ability to maintain authority when challenged

Efficiency

- Ability to work at speed and under pressure
- Ability to organise time effectively and produce clear reasoned judgments expeditiously

33. Similar criteria are used in the Australian provinces of New South Wales and Victoria, and for federal appointments in Canada. Practical experience from the personal conduct of litigation would be essential to satisfy the “merit” criteria.

34. The Bar Council is of the opinion that in order to dispel the apprehension that party politics plays a role in the appointment of judges, it would be wise to include an explicit statutory prohibition on consideration of a person’s political affiliation in determining their suitability for appointment. It is important that judicial appointments are, and are seen to be, politically neutral. The Bar Council does not consider it necessary that persons who were previously involved in party politics or who have held positions in local or national government should be excluded from appointment to judicial office. However, appointments must be based solely on the merit of the candidate.

Improvements to the Application Procedure

35. In order to ensure that JAAB can adequately differentiate between applications for recommendation for judicial office so as to arrive at the maximum number of recommendations outlined above, the Bar Council is of the opinion that the application and selection process should be improved. Where a large number of applications are received by JAAB, two factors will be particularly important in the selection process: the application form and the references accompanying it.
36. The application form should be drafted in such a manner as to permit applicants to demonstrate their compliance with Section 7 of the 1995 Act, as amended by the 2002 Act and any guidelines on the assessment of a candidate's merit that are produced by JAAB. The specifics of the application form should be determined by the Board itself in the exercise of independent control over its practices and procedures. However, the Bar Council recommends that there should be separate application forms for the Superior Courts requiring the applicant to demonstrate compliance with section 16(7)(b)(ii) of the 1995 Act. The English JAC tailors the application form for each selection process to ensure that the Commission has the best information with which to conduct what it terms a "paper sift".
37. The Bar Council is also of the opinion that the Board should set down guidelines for the content of references accompanying the application with a focus on the factors that will be considered in assessing the merit of the candidate. Referees should be required to give their opinion of the compliance by the applicant with the various criteria with reference to the proven qualities, experience and expertise of the candidate.
38. Section 14(2)(e) of the 1995 Act empowers the Board to conduct interviews of applicants who wish to be considered by the Board for appointment to judicial office. In practice, it is understood that the Board has not conducted interviews of applicants. However, the Bar Council submits that if the Board is to reduce the number of recommendations made to the Minister, and is to rank those recommendations in order

of merit, it will be necessary for JAAB to hold interviews of a certain number of candidates after the initial review of the applications and references.

Composition of JAAB

39. The workload of JAAB is likely to increase substantially if it is to function in the manner outlined above. The Bar Council believes that it is very important that the Board should be adequately supported and funded to enable it properly to discharge these additional functions.

The Role of JAAB in Encouraging Diversity in Judicial Appointments

40. In the English Constitutional Reform Act 2005, section 64(1) places a specific onus on the Judicial Appointment Commission in performing its functions to *“have regard to the need to encourage diversity in the range of persons available for selection for appointments.”*

41. One of the barriers to a diverse judiciary is that qualified people with a range of backgrounds and characteristics may not put themselves forward for consideration. The Bar Council notes that section 14 of the 1995 Act permits JAAB to approach individuals and invite them to apply for a recommendation from the Board. The Bar Council views this as an important provision in encouraging barristers and solicitors from different backgrounds that may not otherwise apply.

42. The Bar Council notes that the presence of lay persons on the Board may contribute to the promotion of diversity and avoid “self-replication” by the judicial members. The Bar Council also suggests that all members of the Board be required to undertake diversity training.

43. The Bar Council is of the opinion that merit should be the sole criterion for appointments. The Bar Council notes that one aspect of the merit of a candidate might be their awareness of the diversity of the communities that the courts serve and an understanding of differing needs in society. However, the Bar Council shares the view of the House of Lords Constitutional Committee⁸ that “diversity and merit are distinct concepts”. Candidates from under-represented groups are, in the opinion of the Bar Council, equally capable of being appointed on the basis of objective merit criteria.

44. We note that it is the responsibility of the King’s Inns, the Bar Council, the Law Society and the Universities to ensure that the brightest lawyers from all backgrounds are able to progress to a point where appointment to the judiciary becomes possible.

Judicial Education and Training

45. In order to ensure the continued excellence of the Irish judiciary, the Bar Council recommends that all persons appointed to judicial office should undertake a mandatory course of training upon appointment. The Bar Council is also of the opinion that an ongoing course of training and education for serving judges should be established.

46. The Bar Council suggests that responsibility for the content and format of any such judicial training and education should rest with the proposed Judicial Council, to be established by an Act of the Oireachtas, and that adequate funding for such education and training programmes be provided by the Government through that body.

The Legislative Framework

47. There is currently a plethora of legislative sources that have a bearing on the eligibility, selection and appointment of judges and there is scope for considerable confusion. The Bar Council recommends that all of the relevant statutory provisions governing eligibility

⁸ 25th Report of the House of Lords Constitutional Committee on Judicial Appointments, 2012.

for appointment as a judge and governing the functioning of the Judicial Appointments Advisory Board (as currently constituted or otherwise) be contained in one comprehensive Act of the Oireachtas. The Bar Council – through its Legislative Committee – would be willing to give whatever assistance is required of it in terms of making submissions on a consolidating Bill.

48. The Bar Council would be willing to make further submissions and to be represented on any independent review group or working group established to look further at these critically important issues.

30 January 2014.