



Irish Council for  
**Civil Liberties**

**Submission**

**on**

**Review of Procedures for Appointment as a Judge**

**February 2014**

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## **About the Irish Council for Civil Liberties (ICCL)**

The Irish Council for Civil Liberties (ICCL) is Ireland's leading independent human rights watchdog, which monitors, educates and campaigns in order to secure full enjoyment of human rights for everyone.

Founded in 1976 by Mary Robinson and others, the ICCL has played a leading role in some of the most successful human rights campaigns in Ireland. These have included campaigns resulting in the establishment of an independent Garda Síochána Ombudsman Commission, the legalisation of the right to divorce, more effective protection of children's rights, the decriminalisation of homosexuality and introduction of enhanced equality legislation.

We believe in a society which protects and promotes human rights, justice and equality.

### **What we do**

- Advocate for positive changes in the area of human rights;
- Monitor Government policy and legislation to make sure that it complies with international standards;
- Conduct original research and publish reports on issues as diverse as equal rights for all families, the right to privacy, police reform and judicial accountability;
- Run campaigns to raise public and political awareness of human rights, justice and equality issues;
- Work closely with other key stakeholders in the human rights, justice and equality sectors.

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## I. Introduction

The Irish Council for Civil Liberties (ICCL) welcomes this opportunity to contribute to the consultation of the Department of Justice and Equality on the review of procedures for the appointment of members of the judiciary. The ICCL has long been a proponent of judicial reform, publishing in 2007 its seminal report on the judiciary in Ireland, *Justice Matters*.<sup>1</sup> The findings of this research, which included interviews with judges from across the court system, concluded that the judicial appointments procedure is a key component to the personal independence of the judiciary, which is in turn, paramount to ensuring the overall independence and impartiality of the judiciary.

The Irish courts and the functioning of the judiciary are governed by the Constitution,<sup>2</sup> with Article 35.2 providing in clear terms:

All judges shall be independent in the exercise of their judicial functions and subject only to this Constitution and the law.

International human rights treaties also set out standards for judicial independence and impartiality:

- European Convention on Human Rights (Article 6);<sup>3</sup>
- EU Charter of Fundamental Rights (Article 47);<sup>4</sup>
- International Covenant for Civil and Political Rights (Article 14).<sup>5</sup>

Standards regarding the independence of judges, and specific guidelines in relation to their appointment can be found in a number of international instruments (“soft law” mechanisms) which recognise and affirm the importance of an independent and impartial judiciary:

- Universal Declaration on Human Rights (Article 14(1));<sup>6</sup>
- UN Basic Principles on the Independence of the Judiciary (Para 10);<sup>7</sup>

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<sup>1</sup> ICCL, *Justice Matters: Independence, Accountability and the Irish Judiciary [Parts 1 and 2]*, (July 2007), available at [http://www.iccl.ie/-justice-matters-independence-accountability-and-the-irish-judiciary-parts-1-and-2--\(july-2007\)-.html](http://www.iccl.ie/-justice-matters-independence-accountability-and-the-irish-judiciary-parts-1-and-2--(july-2007)-.html), accessed on 06.02.14.

<sup>2</sup> Constitution of Ireland, 1937 available at <http://www.irishstatutebook.ie/en/constitution/index.html>, accessed on 07.02.14, Article 34-37. Hereinafter “Constitution”.

<sup>3</sup> European Court of Human Rights, Council of Europe, 01 November 1998, available at [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf), accessed on 07.02.14. Hereinafter “European Convention of Human Rights”.

<sup>4</sup> EU Parliament, Council and Commission, C 83/389, 20 March 2010, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:en:PDF>, accessed on 07.02.14. Hereinafter “EU Charter of Fundamental Rights”.

<sup>5</sup> United Nations, General Assembly Resolution 2200 (XXI), 16 December 1966, available at <http://www.un-documents.net/iccpr.htm>, accessed on 07.02.14. Hereinafter “ICCPR”.

<sup>6</sup> United Nations, General Assembly, <http://www.un.org/en/documents/udhr/>, accessed on 07.02.14. Hereinafter “Universal Declaration on Human Rights”.

<sup>7</sup> Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>, accessed on 13.02.14. Hereinafter “UN Basic Principles on the Independence of the Judiciary”.

- The Bangalore Principles of Judicial Conduct 2002;<sup>8</sup>
- Council of Europe Committee of Ministers Recommendation on Independence, Efficiency and Role of Judges;<sup>9</sup>
- Council of Europe Consultative Council of European Judges Magna Carta of Judges 2010;<sup>10</sup>
- European Network of Councils for the Judiciary in their 2012 Dublin Declaration.<sup>11</sup>

The *Justice Matters* report found that “the personal independence of Irish judges is very well-protected.” However, it concluded that the current system of judicial appointments,<sup>12</sup> still allows for “political affiliation to play a part in appointments and that criteria for judicial selection is imprecise and ill-defined”.<sup>13</sup>

In this submission, the ICCL makes a series of recommendations on how the current judicial appointments process should be re-organised, through legislation and administrative change, to bring the Irish judicial appointments system in line with international legal and human rights standards.

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<sup>8</sup> Adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002, available at [http://www.unodc.org/pdf/crime/corruption/judicial\\_group/Bangalore\\_principles.pdf](http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf), accessed on 10.02.14. Hereinafter “Bangalore Principles of Judicial Conduct 2002”.

<sup>9</sup> Council of Europe Committee of Ministers to Member States, Recommendation R (94)12, 1994. Additionally, the submission refers to the Council of Europe European Charter on the Statute of Judges 1998, available at [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/European-Charter-on-Statute-of-Judges\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/European-Charter-on-Statute-of-Judges_EN.pdf), accessed on 14.02.14.

<sup>10</sup> Council of Europe, Consultative Council of European Judges, 17 November 2010 CCJE (2010)3 Final, available at <https://wcd.coe.int/ViewDoc.jsp?id=1707925>, accessed on 07.02.14. Hereinafter “Magna Carta of Judges 2010”.

<sup>11</sup> ENCJ, *DUBLIN DECLARATION ON STANDARDS FOR THE RECRUITMENT AND APPOINTMENT OF MEMBERS OF THE JUDICIARY*, 2012, 9-11 May 2012, available at [http://www.encj.eu/images/stories/pdf/GA/Dublin/encj\\_dublin\\_declaration\\_def\\_dclaration\\_de\\_dublin\\_r\\_ej\\_def.pdf](http://www.encj.eu/images/stories/pdf/GA/Dublin/encj_dublin_declaration_def_dclaration_de_dublin_r_ej_def.pdf), accessed on 11.02.14. Hereinafter “Dublin Declaration 2012”.

<sup>12</sup> Which is governed by the *Courts and Court Officers Act, 1995*, available at <http://www.irishstatutebook.ie/1995/en/act/pub/0031/print.html>, accessed on 14.02.14. Hereinafter “Courts and Court Officers Act 1995”. And the *Courts (Supplemental Provisions) Act 1961* (as amended by the *Courts and Court Officers Act 2002*), available at <http://www.irishstatutebook.ie/1961/en/act/pub/0039/print.html> and <http://www.irishstatutebook.ie/2002/en/act/pub/0015/print.html>, accessed on 14.02.14. Hereinafter “Courts (Supplemental Provisions) Act 1961”, and “Courts and Court Officers Act 2002”.

<sup>13</sup> ICCL, *Justice Matters: Independence, Accountability and the Irish Judiciary [Parts 1 and 2]*, (July 2007), available at [http://www.iccl.ie/-justice-matters-independence-accountability-and-the-irish-judiciary-parts-1-and-2--\(july-2007\)-.html](http://www.iccl.ie/-justice-matters-independence-accountability-and-the-irish-judiciary-parts-1-and-2--(july-2007)-.html), accessed on 06.02.14, Part 2, p. 46.

## II. Personal Independence of the Judiciary

In its submission to the Department of Justice and Equality on this consultation process, the Judicial Appointments Review Committee stated that:

[...] the process of judicial appointments should first and foremost enhance the principle of judicial independence, upon which the rule of law in our democracy is built. Judicial independence is a protection and a Privilege of the People, and not of the judges.<sup>14</sup>

As previously mentioned, the principle of judicial independence is firmly enshrined in Article 35.2 of the Constitution, and is a well-recognised principle of international human rights law stemming from the right to a fair trial. Under the Constitution, the President makes appointments to the Bench;<sup>15</sup> however, the exercise of this Presidential power is explicitly dependent upon the advice of the Government.<sup>16</sup> Accordingly, due to this overt political component to the judicial appointments system, the guarantee of “judicial independence” is not as robust under Irish law as it should be in order to comply with international standards and guidelines.

### *Political Affiliation*

Both the United Nations<sup>17</sup> and the Council of Europe<sup>18</sup> have affirmed that political affiliation should not be considered during the judicial selection process. Despite Ireland’s “judicial independence” scoring well in the *EU Justice Scoreboard*,<sup>19</sup> in reality, the final judicial appointment decision effectively rests with the Executive. The limited role and function of the current Judicial Appointments Advisory Board (JAAB) means that final appointments, including with respect to promotion of judges are determined by Government. The *Justice Matters* Report notes that “despite the introduction of the judicial short-listing process, allegations of political bias in appointments persist and representations to the Ministers on judicial appointments still seem to occur.”<sup>20</sup>

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<sup>14</sup> Judicial Appointments Review Committee, *Preliminary Submission to the Department of Justice and Equality’s Public consultation on the Judicial Appointments Process*, 30th January 2014, available at <http://static.rasset.ie/documents/news/preliminarysubmissionjarc.pdf>, accessed on 10.02.14, para 112, p. 42.

<sup>15</sup> Article 35.1 of the Constitution.

<sup>16</sup> Article 13.9 of the Constitution.

<sup>17</sup> Principle 10 of the *United Nations Basic Principles on the Independence of the Judiciary*.

<sup>18</sup> Council of Europe, Consultative Council of European Judges (CCJE), *Opinion no1 (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*, CCJE (2001) OP N°1, available at [https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE\(2001\)OP1&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3](https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE(2001)OP1&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3), accessed on 13.02.14, para. 17

<sup>19</sup> European Commission, *The EU Justice Scoreboard*, COM(2013) 160 final, March 2013, available at [http://ec.europa.eu/justice/effective-justice/files/justice\\_scoreboard\\_communication\\_en.pdf](http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_communication_en.pdf), accessed on 11.02.14, figure 23, p.25.

<sup>20</sup> ICCL, *Justice Matters: Independence, Accountability and the Irish Judiciary [Parts 1 and 2]*, (July 2007), available at [http://www.iccl.ie/-justice-matters-independence-accountability-and-the-irish-judiciary-parts-1-and-2--\(july-2007\)-.html](http://www.iccl.ie/-justice-matters-independence-accountability-and-the-irish-judiciary-parts-1-and-2--(july-2007)-.html), accessed on 06.02.14, Part 2, p.52.

This allows for the over-politicisation of judicial appointments and subsequent encroachment upon the personal independence of the judiciary. At the very least, political actors as final arbiters in the appointment process could be *perceived* to impact on appointments. Furthermore, we know that the current system has not succeeded in “[d]epoliticising the relationship between the Government (executive) and the judiciary[...],” which the Judicial Appointments Review Committee state should be “reflected in the system of judicial appointments in the State.”<sup>21</sup> For example, members of the judiciary themselves have spoken publicly regarding the importance of political connections with respect to their own appointments and those of their colleagues.<sup>22</sup> In late 2011, the Irish Independent conducted a survey among judges and found that, “a third of the country’s judges had personal or political connections to political parties before being appointed to the bench”.<sup>23</sup> In a related article, the following was reported:

And, despite the acknowledged integrity of the lawyers and judges elevated recently to the bench, it is a fact that **five out of six** of the Coalition’s maiden judicial appointments had some form of political or familial connection to either party [emphasis added].<sup>24</sup>

The report added, “the survey of judges’ political links speaks for itself and confirms what most people know or suspect about the legal profession: it is a deeply political class”.<sup>25</sup> Furthermore, in November 2011, the Irish Times ran a story regarding government judicial nominations, stating that out of six candidates, five had “a personal, family or funding link to Fine Gael or Labour.”<sup>26</sup>

More recently, it was reported that:

“Four people with previous involvement in appointing Supreme Court judges were asked by *The Irish Times* whether political affiliation was a factor. Three of them said it was.”<sup>27</sup>

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<sup>21</sup> Judicial Appointments Review Committee, *Preliminary Submission to the Department of Justice and Equality’s Public Consultation on the Judicial Appointments Process*, 30<sup>th</sup> January 2014, available at <http://static.rasset.ie/documents/news/preliminarysubmissionjarc.pdf>, accessed on 14.02.14, p.47.

<sup>22</sup> See for example, McDonald, D., (25 September 2012), “Supreme Court Posts ‘Purely Political’ Says Kelly”, Irish Independent, available at <http://www.independent.ie/irish-news/supreme-court-posts-purely-political-says-kelly-28813695.html>, accessed on 14.02.14. David Gwynn Morgan, (22 October 2012), “Reform needed in system of judicial appointment”, *Irish Times*, available at <http://www.irishtimes.com/news/crime-and-law/reform-needed-in-system-of-judicial-appointment-1.555901>, accessed on 14.02.14.

<sup>23</sup> McDonald, D. and McQuinn, F., (17 November 2011), “Revealed: Judges and their Links to Political Parties”, *Irish Independent*, available at <http://www.independent.ie/irish-news/revealed-judges-and-their-links-to-political-parties-26792896.html>, accessed on 14.02.14.

<sup>24</sup> McDonald, D., (18 November 2011), “We need to limit political influence on judges’ jobs”, *Irish Independent*, available at <http://www.independent.ie/opinion/analysis/dearbhaile-mcdonald-we-need-to-limit-political-influence-on-judges-jobs-26793324.html>, accessed on 14.02.14.

<sup>25</sup> *Ibid.*

<sup>26</sup> (14 November 2011), “Five out of six judges appointed have connections to Fine Gael or Labour”, *Irish Times*, available at <http://www.irishtimes.com/news/five-out-of-six-judges-appointed-have-connections-to-fine-gael-or-labour-1.11321>, accessed on 14.02.14.

<sup>27</sup> Ruadhan Mac Cormaic, (9 July 2013), “The Supreme Court: where politics and law meet”, *Irish Times*, available at <http://www.irishtimes.com/news/crime-and-law/the-supreme-court-where-politics-and-the-law-meet-1.1456895?page=2>, accessed on 14.02.14

While there are no indicators that the actions and decisions of judges, once appointed, are influenced by any political connections, it is hard to escape the conclusion that the appointments process itself is tainted by political influence. The establishment of a clear and transparent judicial appointments selection system would address this problem.<sup>28</sup> In addition, as suggested by the Bar Council, there should be “an explicit statutory prohibition on consideration of a person’s political affiliation in determining their suitability for appointment.”<sup>29</sup>

### Recommendations

- Prohibit in law lobbying by potential candidates for the judiciary of public representatives.
- Introduce an explicit statutory bar on political affiliation forming part of a determination of suitability for appointment.

### III. Current Appointment Process

#### *Role of the Judicial Appointments Advisory Board (JAAB)*

Although the Constitution vests the powers to appoint a judge in the President,<sup>30</sup> as mentioned previously, this power can only be exercised upon the advice of the Government.<sup>31</sup> The *Courts and Courts Officers Act 1995* introduced a judicial short-listing process via the Judicial Appointments Advisory Board (JAAB), and the *Courts (Supplemental Provisions) Act 1961* (as amended by the *Courts and Court Officers Act 2002*) elaborated further on eligibility criteria and assessment procedures. However, the legislative guidance remains somewhat vague. At present, the JAAB is only empowered to inform, albeit in an advisory capacity, the Government of suitable candidates to the District, Circuit, High and Supreme Courts.<sup>32</sup> Moreover, the JAAB has no role when the positions of the Chief Justice and Presidents of the other Courts are being filled,<sup>33</sup> or when an existing judge is being promoted from one court to another.<sup>34</sup>

It has been noted that where the JAAB’s,

[R]ole is limited to that of carrying out a basic screening process rather than actively undertaking merit-based assessment, the common result is that these flaws are magnified and ultimately greatly undermine the principle of judicial independence and the public’s faith in having a fairly appointed bench.<sup>35</sup>

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<sup>28</sup> ICCL, *Justice Matters: Independence, Accountability and the Irish Judiciary [Parts 1 and 2]*, (July 2007), available at [http://www.iccl.ie/-justice-matters-independence-accountability-and-the-irish-judiciary-parts-1-and-2--\(july-2007\)-.html](http://www.iccl.ie/-justice-matters-independence-accountability-and-the-irish-judiciary-parts-1-and-2--(july-2007)-.html), accessed on 06.02.14, Part 2, p. 53.

<sup>29</sup> Bar Council, *Submissions on the Procedures for Appointment as a Judge*, 30 January 2014, available at [http://www.lawlibrary.ie/documents/news\\_events/BCSubmission-JudicialAppointments30012014.pdf](http://www.lawlibrary.ie/documents/news_events/BCSubmission-JudicialAppointments30012014.pdf), accessed on 14.02.14, p. 13.

<sup>30</sup> Article 35.1 of the Constitution.

<sup>31</sup> Article 13.9 of the Constitution.

<sup>32</sup> Section 13 (1) to be read in conjunction with Section 12 of *Courts and Court Officers Act 1995*.

<sup>33</sup> Section 23 *Courts and Court Officers Act 1995*.

<sup>34</sup> Section 17 *Courts and Court Officers Act 1995*.

<sup>35</sup> Law Society of Ireland, *Consultation on the Review of Procedures for Appointing Judges*, 31 January 2014, available at <http://www.lawsociety.ie/Documents/news/Final%20Submission%20on%20Judicial%20Apmt%20Review%20-%2031%20Jan%202014.pdf>, accessed on 11.02.14, p.32.



### *Membership of the JAAB*

Presently the composition of the JAAB is a mixture of the judiciary and legal professionals, as well as three lay persons who are directly appointed by the Minister.<sup>36</sup> Not only is membership of the JAAB not subject to an open and public competition, the Attorney General, another political appointee, also currently takes part in “both stages of the process-as both a member of JAAB and as advisor to the Cabinet.”<sup>37</sup>

### *Eligibility and Assessment Criteria*

In relation to District<sup>38</sup> and Circuit Court<sup>39</sup> judicial appointments, and when an existing judge is not seeking promotion, a practising barrister or solicitor with ten years of practice experience is eligible to submit an application to JAAB. Judicial appointment to the High or Supreme Court,<sup>40</sup> is reserved to a practising barrister or solicitor with twelve years of practice experience, two of which are immediately prior to such appointment.<sup>41</sup>

The JAAB then assesses applicants on the basis of the following criteria:<sup>42</sup>

- Display of a degree of competence and degree of probity appropriate to and consistent to the appointment concerned;
- Suitability on grounds of character and temperament;
- Otherwise suitable;
- Compliance with Section 19 of the 1995 Act in relation to judicial training and education;
- Tax compliance.<sup>43</sup>

In relation to High and Supreme Court appointment, in addition to the aforementioned criteria the JAAB also assesses applicants’:

- 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 nature and extent of their practice 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.

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<sup>36</sup> Section 13 (2) *Courts and Court Officers Act 1995*.

<sup>37</sup> Law Society of Ireland, *Consultation on the Review of Procedures for Appointing Judges*, 31 January 2014, available at <http://www.lawsociety.ie/Documents/news/Final%20Submission%20on%20Judicial%20Apmt%20Review%20-%2031%20Jan%202014.pdf>, accessed on 11.02.14, p.34.

<sup>38</sup> Section 29(2) *Courts (Supplemental Provisions Act) 1961*.

<sup>39</sup> Section 30 *Courts and Court Officers Act 1995* amending section 17 of the *Courts (Supplemental Provisions) Act 1961*.

<sup>40</sup> When an existing judge is not seeking promotion.

<sup>41</sup> Section 4, *Courts and Court Officers 2002*, No.15 of 2002, inserting section 5(2)(a) of the *Courts (Supplemental Provisions) Act 1961*.

<sup>42</sup> Section 16.7 *Courts and Court Officers Act 1995*, as amended by Section 8 *Courts and Court Officers 2002*.

<sup>43</sup> Section 22 *Standards in Public Office Act 2001*, available at <http://www.irishstatutebook.ie/2001/en/act/pub/0031/print.html>, accessed on 14.02.14.

The ICCL notes that the JAAB's current selection criteria not only lack preciseness and objectivity, but also do not compare favourably with other jurisdictions such as the transparent merit-based criteria of New Zealand or Canada.<sup>44</sup> The need for objectivity throughout the selection process, including the promotion process, as well as merit-based selection criteria is well-recognised internationally. The Council of Europe CCJE *Judges Magna Carta of Judges* notes that decisions on selection are to be based on objective criteria.<sup>45</sup> Another Council of Europe instrument, the Committee of Ministers *Recommendation on Independence, Efficiency and Role of Judges*, in addition to reports of the Venice Commission,<sup>46</sup> reiterate the notion that all decisions regarding the professional career of judges should be based on objective criteria. These bodies further elaborate that the selection and career of judges should be “**based on merit, [emphasis added]** having regard to qualifications, integrity, ability and efficiency.”<sup>47</sup>

The *United Nations Basic Principles on the Independence of the Judiciary*<sup>48</sup> provide that “[p]ersons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law”<sup>49</sup> and where a judge is to be promoted, this “should be based on objective factors, in particular ability, integrity and experience.”<sup>50</sup> In addition, the European Network of Councils for the Judiciary’s *2012 Dublin Declaration* notes that appointments should not only be merits and competency based, but also be clearly-defined and published.<sup>51</sup>

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<sup>44</sup> For more information see ICCL, *Justice Matters: Independence, Accountability and the Irish Judiciary [Parts 1 and 2]*, (July 2007), available at [http://www.iccl.ie/-justice-matters-independence-accountability-and-the-irish-judiciary-parts-1-and-2--\(july-2007\)-.html](http://www.iccl.ie/-justice-matters-independence-accountability-and-the-irish-judiciary-parts-1-and-2--(july-2007)-.html), accessed on 06.02.14, Part 2, p.53.

<sup>45</sup> Council of Europe, Consultative Council of European Judges, 17 November 2010 CCJE (2010)3 Final, available at <https://wcd.coe.int/ViewDoc.jsp?id=1707925>, accessed on 07.02.14.

<sup>46</sup> Council of Europe, *Report on the Independence of the Judicial System Part I: The Independence of Judges*, Adopted by the Venice Commission at its 82nd Plenary Session 16 March 2010, available at [http://www.venice.coe.int/webforms/documents/default.aspx?ref=cdl-ad\(2010\)004](http://www.venice.coe.int/webforms/documents/default.aspx?ref=cdl-ad(2010)004), accessed on 14.02.14, p.6.

<sup>47</sup> Council of Europe Committee of Ministers to Member States on the *Independence, Efficiency and Role of Judges*, Recommendation R (94)12, 1994, Principle 1, para. 2 (c), and Council of Europe Consultative Council of European Judges, *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*, CCJE (2001) OP N°1, available at [https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE\(2001\)OP1&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3](https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE(2001)OP1&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3), accessed on 11.02.14.

<sup>48</sup> Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>, accessed on 11.02.14. (Hereinafter the UN *Basic Principles on the Independence of the Judiciary*)

<sup>49</sup> UN *Basic Principles on the Independence of the Judiciary*, Para. 10. It continues “Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.”

<sup>50</sup> UN *Basic Principles on the Independence of the Judiciary*, Para.13

<sup>51</sup> ENCJ, *DUBLIN DECLARATION ON STANDARDS FOR THE RECRUITMENT AND APPOINTMENT OF MEMBERS OF THE JUDICIARY*, 2012, Section I.1, p.3, available at

It has been recently suggested that the “‘merit criteria’ should include a number of different categories such as personal qualities, standing and record as a lawyer, any special legal knowledge or expertise and any other additional qualifications or experience”.<sup>52</sup> The ICCL advocates for the implementation of clear and transparent merit-based and objective selection criteria, which are in line with the aforementioned international standards.<sup>53</sup> The development of a framework in relation to judicial abilities and qualities should also be considered to avoid vague or overly-subjective criteria. Although Section 14(2)(e) of the *Courts and Court Officers Act 1995* allows the JAAB to interview of judicial applicants, it is understood that in practice the JAAB does utilise this provision.<sup>54</sup>

### *Decision-Making Procedure*

Following on from an assessment of the aforementioned criteria, the JAAB currently submits a short-list of no less than seven candidates to the Government<sup>55</sup> in no order of preference, which notably the Government is not required to follow.<sup>56</sup> The judicial appointments body must be empowered to present nominations in a merit-based order and appointments should be made according to rank.

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[http://www.encj.eu/images/stories/pdf/GA/Dublin/encj\\_dublin\\_declaration\\_def\\_dclaration\\_de\\_dublin\\_r\\_ej\\_def.pdf](http://www.encj.eu/images/stories/pdf/GA/Dublin/encj_dublin_declaration_def_dclaration_de_dublin_r_ej_def.pdf), accessed on 11.02.14. This Declaration also notes that:

*“2. Selection competencies should include intellectual and personal skills of a high quality, as well as a proper work ethic and the ability of the candidates to express themselves.*

*3. The intellectual requirement should comprise the adequate cultural and legal knowledge, analytical capacities and the ability independently to make judgments.*

*4. There should be personal skills of a high quality, such as the ability to assume responsibility in the performance of his/her duties as well as qualities of equanimity, independence, persuasiveness, sensibility, sociability, integrity, unflappability and the ability to co-operate.”*

<sup>52</sup> Law Society of Ireland, *Consultation on the Review of Procedures for Appointing Judges*, 31 January 2014, available at

<http://www.lawsociety.ie/Documents/news/Final%20Submission%20on%20Judicial%20Apmt%20Review%20-%2031%20Jan%202014.pdf>, accessed on 11.02.14, p.9, para. 6.

<sup>53</sup> For more information see ICCL, *Justice Matters: Independence, Accountability and the Irish Judiciary [Parts 1 and 2]*, (July 2007), available at [http://www.iccl.ie/-justice-matters-independence-accountability-and-the-irish-judiciary-parts-1-and-2--\(july-2007\)-.html](http://www.iccl.ie/-justice-matters-independence-accountability-and-the-irish-judiciary-parts-1-and-2--(july-2007)-.html), accessed on 06.02.14, Part 2,

Law Society of Ireland, *Consultation on the Review of Procedures for Appointing Judges*, 31 January 2014, available at

<http://www.lawsociety.ie/Documents/news/Final%20Submission%20on%20Judicial%20Apmt%20Review%20-%2031%20Jan%202014.pdf>, accessed on 11.02.14 p. 25-32 and Judicial Appointments Review

Committee, *Preliminary Submission to the Department of Justice and Equality’s Public Consultation on the Judicial Appointments Process*, 30<sup>th</sup> January 2014, available at

<http://static.rasset.ie/documents/news/preliminarysubmissionjarc.pdf>, accessed on 10.02.14, p.80-91.

<sup>54</sup> Bar Council, *Submissions on the Procedures for Appointment as a Judge*, 30 January 2014, available at [http://www.lawlibrary.ie/documents/news\\_events/BCSubmission-JudicialAppointments30012014.pdf](http://www.lawlibrary.ie/documents/news_events/BCSubmission-JudicialAppointments30012014.pdf), accessed on 14.02.14

<sup>55</sup> Section 16.2, *Courts and Court Officers Act 1995*.

<sup>56</sup> As noted in ICCL, *Justice Matters: Independence, Accountability and the Irish Judiciary [Parts 1 and 2]*, (July 2007), available at [http://www.iccl.ie/-justice-matters-independence-accountability-and-the-irish-judiciary-parts-1-and-2--\(july-2007\)-.html](http://www.iccl.ie/-justice-matters-independence-accountability-and-the-irish-judiciary-parts-1-and-2--(july-2007)-.html), accessed on 06.02.14, Part 2, p.51.

**Recommendations:**

- Abolish the JAAB and replace it with a properly constituted expert body on which lay people preponderate.
- Establish clear and transparent merit-based selection criteria, in consultation with relevant stakeholders, including civil society organisations, which include measures aimed at increasing groups currently unrepresented. Any policy agreed should be publicly available.
- A robust appointments process should be developed, which includes an interview and merits-based testing.
- Grant authority to the replacement of the JAAB to propose all judicial appointments, including the promotion of existing judges from one bench to another; the appointment of the Chief Justice, and the appointment of the Presidents of the Courts.
- Ensure appointment to the replacement for the JAAB is subject to open and public competition.
- Remove the Attorney General, a political appointee, from the appointments process.

**IV. Equality and Diversity in Judicial Appointments**

In addition to the establishment of clear and transparent merit-based selection criteria, as is discussed Section III, the judicial selection procedures should incorporate measures to increase groups which are currently underrepresented in the judiciary.<sup>57</sup> The ICCL considers that a diverse judiciary is a cornerstone of a modern democracy:

Not only should there be equality of opportunity for those eligible to apply, but in a democratic society the judiciary should reflect the diversity of society and the legal profession as a whole. Judges drawn from a wide range of backgrounds and life experiences will bring varying perspectives to bear on critical legal issues.<sup>58</sup>

A judiciary which is visibly more reflective of society will enhance public confidence.<sup>59</sup> Review of the appointments process is a real opportunity to enhance the spectrum from which Irish judges may be drawn. However, this is unlikely to happen unless proactive steps are taken to render our current system – including the education of legal professionals and the ongoing professional development of judges - more inclusive.<sup>60</sup>

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<sup>57</sup> ICCL, *Justice Matters: Independence, Accountability and the Irish Judiciary [Parts 1 and 2]* , (July 2007), available at [http://www.iccl.ie/-justice-matters-independence-accountability-and-the-irish-judiciary-parts-1-and-2--\(july-2007\)-.html](http://www.iccl.ie/-justice-matters-independence-accountability-and-the-irish-judiciary-parts-1-and-2--(july-2007)-.html) , accessed on 06.02.14, Part 2, p.84.

<sup>58</sup> *The Report of the Advisory Panel on Judicial Diversity 2010*, Available at [http://www.equality-ne.co.uk/downloads/759\\_advisory-panel-judicial-diversity-2010.pdf](http://www.equality-ne.co.uk/downloads/759_advisory-panel-judicial-diversity-2010.pdf), accessed on 13.02.14, p. 4, para. 1.

<sup>59</sup> For example, a newspaper report on a seminar examining judicial diversity led with the line, “[a]lmost all of them are white, male, Catholic and graduates of University College Dublin”. McDonald, D., (19 September 2008), “Women still left behind in top jobs for judges”, Irish Independent, available at <http://www.independent.ie/irish-news/women-still-left-behind-in-top-jobs-for-judges-26477985.html>, accessed on 14.02.14.

<sup>60</sup> ICCL, Press Release, *Diverse Judiciary is a “Cornerstone” of Democracy*, 17 September 2008, available at <http://www.iccl.ie/news/2008/09/17/diverse-judiciary-is-a-%E2%80%9Ccornerstone%E2%80%9D-of-democracy-says-the-iccl.html>, accessed on 12.02.14.

Presently, although 43% of barristers are female,<sup>61</sup> just over 30% of the judiciary are female.<sup>62</sup> Beyond these gender-based statistics, there is no publicly-available data on the demographic make-up of the judiciary. It would be useful if the Government conducted a review of representativeness in the legal profession in general, and the judiciary, in particular, with a view to making recommendations and to develop a more demographically-representative profession.<sup>63</sup>

England and Wales has made some progress in this regard. The *Constitutional Reform Act 2005* notes that the Judicial Appointments Commission “must have regard to the need to encourage diversity in the range of persons available for selection for appointments.”<sup>64</sup> In addition, the *Neuberger Report*, produced by the Advisory Panel on Judicial Diversity in 2010, outlined fifty-three long-term recommendations to achieve judicial diversity. In light of this it would be most helpful if the Government established a similar Advisory Panel on Judicial Diversity with the view to producing a recommendations on achieving judicial diversity in Ireland, as well as consider the insertion of an amendment to the *Courts and Court Officers Act 1995* similar to that of section 64 of the *Constitutional Reform Act 2005*.

### Recommendations

- Conduct a “Diversity Audit” of the legal profession and the judiciary, providing clear non-aggregated data on the composition of the professions.
- Establish an Advisory Panel on Judicial Diversity with the view to producing a similar report to that of the *Neuberger Report*, which would include concrete recommendations. This Panel could also be tasked with management of the “Diversity Audit”.
- Any Advisory Panel should be specifically tasked with consideration of an amendment to the *Courts and Court Officers Act 1995* with similar to that of section 64 (i.e. “encouragement of diversity” section) of the UK *Constitutional Reform Act 2005*.

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<sup>61</sup> Bar Council figures supplied to the Irish Times, *Why are so few women becoming senior counsel?*, 9 December 2013, available at <http://www.irishtimes.com/news/crime-and-law/why-are-so-few-women-becoming-senior-counsel-1.1616830>, accessed on 13.02.14. There is no corresponding information about the gender balance in the solicitor profession.

<sup>62</sup> Judicial Appointments Review Committee, *Preliminary Submission to the Department of Justice and Equality's Public Consultation on the Judicial Appointments Process*, 30<sup>th</sup> January 2014, p. 63. An Irish times article in 2013, quoted this figure at 27%. See Gallagher, Conor (9 December 2013), *Why are so few Women becoming Senior Counsel?*, available at <http://www.irishtimes.com/news/crime-and-law/why-are-so-few-women-becoming-senior-counsel-1.1616830>, accessed 14.02.14.

<sup>63</sup> ICCL, *Justice Matters: Independence, Accountability and the Irish Judiciary [Parts 1 and 2]*, (July 2007), available at [http://www.iccl.ie/-justice-matters-independence-accountability-and-the-irish-judiciary-parts-1-and-2--\(july-2007\)-.html](http://www.iccl.ie/-justice-matters-independence-accountability-and-the-irish-judiciary-parts-1-and-2--(july-2007)-.html), accessed on 06.02.14, Part 2,p.84.

<sup>64</sup> Section 64, *Constitutional Reform Act 2005*, available at <http://www.legislation.gov.uk/ukpga/2005/4/contents>, accessed on 13.02.14.

## V. Conclusion

Noting that “[a]n efficient and independent justice system contributes to trust and stability”<sup>65</sup> the ICCL reiterates that an effective, transparent and independent judicial appointments’ procedure will enhance the personal independence of the judiciary, and thus contribute to the overall independence and impartiality of a profession which occupies a key position within the constitutional framework of the Separation of Powers. Given that the judicial appointment process is closely interlinked with the principle of judicial independence, and that “human rights cannot be protected without an independent judiciary functioning under the rule of law”<sup>66</sup>, the ICCL urges the Government, having regard to the recommendations outlined above, to effect changes to the current appointments process in a timely manner.

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<sup>65</sup> European Commission, *The EU Justice Scoreboard*, COM(2013) 160 final, available at [http://ec.europa.eu/justice/effective-justice/files/justice\\_scoreboard\\_communication\\_en.pdf](http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_communication_en.pdf), accessed on 11.02.14, p. 2.

<sup>66</sup> Apple, J. G. (1998) ‘The Role of Judicial Independence and Judicial Leadership in the Protection of Human Rights’ in Cotran, E. and Sherif, A.O. (eds) *The Role of the Judiciary in the Protection of Human Rights*, CIMEL Book Series No. 5/SOAS, at p. 198, as cited in ICCL, *Justice Matters: Independence, Accountability and the Irish Judiciary [Parts 1 and 2]*, (July 2007), available at [http://www.iccl.ie/-justice-matters-independence-accountability-and-the-irish-judiciary-parts-1-and-2--\(july-2007\)-.html](http://www.iccl.ie/-justice-matters-independence-accountability-and-the-irish-judiciary-parts-1-and-2--(july-2007)-.html), accessed on 06.02.14, Part 2, p. 10.