



Irish Council for
Civil Liberties

ICCL Submission on the Judicial Appointments Commission Bill

To: The Oireachtas Joint Committee on Justice

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Executive Summary

The purpose of this submission is to consider the judicial appointments system in Ireland and the proposed amendments to this system via the Judicial Appointments Commission Bill 2020. In particular, this submission focuses on the International standards for the appointment process, including the necessity of independence, transparency and objectivity, as well as the need to ensure diversity and representativeness.¹

International standards require that a judicial appointments process must protect and ensure the independence of the judiciary and uphold the separation of powers. Appointments should be made by a non-political body independent of the Government. This body should have substantial representation from the judiciary. Appointments must be based on merit, with objective criteria such as experience and legal qualifications as the core considerations. Ensuring diversity and representation in the judiciary should also form part of the decision-making process. Finally, the appointments process should be transparent and should inspire confidence in the rule of law.

¹ See ICCL Justice Matters, p.88 <https://www.iccl.ie/archive/justice-matters-independence-accountability-and-the-irish-judiciary-parts-1-and-2-july-2007-2/>

At present, the judicial appointments system in Ireland does not align with best practice as outlined by international instruments on the independence of the judiciary.² First, there are two separate processes depending on whether the applicant is a current member of the judiciary. Existing judges need only “express an interest” in the relevant vacancy without formally going through an application process. Other candidates who are not current members of the judiciary must go through a formal vetting process through the Judicial Appointments Advisory Board, however, the Government need not follow the recommendations of the Board and can effectively exercise its discretion to appoint whomever it wishes. Finally, there are no requirements that diversity form part of the considerations of the Government in the appointment process.

The proposed system under the Judicial Appointments Commission Bill 2020 is an improvement to the current process in that it (i) introduces a formalised, transparent system for all candidates who wish to apply for a judicial vacancy and (ii) introduces the requirement that diversity form part of the consideration of the Appointments Commission. However, the proposed system also has a number of weaknesses from an international best practice perspective. First, judicial members of the Commission should be elected by their judicial peers instead of particular judges automatically being allocated a place on the Commission. Second, the proposal for a separate three-person committee to decide on the appointment of the Chief Justice and Presidents of the High Court and Court of Appeal is problematic as it does not meet the requirements laid out by international standards. Third, the number of recommendations of candidates that the Commission must make to the Government is too high as it provides overly broad discretion to government. Fifth, the knowledge requirements of applicants for positions within the District Court and Circuit Court are inadequate.

Summary of ICCL Recommendations

² Such as the Universal Charter of the Judge, UN Basic Principles on the Independence of the Judiciary, Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges adopted by the Committee of Ministers on 13 October 1994 at the 518th meeting of the Ministers’ Deputies and the European Charter on the Statute for Judges.

- 1) *The voting Judicial Membership of the Commission should be maintained as half the Commission.*
- 2) *The nominees of the Judicial Council should be selected by way of a vote by the Council and should include representatives from both the barrister and solicitor profession.*
- 3) *The representative on the Commission who is a member of the Court in which the vacancy arises should be elected by her or his fellow judges rather than automatically falling to the President of the Court.*
- 4) *The number of candidates sent forward by the Commission should be reduced to 3 recommendations for one vacancy, 5 recommendations for two vacancies and 8 recommendations for three vacancies, to reduce governmental discretion in the choice of candidate.*
- 5) *Recommendations from the Commission on the appointment should be ranked and reasons should be given to the Commission if the Government chooses to diverge from these recommendations.*
- 6) *All judges, including the Chief Justice and the Presidents of all Courts, should be appointed by the same body and procedure as other judicial appointments. There should not be a separate appointments process for the Chief Justice and Presidents of the High Court and Court of Appeal.*
- 7) *All appointments should take into account the fundamental importance of ensuring diversity and appropriate representation in the judiciary.*
- 8) *The knowledge requirements proposed for judges of the Superior Courts should also be required of judges of the District and Circuit Court.*

Background – the appointment of judges in Ireland

1. The appointment of judges in Ireland is governed by Article 35.1 of the Constitution which provides; “[t]he judges of the Supreme Court, the Court of Appeal, the High Court and all other Courts established in pursuance of Article 34 hereof shall be appointed by President.” Although the formal appointment of the judiciary is vested in the President, the power to appoint is contingent on governmental recommendation. Article 13.9 states that the President can only exercise the power to appoint “on the advice of the Government.”

2. In effect, the appointment of the judiciary is controlled by the Government, with the Presidential seal of approval amounting to a formality³. It should be noted that there are no parameters set down within the Constitution as to the process which should be followed by the Government for judicial appointments. The process is therefore highly discretionary, with the decision-making power resting solely with the Government.

The process of appointment

3. There are two procedures for appointment dependent on whether the applicant is currently a member of the judiciary. For existing judges, the process is an informal “expression of interest” which is made directly to the Minister for Justice via the Attorney General’s office.
4. For applicants who are not already members of the judiciary, an application must be made to the Judicial Appointments Advisory Board (“JAAB”). A form must be completed and submitted to JAAB which provides information relating to the applicant’s suitability for judicial office. This includes details in relation to the applicant’s education, professional qualifications, experience and character. The JAAB can only recommend persons who comply with the relevant qualifications set out in the Courts (Supplemental Provisions) Act, 1961, as amended by the Courts and Court Officers Act, 2002. The JAAB must also be satisfied that the candidate:
 - has displayed in his/her practice as a barrister or solicitor, as the case may be, a degree of competence and a degree of probity appropriate to and consistent with the appointment concerned;
 - is suitable on grounds of character and temperament;
 - is otherwise suitable;
 - complies with the requirements of Section 19 of the 1995 Act; and
 - has furnished a Tax Clearance Certificate from the last 18 months or has made a Statutory Declaration that their tax affairs are in order, pursuant to

³ This was considered in *State (Walshe) v Murphy* [1981] IR 275 wherein the Supreme Court stated at 283 that there are “a very great number of powers and functions which [the President] performs on the advice of the Government, without any discretion on his [or her] part. In respect of these matters, apparently, he [or she] can not refuse to accede to that advice within the Constitution. Whilst, therefore, such acts require his [or her] intervention for their effectiveness in law, in fact they are the decision and act of the Executive.”

section 22(1) of the Standards in Public Office Act, 2001 as amended by Section 53 of the Civil Law (Miscellaneous Provisions Act), 2008.

5. Candidates must also furnish two references which are sent directly by referees to the Secretary.

6. The JAAB process includes the following steps:
 - The Minister requests recommendations from the Chairperson of the JAAB;
 - The Chairperson informs the JAAB Secretary who puts in place the relevant procedures to hold a Board meeting;
 - The Secretary may place advertisements in the national newspapers, notifications on JAAB.ie, the Legal Diary and the website of the Law Society and Bar Council seeking applications;
 - A date is agreed with all members of the JAAB for a meeting;
 - In advance of the meeting the Secretary issues copies of all applications held on file for that particular judicial office to each Board member. The Board then meet to consider these applications and decide which applicants to recommend to the Minister;
 - Following this meeting the Secretary corresponds with the Bar Council of Ireland and the Law Society of Ireland requesting verification that those whom the Board propose to recommend are in good standing and are a Practising Solicitor/Barrister who satisfy the requirements of the relevant legislation;
 - On receipt of a response from the Bar Council and the Law Society, the Chairperson informs the Minister who applied for the vacancy/vacancies and encloses a list of the JAAB's recommendations;
 - The Board forwards a list of seven suitable candidates to the Government, without any ranking as to suitability. The Government is not obliged to appoint from this list;
 - Section 16 (8) of the Courts and Court Officers Act 1995 provides that notice of appointments under the procedure envisaged by the Act must be published in the Iris Oifigiúil, the Official Gazette, and the notice must include a statement, if that is the case, that the name of the person was recommended by the Board to the Minister. However, the names of applicants to the Board

who are not selected by the Government for judicial appointment will not be disclosed. Section 20 of the Act of 1995 provides that the proceedings of the Board and all communications to it are confidential and shall not be disclosed except for the purposes of the Act.

7. It should be noted that the Government has the power to recommend a person for appointment to the President without first consulting with the Judicial Appointments Advisory Board. The recommendation made by the JAAB is simply whether the applicant meets the criteria to be appointed as a judge. It is not for the JAAB to rank their suitability and it is the Government's decision as to who is appointed.
8. Once the Minister for Justice receives both the expressions of interest from sitting judges and the recommendations from the JAAB, she will consider the candidates and discuss a recommendation with the Taoiseach and the heads of the parties in Government. Formally, it is a decision of government and in practice, the decision-making process rests with the Minister for Justice, the Taoiseach and the Attorney General.⁴

Constitutional and legislative criteria for appointment

9. At present, the minimum qualifications for the appointment of judges vary according to the Court to which a person seeks to be appointed. The qualifications for the Superior Courts (the High Court, Court of Appeal and Supreme Court) are set out in section 5 of the Courts (Supplemental Provisions) Act 1961, as amended by section 4 of the Courts and Court Officers Act 2002, and section 11 of the Court of Appeal Act 2014. It provides that:

“ a person shall be qualified for appointment as a judge of the Supreme Court or the Court of Appeal or the High Court if the person is for the time being a practising barrister or practising solicitor of not less than 12 years standing

⁴ Carroll McNeill, 'The Politics of Judicial Selection in Ireland' (Four Courts Press, 2016), 136. See also Coakley & Gallagher, *Politics in the Republic of Ireland, 3rd Edition* (Routledge, London, 2004). This practice was also recently confirmed by Minister for Justice, Helen McEntee, during the course of a Dáil Debate on the appointment of Mr Seamus Woulfe to the Supreme Court. See Dáil Debate, *Judicial Appointments Process: Statements*, Thursday, 26 Nov 2020 at <https://www.oireachtas.ie/en/debates/debate/dail/2020-11-26/32/?highlight%5B0%5D=s%C3%83%C2%A9amus&highlight%5B1%5D=woulfe>

who has practised as a barrister or a solicitor for a continuous period of not less than two years immediately before such appointment.”

10. In addition, any person who was at any time during the period of two years immediately before the appointment concerned:

- a judge of the Court of Justice of the European Communities;
- a judge of the Court of First Instance attached to that Court;
- an Advocate-General of the Court of Justice of the European Communities;
- a judge of the European Court of Human Rights;
- a judge of the International Court of Justice;
- a judge of the International Criminal Court;
- a judge of an international tribunal within the meaning of section 2 of the International War Crimes Tribunal's Act, 1998

and was a practising barrister or solicitor before appointment - as any of the above officers - is also qualified for appointment. A judge of the Circuit Court who has served for at least two years is also qualified for appointment.

11. The minimum qualifications to be appointed to the District Court and Circuit Court are set out in section 17(2) of the Courts (Supplemental Provisions) Act 1961 as amended by section 30 of the Courts and Court Officers Act 1995 and section 188 of the Personal Insolvency Act 2012. This provides that the following are qualified for appointment as a judge of the Circuit Court:

- a) a person who is for the time being a county registrar, having held such office for not less than 2 years continuously, and
- b) (i) a person who is for the time being a practising barrister or a practising solicitor of not less than 10 years standing, and
(ii) a judge of the District Court.

12. Section 29 (2) of the Courts (Supplemental Provisions) Act 1961 provides that a person who is for the time being a practising barrister or solicitor of not less than 10 years standing is qualified for appointment as a judge of the District Court.

The Judicial Appointments Advisory Board

13. Section 13 of the Courts and Court Officers Act 1995 provides for the appointment of a Judicial Appointments Advisory Board for the purposes of “*identifying persons and informing the Government of the suitability of those persons for appointment to judicial office.*” The Board consists of the following 10 persons:

- The Chief Justice;
- The Presidents of the High Court, Court of Appeal, Circuit Court and District Court;
- The Attorney General;
- A practising barrister (at present Maura McNally SC, chair of the Bar Council);
- A practising solicitor (at present John Shaw, nominated by the Law Society);
- Three persons identified as suitable by the Minister for Justice.

The Judicial Appointments Commission Bill 2017

14. In 2017, the Judicial Appointments Commission Bill 2017 was put before the Dáil. It sought to significantly alter the manner in which are judges appointed by creating a Judicial Appointments Commission which was composed of the Chief Justice, the Presidents of the Court of Appeal and the High Court, the Attorney General, a nominated barrister, a nominated solicitor, six lay people and a lay Chair. This Bill lapsed with the dissolution of the last Government in January 2020.

The Judicial Appointments Commission Bill 2020

15. The new Minister for Justice, Helen McEntee, was given cabinet approval to draft a Judicial Appointments Commission Bill in 2020. The Bill will provide for the establishment of a new commission to replace the Judicial Appointments Advisory Board. The General Scheme for the Bill was published on 15th December 2020. The Judicial Appointments Commission will develop upgraded procedures and requirements for judicial office selection. The Commission will develop upgraded procedures and requirements for judicial office selection through a Procedures Committee; it will prepare and publish statements setting out selection procedures

and (judicial) skills and attributes having regard to several criteria (including such matters as diversity etc.). It is proposed that the Procedures Committee will be chaired by the Chief Justice, or a Judicial Council nominee. (Head 19). The draft reforms, including provisions relating to the composition of the Commission, will be published subject to Government approval.

16. The General Scheme of the Judicial Appointments Commission Bill provides for the establishment of a Judicial Appointments Commission of 9 members to replace the Judicial Appointments Advisory Board (JAAB). The Commission will be chaired by the Chief Justice rather than the Lay Chair model provided for in the 2017 Bill, and will have a substantial (4 out of 9) lay membership.

17. The membership of the Commission (Head 9) will be;

- Chief Justice, as Chair;
- Two nominees of the Judicial Council, one having been a practising solicitor and one having been a practising barrister;
- The president of the court in respect of which the Commission is to recommend persons for appointment;
- Four lay members, three of which are to be selected by open competition by the Public Appointments Service (PAS), and one of which will be nominated by the Irish Human Rights and Equality Commission; and
- The Attorney General, in an ex-officio non-voting capacity.

18. The Scheme provides that PAS may initiate the process of recruitment of the lay members in the period prior to the commencement of the relevant section. (Head 10).

19. The Scheme ensures that all applications, including from serving judges seeking promotion, must be made in writing to the Commission (Heads 42 and 43). Under the Scheme, the Commission will assess and deal with applications from serving judges and develop appropriate procedures for their assessment.

20. The Minister will receive 5 unranked recommendations for each vacancy; 8 recommendations in instances where there are two vacancies; and 11 recommendations where there are three vacancies. The Minister will also receive the names of all persons who applied. (Heads 44 & 45)
21. The Scheme provides for a Senior Judicial Appointments Advisory Committee (Head 48). This Committee will be composed of the Chief Justice, 1 lay member and the Attorney General and will recommend persons for appointment to the positions of Chief Justice, President of the Court of Appeal and President of the High Court. The Scheme provides for the Chief Justice to be substituted in instances where the vacancy concerned is that of the Chief Justice. Any decision of this committee must be unanimous. Appointments as President of the Circuit Court and President of the District Court will be filled through the Commission recommendation process, as with all other posts.
22. Provision is also made for a dedicated support office headed by a Director and a small number of support staff. A new Commission is a significant organisational development and its remit will be significantly expanded compared to the JAAB. The Scheme also provides for the appointment of an interim Director by the Minister in order to facilitate early establishment of the Commission (Heads 33, 34, 35 and 36).
23. This submission will now go on to consider the key principles that should guide the considerations of the legislature when reforming the judicial appointments process and will analyse the proposals contained within the Scheme from a human rights perspective.

Independence of the judiciary and International Human Rights Standards

24. The independence of the judiciary is a core element of any democracy and is essential in upholding the rule of law. Importantly, the right to a fair trial as guaranteed by Article 38.1 of the Irish Constitution, Article 6 of the ECHR, Article 47 of the Charter of Fundamental Rights and Article 14(1) of the International

Covenant on Civil and Political Rights is contingent on trials being conducted by an independent and impartial judiciary.

25. The UN Basic Principles on the Independence of the Judiciary states “*The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.*”⁵ Similarly, the separation of powers, as guaranteed by the Irish Constitution, has been found to be an essential component of an independent tribunal for the purposes of Article 6 of the ECHR.⁶ It has been described by the International Commission of Jurists as being “*a necessary condition for the fair administration of justice as well as intrinsic to the rule of law.*”⁷
26. The manner in which judges are appointed and promoted is inextricably linked to the independence of the judiciary. The UN Human Rights Committee has observed that the absence of an independent process of appointment for the judiciary limits their ability to perform their functions independently.⁸ Similarly, the ECtHR has found that the process by which judges are appointed is a relevant consideration when assessing both the actual independence of the judiciary and the appearance of their independence.⁹
27. It is clear from the above analysis that (i) independence of the judiciary is essential to the protection of the rule of law, (ii) the separation of powers is an essential component of this independence and (iii) the process of appointment and promotion of the judicial necessarily impacts on this independence, both in terms of actual independence and the appearance of independence. These principles should be to the fore when consideration is given to the reform of the judicial appointments process.

⁵ 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.

⁶ See *Chevrol v. France*, ECtHR judgment of 13 February 2003, Series 2003-III [76].

⁷ International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors – International Commission of Jurists, 2007, 20.

⁸ Concluding Observations of the Human Rights Committee on the Congo, UN document CCPR/C/79/Add.118, [14].

⁹ *Incal v Turkey* (2000) 29 EHRR 449 [65].

28. Although there are a wealth of conventions, treaties and cases which outline important considerations in judicial appointments, there is no one standard process for these appointments which must be implemented to meet the requirements of independence and impartiality of the judiciary. Instead, there are some general principles derived from these sources which should guide the drafters of the new appointment process.
29. Principle 10 of the UN Basic Principles on the Independence of the Judiciary states:
“Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives.” Principle 9 of the Universal Charter of the Judge states: *“The selection and each appointment of a judge must be carried out according to objective and transparent criteria based on proper professional qualification.”*¹⁰
30. The Council of Europe has recommended that *“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.”*¹¹ The use of the term “career” here should be noted and will be considered further below.
31. The International Commission of Jurists have commented that without a clear and objective process of appointment for the judiciary, the judiciary *“runs the risk of not complying with its core function: imparting justice independently and impartially. Therefore, clear selection criteria based on merit are an essential guarantee of independence.”*¹²

¹⁰ The Universal Charter of the Judge was approved by the International Association of Judges on 17 November 1999.

¹¹ Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges adopted by the Committee of Ministers on 13 October 1994 at the 518th meeting of the Ministers' Deputies.

¹² International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors – International Commission of Jurists, 2007, 41.

32. Judges should be appointed on the basis of objective criteria which are transparent and meritorious in nature. There is also authority for the proposition that appointments should be made independent of the government. The UN Human Rights Committee has observed that judges should be nominated for appointment on the basis of their competence and not on the basis of their political affiliations.¹³ Further, the Council of Europe has recommended that “[*the*] authority taking the decision on the selection and career of judges should be independent of the government and the administration.”¹⁴ The use of the term “career” is again noted.
33. Guidance on the actual mechanism of appointment can be found in a variety of doctrines, such as principle 1.3 of the European Charter on the Statute for Judges which states: “*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.*”
34. The Council of Europe have also supported a process of appointment by an independent body with judicial representation and have recommended that “*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.*”¹⁵ The recommendation goes on to say that “*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.*”¹⁶

¹³ Concluding Observations of the Human Rights Committee on Bolivia, UN document CCPR/C/79/Add.74 [34].

¹⁴ Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges adopted by the Committee of Ministers on 13 October 1994 at the 518th meeting of the Ministers’ Deputies, principle 1.2.

¹⁵ Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges adopted by the Committee of Ministers on 13 October 1994 at the 518th meeting of the Ministers’ Deputies, principle 1.2.

¹⁶ *Ibid.*

35. Article 9 of the Universal Charter of the Judge also states that judicial selection “*should be carried out by an independent body, that include substantial judicial representation*”.¹⁷
36. A final matter for consideration when implementing a new process for appointments in the Irish system is the process for “promotion” or elevation. Particularly in Ireland, research shows that a high number of vacancies in the Superior Courts are filled by way of elevation of existing member of the judiciary.¹⁸ At present, the system of elevation in Ireland is entirely lacking in transparency with the informal “expressions of interest” procedure lacking any independent scrutiny.
37. The same principles which relate to appointment apply equally to elevation or promotion of existing judges. As noted above, in a number of the treaties governing judicial appointments reference is made to the “career” or promotion of the judiciary. Further, when discussing the necessity for the application of objective criteria in the appointment process for judges, the International Commission of Jurists goes on to comment that “[*as*] the appointment of a judge is part of his or her career, this recommendation refers to both a judge’s initial entry into the judicial career as well as to any subsequent promotion.”¹⁹ Further, principle 13 of the UN Basic Principles states “*Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.*”²⁰

Summary of Key Principles in Appointment Processes

¹⁷ *Ibid.*

¹⁸ For instance, in Carroll McNeill’s text she outlines that between 2002 and 2014 26% of High Court vacancies and a staggering 91% of Supreme Court vacancies were filled by way of elevation of existing members of the judiciary. *Ibid.*, 100.

¹⁹ International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors – International Commission of Jurists, 2007, 42.

²⁰ *Ibid.*

38. The key principles stemming from international standards to be considered when considering the process of appointment of the judiciary can be summarised as follows:

- The appointment process should be transparent;
- Objective criteria should be applied and applicants should be assessed on the basis of merit with emphasis on their legal ability, integrity and qualifications;
- Political affiliations should not have a bearing on applications for appointment;
- The appointment process should be separate from the government;
- The appointment process should be conducted by an independent body with substantial representation from the judiciary;
- The judicial representatives who form part of this independent body should be elected by their peers.

Applying international standards to the proposed Judicial Appointments Commission Scheme

39. The Scheme proposes a move towards a more transparent and formalised process of appointment for the Irish judiciary. The introduction of formalised procedures and objective criteria are in line with international standards. This is met in particular by the establishment of a Procedures Committee to prepare and publish selection procedures, requisite skills and other criteria to be considered for appointment, including consideration of diversity and representation. The inclusion of sitting judges in a formalised process of appointment is also welcomed and aligns with the best practice procedures outlined in many of the international instruments.

40. Despite this, there are a number of proposals within the Scheme which are a cause for concern and fail to meet best practice as outlined above.

(i) Judicial members of the Commission

41. The Scheme proposes the introduction of a body known as the Judicial Appointments Commission, which will be responsible for making

recommendations to the government to fill judicial vacancies. The proposed 9-person membership of the Commission is to include the Chief Justice as Chair, two nominees of the Judicial Council (one former barrister and one former solicitor), the President of the Court in which the vacancy arises, four lay members selected by the Public Appointments Service and the Attorney General in a non-voting capacity.

42. Although there are representatives from the judiciary, these representatives constitute the Chief Justice, two members of the Judicial Council and the President of the relevant court. Best practice by international standards requires that the judiciary involved in the appointment process be selected by their peers. It is not clear how the two members who are drawn from the Judicial Council will be selected.
43. International standards also suggest that there should be ‘substantial representation’ from the judiciary with the European Charter on the Statute for Judges stating that within the independent body responsible for the appointment of judges “*at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.*”²¹

Recommendation

44. ICCL recommends that the judicial members of the Commission should constitute “at least one half” of members of the Judicial Appointments Commission, in line with the European Charter on the Statute of Judges. We note that the current proposal is that the judicial members would constitute one half of the voting members of the Commission.
45. ICCL recommends that all judicial members of the Commission should be chosen through election by their peers, as recommended by the European Charter on the Statute of Judges and other instruments.²² In particular, we recommend that instead of the President of each Court automatically forming part of the

²¹ Principle 1.3

²² See article 9 of the Universal Charter of the Judge and Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges adopted by the Committee of Ministers on 13 October 1994 at the 518th meeting of the Ministers’ Deputies, principle 1.2..

appointment process, each Court should vote as to which member of their Court represents that Court during the appointment process.

(i) The composition of the Senior Judicial Appointments Advisory Committee

46. The Scheme in its current form creates a separate committee for the appointment of the Chief Justice and the Presidents of the Court of Appeal and the High Court. This separate committee is only composed of three members, those being the Attorney General, the Chief Justice and one lay member. This is not in line with international standards on judicial appointments, as outlined above. We make two recommendations in respect of this separate scheme of appointment.
47. First, the purpose of the new appointment process should be to create an independent appointment system based on objective meritorious criteria such as experience and legal qualifications. In order for the system to operate independently it must be non-political. The role of Attorney General is inevitably a political one. Allowing the Attorney General to have a third of the voting power on the most important appointments in the Courts system interferes with the separation of the appointments system from the political system, thereby risking the separation of powers and the independence of the judiciary.
48. Second, there is no clear reasoning underpinning the proposal to have a separate committee for these three senior appointments. Judicial appointment systems should be independent and should inspire confidence in the rule of law and the legal system as a whole; this is most important for the three most senior roles within this system. The proposal to differentiate these appointments from other judicial vacancies gives the appearance of a lack of independence with regard to these appointments. As discussed in a previous section of this submission, the importance of independence in the appointment of the judiciary extends not just to actual independence but also to the appearance of independence.

Recommendation

49. ICCL recommends that the appointment of all members of the judiciary should follow the same transparent, objective appointment process.

(ii) Number of recommendations and reasons from the JAC

50. The Scheme in its current form requires that the Commission send forward 5 unranked recommendations for each vacancy, with 8 recommendations in instances where there are two vacancies and 11 recommendations where there are three vacancies. It is recommended that this number be reduced so as to reduce the level of the discretion afforded to the Government when making appointments. It is clear from previous discussion in this submission that the best practice for an independent appointment system is to have an independent body assess candidates on the basis of objective criteria in a transparent manner.

51. The benefits of the Commission carrying out such a system of assessment are detrimentally impacted in circumstances where such a high level of discretion is afforded to the Government to make the final decision on appointment. It is recommended that the number of candidates sent forward by the Commission be reduced from 5 to 3 for one vacancy, from 8 to 5 for two vacancies and from 11 to 8 for three vacancies. This will limit the degree of political influence that can be exercised in making judicial appointments.

52. These recommendations should also be ranked for the purposes of transparency. Where the Government chooses to appoint a candidate who is not the most highly ranked candidate recommended by the Commission, the Government, specifically the Minister for Justice, should be required to communicate written reasons to the Commission outlining the rationale behind the decision to diverge from the recommendations of the Commission. This will ensure transparency, accountability and also assist in ensuring that independence remains a key principle in the appointments system.

Recommendation

53. ICCL recommends that the number of candidates sent forward by the Commission be reduced from 5 to 3 for one vacancy, from 8 to 5 for two vacancies and from 11 to 8 for three vacancies.

(iii) Qualifications of the Circuit and District Court judiciary

54. Head 40(3) of the Scheme states:

“(3) In the case of an appointment to the office of ordinary judge of the Supreme Court, the Court of Appeal or High Court, the Commission shall not recommend the name of a person to the Minister unless, in the opinion of the Commission the person has— i. an appropriate knowledge of the decisions, and ii. an appropriate knowledge and appropriate experience of the practice and procedure, of the Supreme Court, the Court of Appeal and the High Court.”

55. In effect, Judges applying to vacancies in the High Court, Court of Appeal and Supreme Court must have demonstrable knowledge of the procedures of these courts. There is no similar requirement for the appointment of judges to the District Court and Circuit Court. In the most recent Courts Services report²³, statistics for year end 2019 compared the number of incoming cases in each of the Courts:

District Court	Circuit Court	High Court	Court of Appeal	Supreme Court
144,485	50,723	36,701	685	364

These statistics show that users of the Courts system are almost 400 times more likely to use the District Court than the Supreme Court.

56. In Carroll McNeill’s text on Politics on Judicial Selection, she states that political appointments are most common in the District Court.²⁴

²³ Courts Service Annual Report 2019, <https://www.courts.ie/acc/alfresco/9bd89c8a-3187-44c3-a2e9-ff0855e69cb5/CourtsServiceAnnualReport2019.pdf/pdf>

²⁴ *Ibid*, 138 – 140.

Recommendation

57. The ICCL recommends that the judges of the District and Circuit courts are as important as the judges of the Superior Courts and the disparity in requirements for the appointment of members to these courts is not justified. Knowledge of the procedure of the Court to which the applicant seeks to be appointed should be a basic requirement and will instil confidence in the public as to the competence of the judiciary in the Courts which most frequently interact with members of the public. Ensuring the same focus on merit is applied to the District and Circuit courts will also ensure these appointments are not influenced by extraneous factors, such as political affiliation. It is recommended that the appropriate knowledge requirement set out in Head 40(3) of the Scheme apply equally to applicants to posts in the District and Circuit Court.

Summary of ICCL Recommendations

- 1) *The voting Judicial Membership of the Commission should be maintained as half the Commission.*
- 2) *The nominees of the Judicial Council should be selected by way of a vote by the Council and should include representatives from both the barrister and solicitor profession.*
- 3) *The representative on the Commission who is a member of the Court in which the vacancy arises should be elected by her or his fellow judges rather than automatically falling to the President of the Court.*
- 4) *The number of candidates sent forward by the Commission should be reduced to 3 recommendations for one vacancy, 5 recommendations for two vacancies and 8 recommendations for three vacancies, to reduce governmental discretion in the choice of candidate.*
- 5) *Recommendations from the Commission on the appointment should be ranked and reasons should be given to the Commission if the Government chooses to diverge from these recommendations.*
- 6) *All judges, including the Chief Justice and the Presidents of all Courts, should be appointed by the same body and procedure as other judicial appointments.*

There should not be a separate appointments process for the Chief Justice and Presidents of the High Court and Court of Appeal.

- 7) All appointments should take into account the fundamental importance of ensuring diversity and appropriate representation in the judiciary.*
- 8) The knowledge requirements proposed for judges of the Superior Courts should also be required of judges of the District and Circuit Court.*