Towards Best Practice: A report on the new Judicial Council in Ireland

Irish Council for Civil Liberties

IRISH RESEARCH COUNCIL
An Chomhairle um Thaighde in Éirinn

Towards Best Practice: A report on the new Judicial Council in Ireland

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Executive Summary

Although Ireland has been regarded as having a robustly independent judiciary, it has lagged behind international standards in the development of judicial education and training and judicial conduct. The Judicial Council Act 2019 is a major step forward in this regard. This report assesses the implementation of the Act two years on and discusses two seminars jointly convened by the Schools of Law at NUI Galway, the University of Limerick, and the Irish Council for Civil Liberties. It builds on ICCL's 2007 report, 'Justice Matters'.

The right to a fair trial demands independence and impartiality. International standards in protecting these values are set out in the Bangalore Principles of Judicial Conduct and other documents. Social context is becoming an increasingly important part of judicial education and training. The Measures for Effective Implementation of the Bangalore Principles require a 'Formulation of a Statement of Principles of Judicial Conduct'. The draft guidelines on judicial conduct under consideration by the Judicial Council should enable Ireland to meet this requirement.

A judicial council for Ireland was first proposed in 1996 and legislation to create it was finally passed in 2019. Its various committees – Judicial Studies Committee, a Personal Injuries Guidelines Committee, a Sentencing Guidelines and Information Committee, Judicial Support Committees, and a Judicial Conduct Committee – have been established. A Director of Judicial Studies has been appointed. Judicial conduct guidelines should be adopted by the Council in 2022. The Personal Injuries Guidelines Committee has completed its work, and guidelines were adopted by the Council in March 2021. Research on sentencing data collection methodologies has been commissioned.

Judicial education and training (JET) in Ireland was not mandatory until 1995. The Judicial Council Act 2019 creates an obligation for the Council to provide judicial training and puts it on a more developed statutory basis. Some activities and training topics are suggested, but are not mandatory.

A complaint against a judge is first dealt with the Registrar, who decides whether or not the conduct complained of could constitute misconduct. If so, it will be reviewed by the Complaints Review Committee. The judge can consent to a reprimand or the matter may be referred for resolution by informal means (which is procedurally vague) or by a panel inquiry. The panel can investigate and conduct hearings, and then makes a written report, including recommendations, to the Judicial Complaints Committee, which makes a determination which can include a reprimand, advising on a course of action, or issuing an admonishment. It can also refer the complaint to the Minister for Justice in order that a motion for the removal of the judge be considered by the Oireachtas.

Academic literature over the last sixty years has gradually witnessed an increasing recognition of the significance of judicial education and training. International principles have been developed, including by the European Judicial Training Network and the International Organisation for Judicial Training. Best practice recommends training needs assessments and evaluations, judge-led and judge-delivered training (including 'training the trainers'), interactive and skills-focused sessions, and the inclusion of social context.

Academic literature on judicial conduct and ethics highlights the importance of balancing accountability and independence, the need for procedural safeguards, and the development of clear codes of conduct, including definitions of misconduct.

In the online seminar on judicial education and training,

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key issues included the importance of skills-based learning, the need to address bias and prejudice, and the challenges of emotion and well-being in the courtroom. The time required to undertake training and therefore the need for adequate judicial resources was also a focus.

In the online seminar on judicial conduct and ethics, the main themes included the need to take a holistic approach, encompassing education and training and judicial welfare, which would proactively seek to reduce the risk of bad behaviour by judges; the need for clarity on misconduct and the resulting sanctions; and the risk that informal procedures would leave complainants without transparency and judges under the shadow of a seeming cover-up.

The JUDICIAL STUDIES COMMITTEE should ensure that its training programmes include material on

•	interpersonal and communications skills, including the use of clear and plain language;
•	the broader social context;
•	unconscious bias and diversity for judges;
•	specific human rights topics;
•	EU, Council of Europe and UN human rights instruments; and
•	the issues raised by vulnerable witnesses, which has already been identified as a priority.

The JUDICIAL STUDIES COMMITTEE should also consider

•	widening the needs based assessments for JET to groups outside of the judiciary, as recommended by the international experience; and
•	engaging external reviewers on a regular basis, such as every five years.

The JUDICIAL COMPLAINTS COMMITTEE should ensure that

•	there is clarity on informal resolution and what it entails;
•	there is clarity on sanctions and reprimands, particularly admonishments, and what exactly they will involve;
•	the names of judges who consent to a reprimand are published in the Council's Annual Report;
•	it provides guidance on when the Council will regard misconduct to be so serious as to amount to stated misbehaviour; and
•	it provides sample transgressions and potential consequences, in the Guide to Judicial Conduct and Ethics, following the OSCE recommendations;.

The JUDICIAL CONDUCT COMMITTEE when finalising the Code of Ethics and Conduct should consider including requirements that judges should:

•	be aware of the diversity of society and differences linked with background;
•	by words or conduct, a judge should not manifest bias towards persons or groups on the grounds of their racial or other origin;
•	carry out their duties with appropriate consideration for all persons such as parties, witnesses, lawyers, court staff and their colleagues, without unjustified differentiation; and
•	oppose the manifestation of prejudice by the persons under their direction and by lawyers or their adoption of discriminatory behaviour towards a person or group on the basis of their colour, racial, national, religious or sexual origin, or on other irrelevant grounds.

The OIREACHTAS should

•	provide a precise process for when a removal motion is proposed; and
•	ensure that the Judicial Appointments Commission Bill gives due weight to the appropriate characteristics of a good judicial candidate in the context of the selection of candidates for the bench, as clarity and detail on the desired personality and temperament may reduce future complaints regarding judicial misconduct.

The GOVERNMENT, in its role in resource allocation, should ensure there is

•	sufficient time available for judges to attend training courses, by appointing an adequate number to the bench; and
•	adequate financial resourcing for the Judicial Council to staff its training function and to engage external experts as necessary.

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INTRODUCTION

TOWARDS BEST PRACTICE:
A REPORT ON THE NEW JUDICIAL COUNCIL IN IRELAND

Irish Council for **Civil Liberties**

1. Introduction

Ireland has long been regarded as having a robustly independent judiciary. However, we have lagged behind international standards on judicial structures and systems that would both guarantee and be perceived to guarantee the maintenance of both an independent and impartial judiciary. With the passing of the Judicial Council Act 2019, Ireland took a significant step forward towards meeting international best practice. The Act mandated a Judicial Council, which would be responsible for drafting a Code of Ethics, devising fair disciplinary and complaints proceedings for judges and developing a professional and modern judicial education and training programme.

With funding from the Irish Research Council, a joint team from the Schools of Law in NUI Galway and the University of Limerick and the Irish Council for Civil Liberties embarked on a project to assess the implementation of the elements of the Act that deal with judicial education and conduct two years on. In late 2021, we organised two seminars to engage practitioners, academics and other stakeholders in expert discussions about what modern standards on both judicial education and training and judicial conduct and ethics look like and whether work so far by the Judicial Council was on track to meet them. This report reflects the research underpinning the seminars as well as the presentations and discussions contained in both sessions. The report builds on a 2007 report by the Irish Council for Civil Liberties, 'Justice Matters' and makes recommendations to ensure the current judicial reform process remains in line with international best practice.

1.1 Judicial Education and Training — International Standards

The right to a fair trial, as contained in the Irish Constitution, the European Convention on Human Rights, and the International Covenant on Civil and Political Rights requires both independence and impartiality to be guaranteed in the delivery of justice. Beyond the fair trial requirement of an independent and impartial tribunal, human rights law also imposes a positive obligation on the judiciary to treat people equally before the law and to combat discrimination, including in the way they exercise their personal judgment.

The European Court of Human Rights has defined impartiality as 'an absence of prejudice or bias' and has distinguished between subjective impartiality, which relates to personal conviction, and objective impartiality which means giving sufficiently clear guarantees of impartiality to avoid doubt.[1] Legal scholars have referred to the notion of corporate bias, whereby, because of their background, judges may be influenced by a particular outlook on life and a similar value system.[2] The potential for different types of bias translates to a need for training for the judiciary that includes 'social context' and diversity. This has been recognised by numerous international and regional bodies, as well as judicial training programmes in other jurisdictions.

Key instruments outlining international standards on education and training include the Bangalore Principles of Judicial Conduct (the Bangalore Principles) from 2002. These Principles state that judges are required to take 'reasonable steps' to maintain and enhance the 'knowledge, skills and personal qualities necessary for the proper performance of judicial duties' through available training and other supports.[3] This includes an obligation to keep apprised of relevant developments in international law and other instruments establishing human rights norms. In other words, continuous training is necessary. This is an area where Ireland has fallen short, given that a Council of Europe Report on efficiency of justice in European Judicial Systems from 2018 notes that Ireland is one of only three States that did not, at the time, provide continuous training.[4]

The Bangalore Principles are clear that '[e]nsuring

1 *Piersack v Belgium* (1983) 5 EHRR 169 at para 30.
2 See eg JAG Griffith, *The Politics of the Judiciary* (Fontana Press 2001). See further Tanya Ward, *Justice Matters* (ICCL 2007).
3 Bangalore Principles on Judicial Conduct, Principle 6.3.
4 European Commission for the Efficiency of Justice, 'European Judicial Systems Edition 2020 (date 2018): Efficiency and Quality of Justice' (Council of Europe, 2018), 99. The other two countries were Spain and Malta.

equality of treatment to all before the courts is essential to the due performance of the judicial office.' In order to make this a reality, '[a], judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes.'

A follow up instrument to the Bangalore Principles elaborated by international experts called 'Measures for effective implementation of Bangalore Principles' goes further by stating that: 'The training of judicial officers should be pluralist in outlook in order to guarantee and strengthen the open-mindedness of the judge and the impartiality of the judiciary.' The Latimer House Guidelines (developed at Commonwealth level) provide that, 'Judicial training should include the teaching of the law, judicial skills and the social context, including ethnic and gender issues.' The European Charter on the Statute for Judges indicates that judges need to maintain and broaden their knowledge in order to perform their duties 'through regular access to training which the State pays for' and requires training programmes that address 'the requirements of open-mindedness, competence and impartiality which are bound up with the exercise of judicial duties.'

In the EU, the need to expand training beyond legal skills has been recognised. In 'Ensuring justice in the EU — a European judicial training strategy for 2021-2024', the Commission states the need to promote a common rule of law culture, uphold fundamental rights, upscale the digitalisation of justice and go beyond legal education and support the development of professional skills. Unconscious bias is listed as a 'necessary component of practitioners' training beyond EU law' and the need for training on 'communication with and support for victims' is clearly identified. The strategy further identifies the need for specialised training on the rights of children, the rights of people with disabilities and the need for the adaptation of justice systems to these groups, the specific challenges faced by victims of gender-based violence, and equality and non-discrimination.[5]

Training for the judiciary across the EU is offered on these topics by the European Judicial Training Network (EJTN). In 2021, this network delivered training on human rights, freedom of expression and hate speech, and freedom of speech in the digital era. These are cutting edge human rights issues that the courts will presumably be called upon to rule on increasingly in the coming years, underlining the importance of training in these areas of human rights law.

'Social context' is a core curriculum area in many jurisdictions. For example, a report published in 2006 found that United States, Canada, France, Germany, Spain, the Netherlands, Austria, Denmark, Portugal, Finland, Italy and Australia all had social context courses for judges which include 'subjects related to the potential for gender, race, age and disability discrimination in the legal process'.[6] The National Judicial Orientation Program in Australia includes gender training; New Zealand offers training for the judiciary on disability and disadvantage; and in Canada social context training for the judiciary includes systemic racism and systemic discrimination.

It should be noted that the European Convention on Human Rights Act 2003 requires human rights training for the judiciary, as section 2(1) requires Irish courts when interpreting and applying any statutory provision or rule of law, to do so "in a manner compatible with the State's obligations under the Convention provisions" and section 4 requires judges to take notice of Convention provisions and jurisprudence from the European Court of Human Rights and the European Commission of Human Rights, together with any decision from the Committee of Ministers.

We very much welcome the new obligation for the Judicial Council to provide more developed judicial education and training, including the 'continuing education of judges'. The creation of the Judicial Studies Committee (JSC), which is 'to facilitate the continuing education and training of judges with regard to their functions' is also a welcome development. The Act provides a list of topics that may be included in future judicial training. It is very welcome to see that human rights and equality law are included in this list, but we would recommend broader recognition of the need for 'social context' and 'diversity' training to fully reflect international best practice from a human rights perspective. The International Organisation for Judicial Training recognises this clearly, stating:

[5] European Commission, Ensuring Justice in the EU — a European Judicial Training Strategy for 2021-2024, (2020).

[6] Cheryl Thomas, 'Review of Judicial Training and Education in Other Jurisdictions Report', May 2006, 13, available at <https://www.ucl.ac.uk/judicial-institute/sites/judicial-institute/files/judicial_training_and_education_in_other_jurisdictions.pdf> accessed 5 November 2021.

It is also critical to acknowledge that the law and legal principles do not exist in a vacuum. Judges operate publicly within society, and interact on a day-to-day basis with other human beings—litigants, witnesses, and legal representatives. Judicial training should therefore not be limited to addressing principles of law.[7]

1.2 Code of Conduct and Ethics — International Standards

A key recommendation in ICCL's 2007 Justice Matters report was for the Irish judiciary to elaborate a code of conduct and a corresponding judge led disciplinary process. This is in line with international best practice standards. For example, principle 19 of the UN Basic Principles on the Independence of the Judiciary state that: 'All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.' Principle 8 refers to an ongoing duty of judges in relation to their conduct: 'members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.'

The first principle in part one of the Measures for Effective Implementation of the Bangalore Principles requires a 'Formulation of a Statement of Principles of Judicial Conduct'. This underlines the importance of such a document. Key issues addressed by this instrument include the fact that the judiciary must be involved in drafting the Code; the rights of the judges must be upheld; disciplinary proceedings must be underpinned by fair procedures; sanctions must be proportionate and concepts such as misconduct must be clearly defined.

The establishment of some sort of disciplinary body was one of the main motivations behind the Judicial Council Act.[8] According to the Act, the function of the Judicial Conduct Committee (JCC) is to 'promote and maintain high standards of conduct among judges, having regards to the principles of judicial conduct requiring judges to uphold and exemplify judicial independence, impartiality, integrity, propriety (including the appearance of propriety), competence and diligence and to ensure equality of treatment to all persons before the courts.'[9]

Draft guidelines on judicial conduct and ethics have now been elaborated in Ireland, awaiting final adoption by the Judicial Council (expected in June 2022). The Judicial Council has committed to implementing an Informal Resolution Process and a Procedure for Making Complaints but the timeline for completion is, at time of writing, unclear. We recommend that the Judicial Council consider issuing practical guidance for interpreting the Code to make it clear and accessible to judges, decision makers and the public. In addition, the Judicial Complaints Committee should provide sample transgressions and potential consequences in the Guide to Judicial Conduct and Ethics.

In one of the seminars we held, a practitioner questioned whether the requirement to develop a code of conduct and a disciplinary process could represent an interference with the independence of the judiciary. In fact, the motivation behind the requirement is to ensure that no other authority, such as members of the executive, can interfere with judicial disciplinary proceedings, perhaps for political reasons. Therefore, mandating a judge-led process of elaborating a code and corresponding disciplinary process is a means of enhancing the independence of the judiciary, both in terms of ensuring the judiciary themselves are in charge of disciplinary proceedings and in terms of showing the public that judges too will be held accountable for any wrongdoing.

The Special Rapporteur on the Independence of Judges and Lawyers drew this connection clearly in her report to the UN Human Rights Council in 2014, where she said:

The principle of the independence of the judiciary is not aimed at benefitting judges themselves, but at protecting individuals from abuses of power and ensuring that court users are given a fair and impartial hearing. As a consequence, judges cannot act arbitrarily by deciding cases according to their own personal preferences. Their duty is the fair and impartial application of the law. Judges must therefore be accountable for their actions and conduct, so that the public can have full confidence in the ability of the judiciary to carry out its functions independently and impartially.[10]

[7] International Organisation for Judicial Training Principles, 'Declaration of Judicial Training Principles' 10.

[8] See the Regulatory Impact Analysis for the 2017 Bill, at <http://www.justice.ie/en/JELR/Judicial_Council_Bill_2017_RIA.pdf/Files/Judicial_Council_Bill_2017_RIA.pdf> accessed 3 November 2021.

[9] S 43(2).

[10] A/HRC/26/32, April 2014, 9.

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THE JUDICIAL COUNCIL

TOWARDS BEST PRACTICE:
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Irish Council for **Civil Liberties**

2. The Judicial Council

2.1 Background to the Establishment of the Council

The Judicial Council Act was finally published in July 2019, almost 20 years after it was first proposed. The origins of the proposal go back further still. In 1996, the Constitution Review Group had recommended amending Article 35 of the Constitution in order to provide for a Judicial Council which would regulate judicial conduct.[11] The Fourth Progress Report of the All-Party Oireachtas Committee on the Constitution, published in 1999, also recommended the establishment of a council to regulate the conduct of judges, which would comprise judges, retired judges and also a lay element.[12] Similar recommendations were made in further reports such as the Sixth Report of the Working Group on a Courts Commission (the Denham Report)[13] and the Report of the Committee on Judicial Conduct and Ethics (the Keane Report).[14] These two latter reports form the original basis of the Act. The Keane Report was a detailed response to the Denham Report and as a result, the Government brought forward a proposal which sought to amend the Constitution in order to establish a judicial council.[15] That particular bill was not well-drafted and consequently, the proposal was dropped.[16] In 2007, the Irish Council for Civil Liberties produced a further report making similar recommendations[17] and subsequently, draft legislation was prepared and a scheme of a bill was published to give effect to the Keane Report in August 2010. From 2011 to 2015 the Bill featured in successive iterations of the Government's Legislative Programme and while it appeared to drop off the radar in 2016,[18] the Bill was finally initiated in 2017. The 2019 Act is the final product of that journey.

Two major scandals (along with a number of less serious incidents)[19] involving judicial misconduct occurred in the period between the first proposals for a judicial council and the publication of the Act. The Sheedy Affair,[20] (in which Chief Justice Hamilton concluded that two judges had compromised the administration of justice in dealing with the review of a case involving dangerous driving causing death), and the Curtin Case,[21] (in which a judge was acquitted of possession of child pornography but was subject to an unsuccessful impeachment motion before the Oireachtas which did not conclude before he took early retirement), both rocked public confidence in the administration of justice. In 2016, in calling for urgent action on the establishment of the council, the Chief Justice at the time, Susan Denham cited a fear for Ireland's reputation as a major concern.[22] The Council of Europe's 2014 GRECO Report on 'Corruption prevention in respect of members of parliament,

11 *Report of the Constitution Review Group* (Dublin Stationary Office, 1996).

12 *Fourth Progress Report: The Courts and the Judiciary*, The All-Party Oireachtas Committee on the Constitution (Dublin Stationery Office, 1999).

13 This Group was established by the Minister for Justice Nora Owen in 1996 and was published in 1998, see *Working Group on a Courts Commission Conclusion* 1998, available at <https://www.courts.ie/acc/alfresco/e5c33f6d-5c57-4bf0-b586-92c66746ff29/6th%20Report%20WGCC%20conclusion.pdf/pdf#view=fitH> accessed 8 November 2021. Unlike the Fourth Progress Report, this Report (which was published first) has no mention of lay involvement, and suggested the body be set up on a non-statutory basis.

14 *Report of the Committee on Judicial Conduct and Ethics*. (Dublin Stationery Office, 2000).

15 Twenty-Second Amendment to the Constitution Bill.

16 For more on this, see Laura Cahillane, 'Ireland's System for Disciplining and Removing Judges' (2015) 38(1) Dublin University Law Journal 55.

17 Irish Council for Civil Liberties (2007) *Justice Matters: Independence, Accountability and the Irish Judiciary* available at <https://www.iccl.ie/archive/justice-matters-independence-accountability-and-the-irish-judiciary-parts-1-and-2-july-2007-2/> accessed 8 November 2021.

18 The Programme for a Partnership Government published in May 2016 did not contain provision for a Judicial Council Bill, although it had been included in an earlier discussion draft. In June 2016, when the Office of the Government Chief Whip published its 'Legislation programme Current Session', the Bill was listed under 'All Other Legislation', a list described as 'long-term' plans.

19 Arguably the Heather Perrin case from 2012 was also a significant scandal although the fact that the conduct occurred before her appointment to the bench and the fact that the judge resigned once the detail emerged meant the story did not have much time to gather momentum. For details, see Fiona Gartland, 'Former judge Heather Perrin found guilty of misconduct' *The Irish Times* (Dublin, 17 Oct 2013). There are other examples of less serious incidents although most are not known publicly. For one case of potential judicial interference which was publicised, see Ruadhán MacCormaic, 'Judge should not have raised family law case, inquiry finds' *The Irish Time*s (Dublin, 5 November 2013).

20 For details see John O'Dowd, 'The Sheedy Affair' (2000) 3 Contemporary Issues in Irish Law & Politics 103.

21 For details see Laura Cahillane, 'Judicial Discipline: Where do we Stand? A Consideration of the Curtin Case' (2009) 27 Irish Law Times 26.

22 See for example the statement by the Chief Justice marking the beginning of the new legal year, September 2016 available at https://scoirl.files.wordpress.com/2016/09/a-vacum_-statement-by-chief-justice-denham.pdf Last accessed 12 November 2019.

judges and prosecutors' had criticised Ireland for its failure to establish a council and its 2017 compliance report also criticised Ireland for its low levels of compliance with the recommendations.[23] Given that there was such support and detailed reform proposals already in place, it is difficult to understand why it has taken so long to get to this point.

2.2 Establishment and Progress to Date

The Act provides for the establishment of the Judicial Council, which is intended to be the over-arching body comprising all of the judges in Ireland. It is a body corporate with perpetual succession and an official seal.[24] The Council was officially established in December 2019 and held its first meeting in February 2020. All of the committees specified in the Act have been established and have begun work. The Council produced an annual report in July 2021, which provided information on its work to date.[25]

On judicial education and training (JET), Ms. Justice Mary Rose Gearty of the High Court has been appointed as Director of Judicial Studies and a detailed workplan is under development. A training needs analysis has been conducted, an induction programme has been developed and provided to new judges, and mentoring training has been delivered, with mentoring to be provided from 2021 on. Implementing the recommendations of the 'Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences' is a priority, and consideration is being given to the digitisation of training.[26]

On judicial conduct and ethics (JCE), the Judicial Conduct Committee (JCC) was established on 30 June 2020 after the five laypersons were appointed following recommendations from the Public Appointments Commission. According to the annual report of the Council, the JCC met for the first time in July 2020 and following its second meeting in September, three subcommittees were formed, each focused on dealing with a distinct element of the conduct regime. The first subcommittee focused on drafting guidelines on judicial conduct and ethics including guidance on recusal. The second subcommittee looked at procedures for resolution of complaints by informal means. The third subcommittee considered and drafted complaints procedures, although after some time it became apparent that there was such overlap between the second and third areas that these were amalgamated. The first subcommittee has produced a set of guidelines based on international models. These have been adopted by the JCC and they are currently before the Board of the Council. The next step will be to finalise the guidelines and it is expected that these will be adopted by the Council early next year.[27]

2.3 Powers and Functions of the Council

The functions of the Council include promoting and maintaining high standards of conduct among judges, the effective and efficient use of resources made available to judges, continuing education of judges, respect for and public confidence in the judiciary and the administration of justice.[28] Under the Act, the Council has the power to: develop schemes for education and training of judges; adopt and publish guidelines on judicial conduct, personal injuries, sentencing guidelines; make decisions on reports or recommendations sent to it by the Board;[29] liaise with international judicial bodies; establish committees; delegate its functions to committees; and engage consultants with the consent of the Minister for Justice and Equality.[30]

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[23] See 'Corruption prevention in respect of members of parliament, judges and prosecutors' Evaluation Report – Ireland, available at http://www.justice.ie/en/JELR/Greco%20Eval%20IV%20Rep%20_2014_%203E%20Final%20Ireland.pdf/Files/Greco%20Eval%20IV%20Rep%20_2014_%203E%20Final%20Ireland.pdf accessed 12 November 2019) and Compliance Report available at http://justice.ie/en/JELR/GRECO_Compliance_Report_Corruption_Prevention_in_Respect_of_Members_of_Parliament,_Judges_and_Prosecutors.pdf/Files/GRECO_Compliance_Report_Corruption_Prevention_in_Respect_of_Members_of_Parliament,_Judges_and_Prosecutors.pdf accessed 12 November 2019.

[24] Judicial Council Act S6.

[25] The Judicial Council 'Annual Report 2020' (2020) , available at <https://judicialcouncil.ie/assets/uploads/documents/Annual%20Report%202020%20English.pdf> accessed 27 October 2021.

[26] The Judicial Council 'Annual Report 2020' (2020) 17, available at <https://judicialcouncil.ie/assets/uploads/documents/Annual%20Report%202020%20English.pdf> accessed 27 October 2021.

[27] The Judicial Council 'Annual Report 2020' (2020) 26–27, available at <https://judicialcouncil.ie/assets/uploads/documents/Annual%20Report%202020%20English.pdf> accessed 27 October 2021.

[28] S 7.

[29] See below.

[30] S 7.

2.4 Structure of the Council

While the Council is at the apex of the organisation, the de facto decision-making body is the Board. The Board of the Council is intended to be an executive-type body with the power to determine policy and to review any guidelines made by the committees on conduct, sentencing or personal injuries. The Act specifies that the Board shall have 'all such powers as are necessary or expedient for the performance of its functions'.[31] The Board will comprise 11 members; the five court presidents, one judge from each court elected by that court and 1 further judge co-opted from one of the courts. The co-opted member will be from a different court in rotation beginning with the Supreme Court and working down through the hierarchy.[32] Membership is for four years and members may serve two consecutive terms. The Board must hold at least four meetings a year with intervals of not more than four months in between. All decisions will be determined by a majority of the votes present.[33]

The Act provides that the Council may establish such committees as it thinks fit to advise and assist it in the performance of its functions but certain other committees are specified, in particular it is provided that the Council shall establish a Judicial Studies Committee, a Personal Injuries Guidelines Committee, a Sentencing Guidelines and Information Committee, Judicial Support Committees, and a Judicial Conduct Committee.

Having considered the general structure and roles of the Council and the Board, we now turn our attention to specific strands of the Council's work undertaken by the designated committees.

2.4.1 The Judicial Studies Committee

The new Judicial Studies Committee will replace the current more informal Committee for Judicial Studies (formerly the Judicial Studies Institute). The purpose of the Judicial Studies Committee is to 'facilitate the continuing education and training of judges with regard to their functions.'[34] While initial introductory training or induction courses are not mentioned here, presumably they come within the remit of this Committee also. Indeed induction training has already begun for some newly appointed judges in recent weeks. Section 17(3) outlines some of the areas of competency of the Committee, which include preparing, distributing, and publishing material relevant to its functions and some training areas are proposed which include dealing with accused persons, jury trials, EU and international law, human rights and equality law, IT, and personal injuries assessment. The composition of this committee is not set out in the Act.

Until very recently, in Ireland there existed no formal system of judicial education and training. From an international perspective, this is very unusual. In a survey from 2016, it was noted that in all of the 10 European jurisdictions surveyed, there existed mandatory initial or induction training for all new judicial appointees. This included England and Wales.[35] However, while training was supposedly mandatory since 1996 in this jurisdiction, as per Section 16 of the Court and Court Officers Act 1995, beyond the provision of bench books, some ad hoc shadowing and funding for judges to attend courses abroad, a formal system had never materialised.[36] A passage on the website of the Association of Judges in Ireland, describes the system in place before the introduction of the Judicial Council Act:[37]

> **The Judicial Studies Committee has extremely limited financial resources and is accordingly unable to provide the type of continuing training and education that is common in other jurisdictions. In the circumstances its activities are confined to the organisation of annual one-day conferences for the Judges of the District Court, the Circuit Court, and the combined High and Supreme Courts, respectively. In addition there is a one day annual National Judges' Conference at which topics relevant to judges of all jurisdictions are discussed.**

[31] S 11.
[32] S 12.
[33] S 15.
[34] S 17(2).
[35] Diana Richards, 'Current Models of Judicial Training: An Updated Review of Initial and Continuous Training Models across Western Democratic Jurisdictions' (2016) 5 Judicial Education and Training 41, 43.
[36] A review into the Judicial Studies Institute was commissioned by the Chief Justice in 2004. It was critical of the existing set up, or lack thereof, as well as the lack of funding. It examined a number of other jurisdictions and made recommendations in relation to establishing a formal training system. The various recommendations made in the report were not acted upon due to lack of funding. The report has recently been updated in light of the Act and it is expected that this will be relied upon in setting up a system for education and training under the new body. Neither report has been published.
[37] An informal representative group for judges established in the absence of any statutorily-sanctioned body.

The fact that there was no existing structure might be an advantage in that the new Committee essentially must begin from scratch and could therefore develop a truly modern needs-based system. The approaches used across various jurisdictions to determine what type of training is necessary vary but usually include one or more of the following: training committees, questionnaires or surveys of judges, court users and community assessment exercises, large-scale reviews of the judiciary, research.[38] All jurisdictions involve judges in the assessment of their training needs. The types of training offered to judges in other jurisdictions also varies considerably with some jurisdictions offering much wider programmes than others but the main curriculum areas include:

- substantive law;
- social context;
- legal skills ('judgecraft');
- judicial ethics;
- judicial skills (management, media, technology, languages); and
- personal welfare.[39]

2.4.2 The Personal Injuries Guidelines Committee

The Personal Injuries Guidelines Committee was a relatively late addition to the Bill. The creation of this Committee was a result of the report of the Personal Injuries Commission (PIC) which was published in September 2018.[40] The Report of the PIC, which was chaired by former High Court President Mr Justice Nicholas Kearns, recommended that:

> **the Judicial Council should, when established, be requested by the Minister for Justice and Equality to compile guidelines for appropriate general damages for various types of personal injury. The PIC believes that the Judicial Council will, in compiling the guidelines, take account of the jurisprudence of the Court of Appeal, the results of the PIC benchmarking exercise, the WAD (Whiplash Associated Disorder scale as established by the Quebec Task Force) scale and any other factors it considers relevant.**[41]

The frustration behind the lack of progress on reform of the personal injuries area and the fact that businesses around the country are being forced to close as a result of rising insurance costs meant that this section was added to the Bill and efforts were made to speed up the progress of the Bill through its final stages.

The Committee was officially constituted on 28 April 2020 following the first meeting of the Council in February, though it had already begun work unofficially before that. After being formally established, the Committee met nine times before submitting draft guidelines to the Council on 9 December 2020. According to the annual report of the Council, in completing this work, the Committee engaged with insurers and indemnifiers, the Personal Injuries Assessment Board and with the judiciary across Europe. It also consulted legal research, legal advice and economic and statistical analysis. The draft Guidelines were accompanied by a report, available on the Council's website, outlining the Committee's activities and the methodology and processes followed in deciding on the appropriate level of awards.

In October 2020, the Act was amended by section 7(2)(g) of the Commission of Investigation (Mother and Baby Homes and Certain Related Matters) Records, and Another Matter, Act 2020, in order to ensure that the guidelines would be adopted and published by, at the latest, 31 July 2021, three months earlier than originally required under the Act. In fact, the guidelines were adopted by the Council on 6 March 2021. However, the adoption of the guidelines was not straightforward and there was significant opposition from a number of judges. The Judicial Council initially met virtually on 5 February 2021 in order to consider the guidelines but the meeting was adjourned when it became clear no agreement would be reached. It was then reported that various memos were circulated amongst members of the judiciary from a number of judges experienced in personal injuries cases who were critical of the draft guidelines. A further meeting was also adjourned on 20 February in order to give members more time to reflect on the

[38] For information generally on judicial education and training, see the website of the International Organisation of Judicial Training and its associated journal, http://www.iojt.org/

[39] Cheryl Thomas, 'Review of Judicial Training and Education in Other Jurisdictions Report', May 2006. 57 et seq. available at https://www.ucl.ac.uk/judicial-institute/sites/judicial-institute/files/judicial_training_and_education_in_other_jurisdictions.pdf accessed 12 November 2019.

[40] See Final Report of the Personal Injuries Commission, available at https://dbei.gov.ie/en/Publications/Publication-files/Second-and-Final-Report-of-the-Personal-Injuries-Commission.pdf accessed 12 November 2019.

[41] Ibid at p 9.

issues and eventually at the meeting of 6 March the guidelines were adopted formally by the Council.

2.4.3 The Sentencing Guidelines and Information Committee

The principal function of the Sentencing Guidelines and Information Committee is to prepare draft sentencing guidelines to submit to the Board. It is also required to monitor the operation of the guidelines, collate information on sentencing and disseminate that information. The SGIC is given the authority to have access to and make copies of court documentation. As well as its principal functions, the SGIC is also permitted to consult with external persons in its work on preparing guidelines, also to collate information and conduct research on sentencing as well as disseminate information and organise conferences and events. Indeed the SGIC has already engaged the University of Strathclyde to carry out a project entitled 'Assessing Methodological Approaches to Sentencing Data Collection and Analysis'.[42]

There are 13 members on this Committee; eight judges nominated by the Chief Justice and including one judge from each court, and 5 lay persons appointed by the Government, through the Public Appointments Service, at least two of which will be women.[43] They will serve a four year term and can serve no more than two terms. Following its establishment on 30th June 2020 and after the appointment of its members in July 2020, the Committee met on four occasions before the end of the year in order to decide on the approach to be taken to the considerable tasks allocated to the SGIC. As well as the research tender to investigate data collection methodologies, the Committee has also begun engaging with individual members of the judiciary in 2021 and seek their views on a number of issues relevant to preparing sentencing guidelines.

2.4.4 Judicial Support Committees

The Act requires that the Council also establish what are referred to as Judicial Support Committees and there will be one for each court, comprising the head of that court and one further judge of that court elected by the ordinary members of the court.[44] The purpose of these committees is to advise the Council in matters relating to particular courts. So for example, if the Council needs advice on a Supreme Court issue, it will seek the assistance of the Supreme Judicial Support Committee. Like the other committees, the term is for four years, renewable for one further term but eligibility returns following a further four years after the expiration of membership. It is not clear what led to the inclusion of these Committees in the Act and there is no discussion of them during the Oireachtas debates. Because of this, their exact role is not apparent and we will have to wait to see how they will function in practice.

2.4.5 The Judicial Conduct Committee

The establishment of some sort of disciplinary body was one of the main motivations behind the Judicial Council Act.[45] According to the Act, the function of the Judicial Conduct Committee (JCC) is to 'promote and maintain high standards of conduct among judges, having regards to the principles of judicial conduct requiring judges to uphold and exemplify judicial independence, impartiality, integrity, propriety (including the appearance of propriety), competence and diligence and to ensure equality of treatment to all persons before the courts.'[46] The JCC is made up of 13 members; the five court presidents, three judges elected by and from the ordinary judges, and five lay persons appointed by the Government, as recommended by the Public Appointments Service, at least two to be women. The term is four years, renewable for one further consecutive term.[47] The JCC is also provided with a 'Registrar', who may be the Secretary or another member of staff but is known as Registrar when carrying out functions for the JCC.[48]

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42 Judicial Council, 'Sentencing Guidelines and Information Committee' (Judicial Council, 12 July 2021) , available at <https://judicialcouncil.ie/sentencing-guidelines-committee/> accessed 5 November 2021.

43 S 24.

44 S 30.

45 See the Regulatory Impact Analysis for the 2017 Bill, available at <http://www.justice.ie/en/JELR/Judicial_Council_Bill_2017_RIA.pdf/Files/Judicial_Council_Bill_2017_RIA.pdf> accessed 3 November 2021.

46 S 43(2).

47 Ss 44–46.

48 S 49.

3

JUDICIAL EDUCATION AND TRAINING IN IRELAND

TOWARDS BEST PRACTICE:
A REPORT ON THE NEW JUDICIAL COUNCIL IN IRELAND

Irish Council for **Civil Liberties**

3. Judicial Education and Training in Ireland

Judicial education and training (JET) in Ireland was not mandatory until 1995. As part of the establishment of the Judicial Appointments Advisory Board (JAAB), section 19 of the Courts and Court Officers Act 1995 requires that for those appointed through the JAAB process, there is an obligation to follow any training which is required by the relevant court president. There was no statutory obligation to provide any such training. However, since then, the judiciary have provided JET; initially through the non-statutory Judicial Studies Institute, later renamed to the Committee on Judicial Studies, and now through a statutory committee.

The Judicial Council Act 2019 creates an obligation for the Council to provide judicial training and puts it on a more developed statutory basis. Section 7 of the Act includes 'continuing education of judges' as one of the functions of the Council, while section 17 creates the Judicial Studies Committee (JSC), which is 'to facilitate the continuing education and training of judges with regard to their functions'. The intention is for the JSC to provide judicial education and training as directed by the Judicial Council. Some activities and training topics are suggested, but are not mandatory. However, this list provides a framework that will be important in the development of JET. Amongst the activities which the JSC may engage in are to:

(a) prepare and distribute relevant materials to judges,
(b) publish material relevant to its function,
(c) provide, or assist in the provision of, education and training on matters relevant to the exercise by judges of their functions, including but not limited to—
    (i) dealing with persons in respect of whom it is alleged an offence has been committed,
    (ii) the conduct of trials by jury in criminal proceedings,
    (iii) European Union law and international law,
    (iv) human rights and equality law,
    (v) information technology, and
    (vi) the assessment of damages in respect of personal injuries,

and
(d) establish, maintain and improve communication with—
    (i) bodies representing judges appointed to courts of places other than the State, and
    (ii) international bodies representing judges.

The sections of the Act that deal with judicial conduct, and sanctions for failure to meet the relevant standards here, provide some more specific possible content. Sections 72 and 76, which deal with the content of a report of a panel of enquiry into alleged misconduct, both allow for the panel to recommend that the judge attend 'a specified type of course or training'. It is not necessary that this training be provided by the JSC but it is likely to have a role, particularly if certain issues continue to arise in complaints against judges. While induction training is not mentioned in the legislation, this is seen as a key area by judges and the JSC has already begun to provide this training to newly-appointed judges.

4

JUDICIAL CONDUCT AND ETHICS IN IRELAND

TOWARDS BEST PRACTICE:
A REPORT ON THE NEW JUDICIAL COUNCIL IN IRELAND

Irish Council for **Civil Liberties**

4. Judicial Conduct and Ethics in Ireland

4.1 The Workings of the Judicial Conduct Committee

The first major task of the Judicial Conduct Committee (JCC) will be to prepare guidelines on judicial conduct and ethics. These must be submitted to the Board within 12 months.[49] The JCC is also given all 'such powers as are necessary or expedient for the performance of its functions.'[50] In terms of its principal area of competence, the JCC is authorised to consider complaints, to refer them for resolution by informal means or undertake investigations, to publish guidelines on informal resolutions, provide advice and recommendations to judges, and take any action necessary to safeguard the administration of justice.[51] It is also authorised to specify procedures in relation to the making and investigation of complaints and the making of determinations.[52] The Act provides that in order to constitute a valid complaint for the purposes of the Act, the judicial misconduct must have occurred after the commencement of this part of the Act. Also, complaints will only be considered in respect of sitting judges.[53] This means that if a judge ceases to be a judge before the referral or investigation of the complaint or during that process or before an Article 35.4.1° removal motion, the action will be discontinued.

The Registrar is the first point of contact for complaints. A complaint about judicial behaviour which is alleged to constitute judicial misconduct may be made to the Registrar up to three months from the date of the occurrence of the conduct. However, the JCC may extend the time limit where it is felt it is just and equitable to do so.[54] A complaint can be made by any person directly affected by, or who witnessed, the conduct. Complaints can also be made on behalf of solicitors or barristers, as well as anyone unable to make a complaint themselves by reason of mental or physical capacity.[55] The fact that lawyers, or 'duly appointed officers', can make complaints though their professional bodies, the Bar Council or Law Society is crucial in that it enables practitioners to make complaints anonymously and without fear of reprisal. On receiving a complaint, the Registrar must first determine whether or not it is admissible; in other words, the complaint must be made by an authorised person and be within the time limit, not frivolous or vexatious, in compliance with procedures, and potentially constitute judicial misconduct.[56] If the Registrar determines that the complaint is admissible, she or he will refer it to the JCC, who will decide whether to refer the matter to be resolved by informal means or whether to refer further to a panel of investigation. If on the other hand the complaint is held inadmissible, all parties will be notified of the decision in writing and given reasons for the decision. The complainant may then seek a review of the determination within 30 days.[57]

The Registrar plays a crucial role here in that he or she will make the initial call as to whether the behaviour complained of could constitute judicial misconduct. This is potentially a substantial power indeed, although once guidelines on judicial conduct and ethics are drawn up by the JCC, it may be possible that a more precise definition of what constitutes judicial misconduct will be available and the scope of the decision-making power of the Register may be more limited in that regard. As it stands however, the Registrar retains a powerful decision-making capacity as gate-keeper of complaints and in this context it is surprising that no particular experience or expertise for the office is required by the Act.

[49] S 43(1)(d).
[50] S43(5)
[51] S 43(3).
[52] S 52.
[53] S 42.
[54] S 51.
[55] S 50.
[56] S 53.
[57] S 56. This review will be carried out by the Complaints Review Committee – see below.

As noted above, the Act makes it clear that it will only apply to conduct which has taken place after the commencement of this part of the Act.[58] Furthermore, complainants have only three months to complain about judicial conduct (unless the JCC grants an extension), therefore, historic conduct will not be considered and conduct which occurred before a judge's appointment to the bench is excluded.[59] It is understandable that going forward, there must be a time limit for complaints but surely serious misconduct which has occurred before appointment is relevant and cutting off all historic conduct might be seen as unfair.

Any review will be carried out by the Complaints Review Committee, which will comprise three members of the JCC (two judges and one lay person), appointed by the JCC. Members of this Committee will serve a one to two-year term. If the admissibility relates to the time limit, the Review Committee can decide to extend that period. It can also decide that the complaint, or part of it, is admissible and if that is the case, all parties will be notified in writing and given reasons.[60] If a complaint is withdrawn while under consideration by the Registrar or the Review Committee it may still be referred to the JCC for a decision on whether the matter should be pursued.[61] The JCC can also refer a matter for investigation even in the absence of a complaint if satisfied that there exists prima facie evidence of judicial misconduct and if it is necessary to safeguard the administration of justice.[62] This is an interesting power and a sensible one, particularly if a complainant is reluctant to come forward but the behaviour has already been made public knowledge – the ability to investigate in these circumstances is crucial to upholding public confidence in the system.

Section 58 of the Act allows a judge to consent to a reprimand, if requested in writing, before a panel of inquiry is appointed. In such circumstances, the JCC will consider the nature, gravity and circumstances of the complaint and if satisfied that it is appropriate and in the interests of the administration of justice may issue a reprimand. The reprimand may take the form of advice, recommendations to pursue a course of action, and/or admonishment. This section is likely to be controversial. First, unlike with informal resolution below, the consent of the complainant is not required in this situation. Furthermore, unlike judges reprimanded following an investigation by the JCC or a judge who receives a reprimand due to failure to co-operate with an inquiry, judges receiving voluntary reprimands will not have their names published in the Council's annual report.[63] It is unclear why details of reprimands in these cases should not be included. This may be an attractive option for an errant judge but it is likely to lead to dissatisfaction amongst complainants if the accused judge simply consents to a reprimand before any investigation is launched, thereby avoiding the entire process. The fact that a reprimand has been issued but that this will never become public knowledge will hardly be satisfactory to a complainant, who may see this as an escape mechanism for the judge. There does not appear to be any alternative avenue for a complainant in this scenario.

However, the Act does not prohibit the publication of the names of those receiving voluntary reprimands and in order to ensure that justice is seen to be done, to avoid the perception that the process is untransparent, and to ensure public confidence in the system, this report therefore recommends that:

- **the names of judges who consent to a reprimand are published in the Council's Annual Report.**

4.2 Informal Resolution

If a complaint is deemed admissible, the JCC will either refer the matter for resolution by informal means or refer to a panel of inquiry for further investigation. The whole procedure around resolution by informal means is very vague. The JCC will request one or more 'designated judges' to undertake the resolution of the complaint by informal means. The Act is silent on who designates these judges or how. The designated judge or judges will then appoint up

[58] S 42.
[59] Unless a judge is appointed after the commencement of this part and the JCC decide the complaint is admissible. This issue is discussed further below.
[60] S 56.
[61] S 57.
[62] S 59.
[63] S 87(6) states that the name of the judge will be published under S79(13) and the name and the reprimand issued under S 71 or S79(2)(b) will also be published but S58 is not mentioned here.

to three judges from the relevant court to undertake the resolution by informal means of the complaint on behalf of the designated judge or judges.[64] The purpose of this additional step is unclear. These designated judges must report back to the JCC and the report must state whether or not they are satisfied that the complaint has been resolved and must provide details and reasons. The informal resolution route can only be undertaken with the consent of both the complainant and the judge concerned.[65] No further information is given on how a resolution by informal means should proceed other than to specify that payment of financial compensation is prohibited.[66]

Chapter 4 of the Judicial Council Act 2019 on the informal resolution process is needlessly convoluted and confusing. Presumably there was a desire to retain the sort of informal measures which had been used in the past to deal with questionable judicial behaviour and while informal processes can be very useful, the lack of clarity in these sections is problematic. First, we are given no indication of what resolution by informal means will actually entail. However, given that section 43 requires the JCC to publish guidelines regarding the resolution of complaints by informal means, we can presume that the JCC is expected to provide detail on this once it is established. However, further difficulties remain including the seemingly unnecessary step of the designated judges appointing a further three judges to undertake the resolution by informal means. It is not clear who is to decide on what the informal means will be – the panel, the designated judges, or the further judges. Also it is not clear what role exactly the designated judges or further judges are to play; whether they are to be supervisors, helpers, investigators, mediators or watch dogs. A final issue here is that the Council's annual report will not contain any detail on complaints which were resolved by informal means other than to give the number so resolved in any given year.

It is to be hoped that once the JCC publishes guidelines on informal resolutions that some clarity will be achieved but it is hard to avoid the conclusion that this section was intended to remain vague in order to allow for maximum flexibility and while an informal process can be a useful process in order to protect the reputation of a judge in relatively minor disciplinary scenarios and therefore aim to correctly balance the competing interests of judicial independence and accountability, there is a danger if the process is not clearly seen to provide fairness. It is a welcome requirement that the consent of all parties is required before this option can be used.

Similarly to the recommendation above, in order to ensure that justice is seen to be done, to avoid the perception that the process is untransparent, and to ensure public confidence in the system, this report therefore recommends that:

- **there is clarity on informal resolution and what it entails.**

4.3 Panels of Inquiry

If the informal route is not appropriate, the JCC can decide to refer a complaint for further investigation by a panel of inquiry. The JCC will then appoint a panel of three persons; two judges who are not members of the JCC, one to be a judge in the relevant court and the other to be a judge of another court, and one lay person. There will be a separate appointments process for lay persons who may become members of panels of inquiry. The Government will request the Public Appointments Service to undertake a selection process[67] and will then nominate between seven and twelve persons to appointment by the JCC to a panel.[68] 40% of the membership must be women. A member of staff, other than the Registrar, will be appointed as registrar to the panel.[69]

In order to investigate the complaint, the panel may seek documents or information and may hold a hearing, which will usually be conducted in public.[70] While the hearing may be held in public, Section 82(1) specifies that proceedings relating to the investigation of a complaint are to be conducted in

[64] S 61.
[65] S 62.
[66] S 62(4).
[67] S 65.
[68] S 66.
[69] It is a pity that the title registrar was decided upon for both of these roles. Given that they are separate and distinct, a different title would have made more sense.
[70] S 68(5) specifies that 'A hearing of a complaint before a panel of inquiry shall be conducted in public unless the Judicial Conduct Committee directs that in order to safeguard the administration of justice the hearing should be conducted in whole or in part otherwise than in public.'

private. Section 68(5) also provides that in order to safeguard the administration of justice, the JCC can direct that a hearing may be conducted in whole or in part in private. Also under Section 64, a judge or complainant can request that the hearing be conducted in private but the JCC will not accede to such request in the absence of 'reasonable and sufficient cause'.[71] The Act does not provide guidance on what would constitute reasonable and sufficient cause.

There was opposition to this provision from the judiciary who felt that a judge under public investigation might be undermined to the extent that their independence and ability to do their job would be affected.[72] This fear is understandable. However, fair procedures are carefully guaranteed at all stages in the process. Furthermore, there is a greater risk with private hearings that the public will envisage some special treatment being given to judges or that justice is not being served. This is potentially highly damaging to the administration of justice and also potentially damaging to the reputation of an individual judge who might be cleared of suspicion by a hearing but not in the eyes of the public who have not been allowed to witness the process. For these reasons, public hearings are common in many jurisdictions.[73] Thus, section 55 of the original bill, as published in 2017, provided that the default position would be that hearings would be conducted otherwise than in public but that the JCC could require a public hearing in order to safeguard the administration of justice. Following some criticism of this provision in the media[74] and pressure from opposition senators,[75] the Government amended this at committee stage in the Seanad to provide for public hearings.[76] The original bill also provided that in the case of unauthorised disclosure of confidential information relating to investigations, penalties of a class A fine or imprisonment of up to 12 months were available but this was later amended to take out the possibility of imprisonment.[77]

The structure of the hearing will involve the registrar to the panel presenting the particulars of the complaint. Testimony of witnesses will be given on oath and there will be a right to cross-examine and call evidence in reply. For this purpose, the panel will have all the power, rights, and privileges that are vested in the High Court in this area.[78] If a complainant refuses to cooperate with an investigation, the panel will report back to the JCC, which will decide whether to proceed or discontinue the investigation. If a judge under investigation refuses to cooperate, the panel can decide to discontinue and report back to the JCC. The report will set out the circumstances and recommend a reprimand and or make further recommendations, which can include advising on a course of action or issuing an admonishment. The JCC may accept, modify, or reject the report.

During the course of an investigation, if it becomes clear that the behaviour complained of relates to the health of a judge, the panel will give the judge an opportunity to address the matter and then report to the JCC, which will forward the report to the head

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71 S 64(4)

72 2015 memo from then Chief Justice Susan Denham to then Minister for Justice Frances Fitzgerald, as reported by Conor Gallagher who obtained it through FOI. See Conor Gallagher, 'Judiciary sought "legal aid" for judges: Former chief justice wanted legal fees paid by State for judges accused of misconduct', *The Irish Times* (Dublin, 9 September 2017).

73 This is particularly the case in civil law countries. For example, in France disciplinary hearings are public and all decisions are published on the website of the Conseil Superieur de la Magistrature, see http://www.conseil-superieur-magistrature.fr/. Belgium, Poland, Italy and Romania have similar processes. See Acquaviva Naïs, Castagnet Florence and Evanghelou Morgane, 'A Comparative Analysis of Disciplinary Systems for European Judges and Prosecutors', prepared for the 7th edition of the European Judicial Training Network's THEMIS Competition, 2012. On the US States, see Robert H. Tembeckjian, 'Judicial Disciplinary Hearings Should Be Open', (2007) 28(3) The Justice System Journal, 419-425, who outlines 35 States where public hearings are held. Similar processes are adopted in Canada; see Kate Malleson, *The New Judiciary: The Effects of Expansion and Activism* (Ashgate, 1999), though there is discretion here (see Judges Act, RSC 1985 c J-1, s 63(6)). The process in New South Wales is also discretionary (see Judicial Officers Act 1986 (NSW) s 24(2). In New Zealand, once the matter becomes serious enough to be elevated to a panel process the hearing will then become public (see Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 (NZ) s 29). In fact, Appleby and Le Mire have noted an increasing trend towards transparency in many jurisdictions; see Gabrielle Appleby & Suzanne Le Mire, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' (2014) 38 Melbourne University Law Review 1, 61.

74 See for example Fiona Gartland, 'Judges not named if censured under proposed Judicial Council Bill', *The Irish Times* (Dublin, 26 August 2017), Elaine Edwards and Fiona Gartland, 'NUJ calls for 'unacceptable secrecy provisions in Judicial Council Bill to be revisited', *The Irish Times* (Dublin, 26 August 2017).

75 Senators Clifford-Lee and Ó Donnghaile had put down amendments.

76 See Seanad Debates, Vol. 264 No. 12, 2 April 2019.

77 S 94 further provides that the Freedom of Information Act 2014 shall not apply to a record relating to the making or investigation, or the resolution by informal means, of a complaint or an investigation pursuant to a referral unless it was created before the making of the complaint or initiation of the investigation or unless it relates to an expenses inquiry

78 S 69.

of the relevant court, who may recommend that the judge seek medical assistance or take further appropriate steps and report back to the JCC. If the judge complies, the investigation will be discontinued. If the judge fails to comply, the JCC will direct the panel to continue the investigation.[79]

When a panel has concluded an investigation, it will send a written report to the JCC, specifying the particulars of the complaint, the evidence presented, the findings of the panel and the reasons for that finding. If the finding is that an allegation is proved, the report will also include such recommendations as the panel considers appropriate for reprimanding the judge and for safeguarding the administration of justice.[80] A recommendation for reprimand can include the issuing of advice, making a recommendation to pursue a course of action, or the issuing of an admonishment. No detail is provided in the Act on what constitutes an admonishment. Recommendations for safeguarding the administration of justice can include recommendations in relation to court procedure, practice directions, distribution of work and related matters.

Before a final report is sent to the JCC however, the panel will send an interim report to the judge concerned and the complainant, along with details of time periods for reply. If the complainant or the judge feels that fair procedures have not been observed, he or she may submit a statement to that effect and request the panel to review the report as a result. The panel may then amend its report or decline to amend and send the report, along with the reasons for not amending it, to the JCC.[81] Once the JCC receives the report it will notify the complainant and the judge that they may make submissions, written or oral, to the JCC within a specified time period. The JCC will then consider the panel's report and any further submissions made and make a determination. However, the JCC can conduct a further hearing for the purposes of assisting it in making a decision or in order to observe fair procedures.[82] A great deal of effort has been made to ensure fair procedures on all sides. A determination in writing, including reasons will then be given. The JCC may accept, modify, or reject any recommendation from the panel's report. If the determination from the JCC requires the judge to pursue a course of action, it may also require the judge to report to the JCC regarding compliance with the determination. If it is felt the judge has not taken appropriate action, the JCC can then take further action as it considers appropriate, including making a referral to the Minister to pursue an Article 35.4.1° removal motion.[83] If the hearing has been held in public, the JCC will publish the determination.[84]

Towards the end of the investigatory process the language becomes mandatory. Earlier in the process, the Act provides that the JCC may suggest or advise a course of action; a judge cannot be forced to pursue a course of action due to the independence of the judiciary. However, once a final determination has been made, the Act states that the JCC can 'require' the judge to pursue a course of action and while independence still applies here and the JCC has no power to compel the judge to cooperate, in the absence of cooperation a removal motion will be proposed and so effectively, the determinations of the JCC will be compulsory.

Where hearings have been conducted and the JCC has determined that the complaint has not been substantiated, the judge can apply to the JCC for the recovery of reasonable legal costs and expenses associated with legal representation at the hearing.[85] Where the JCC considers that the interests of justice require the payment of such costs, it will nominate an independent solicitor to agree costs, which will be paid by the Minister.[86] This section was requested by the judiciary. In fact, the original request was that all judges before the JCC should receive access to legal representation and that the costs should be borne by the Minister.[87] The decision was taken to provide for costs where accusations are not proven and this section was added to the Bill during the committee stage in the Seanad in April 2019.

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79 S 72.
80 S 76.
81 SS 77 and 78.
82 S 79(3).
83 S 79(13).
84 S 79(14).
85 S 88.
86 If costs cannot be agreed this will be referred to the taxing Master of the High Court under S 88.
87 See Gallagher (n 72).

Like the recommendations above, in order to ensure that justice is seen to be done, to avoid the perception that the process is untransparent, and to ensure public confidence in the system, this report therefore recommends that:

- **there is clarity on reprimands, particularly admonishments, and what exactly they will involve.**

4.4 Removal of a Judge

The JCC can also make a referral to the Minister in relation to an Article 35.4.1° removal motion, whether or not the conduct or capacity at question has been the subject of a complaint.[88] If such a referral is made, the Minister will then propose such a motion in either House of the Oireachtas. If the proposal to make a referral has come from a panel of inquiry, the JCC will send a copy of the panel's report to the judge together with notice periods for reply. It will then consider the report and any reply and when making the referral to the Minister will include the panel's report, the judge's reply (if any) and the views of the JCC. These documents should not accompany an Article 35.4.1° motion but the Minister may use them for the purposes of proposing the motion.[89]

The language here again is mandatory; so if a referral is made, the Minister will have no choice and a motion will have to be proposed. This is in contrast to many of the earlier reform reports which contained much milder recommendations and more hesitant language. For example, in the Keane report, if the result of an inquiry meant that the Judicial Council recommended removal of the judge, a recommendation would be made that 'the executive consider the tabling of a resolution in both Houses of the Oireachtas calling for the removal of the judge from office for stated misbehaviour or incapacity.'[90]

The Act does not provide any guidance on the process to be undertaken in the Oireachtas once the removal motion has been proposed. This was a missed opportunity as while some guidance has been provided by the Supreme Court in its judgment in Curtin v Dáil Éireann[91] as to the steps to be taken in the event of a removal motion, and some further detail was later provided in the standing orders as a result, some statutory direction would have been useful. The controversy in 2020 over the 'Golfgate' affair demonstrated the degree of reluctance that exists amongst members of the Oireachas and government to engage with these issues – despite the fact that questions around the removal of a judge are part of their remit in accordance with Article 35.4.1°. In the event of a removal motion being proposed in the future, it is not at all clear what processes exactly should be adopted and issues around whether the question of removal can be discussed in advance of the motion remain nebulous. In that context, some statutory direction on the process to be adopted would have been very welcome. This report therefore recommends that:

- **the Judicial Complaints Committee should provide guidance on when the Council will regard misconduct to be so serious as to amount to stated misbehaviour; and**
- **the Oireachtas should provide a precise process for when a removal motion is proposed.**

[88] S 80.
[89] S 80(10) and (12).
[90] *Report of the Committee on Judicial Conduct and Ethics* (Stationery Office, 2000) 55.
[91] [2006] IESC 27.

5

BEST PRACTIVE INTERNATIONALLY

TOWARDS BEST PRACTICE:
A REPORT ON THE NEW JUDICIAL COUNCIL IN IRELAND

Irish Council for **Civil Liberties**

5. Best Practice Internationally

5.1 The Development and Challenges of Judicial Education and Training

The key literature in this area indicates that the last sixty years have gradually witnessed an increasing recognition of the significance of JET across the globe. Livingston Armytage, a well-established international academic on JET accordingly noted in his book *Educating Judges: Towards Improving Justice: A Survey of Global Practice* that judicial education has become a common practice in many countries, and it is now acknowledged as invaluable for the everyday success of the role of the judge in both the civil and common law jurisdictions.[92] As a result, the literature traces efforts to promote and develop sophisticated models of JET which have grown substantially with judges now engaging in continuing education around the world.[93]

It has also been recognised on a worldwide level that publications on this field of research in professional journals and newsletters have ebbed and flowed,[94] and academic literature on JET is relatively limited.[95] However, 2013 witnessed a new direction with the launch of *Judicial Education and Training*, a journal established by the International Organisation for Judicial Training (IOJT) that has promoted the development of international discourse on JET. Moreover, in a European context, bodies such as the IOJT which supports the work of global judicial education training and the European Judicial Training Network (EJTN), the principal platform and promoter for the training and the exchange of knowledge of the European judiciary, amongst others, have published many reports that promote best practice in JET across Europe. The following passage published by the EJTN in 2016 provides an insight into the challenges that have the potential to hinder sophisticated JET programmes and thus may need to be addressed to ensure JET is effectively provided for in Ireland:

> **The proper conceptual planning of a comprehensive training programme over a certain period of time, and for the organization of individual training events, necessarily implies the need for a thorough knowledge of modern judicial training methodology. Often, both tasks actually overlap.**
>
> **It has been discovered that the challenges in implementing modern judicial training methodology are – independently of the different judicial and training structures and cultures in the EJTN member institutions – the same everywhere. It emerged that all national judicial training institutions are, for example, facing the difficulty of getting away from mere frontal lectures, and the challenge of instead promoting interactivity and variation in methods. A good judicial trainer with the necessary didactical skills will see his or her role above all as to facilitate practice-oriented exchanges between the participants and to promote learning by transferring experiences. It will make trainees learn to improve their professional knowledge, capabilities and skills from their own incentive. Accordingly, a good judicial trainer needs to have broad knowledge and experience in implementing a variety of modern training needs.**
>
> **The proper use of good e-learning tools in suitable learning situations is another challenge where Europe is currently still standing more or less at the starting line.**[96]

[92] Livingston Armytage, *Educating Judges: Towards Improving Justice: A Survey of Global Practice* Volume 4 (Brill Nijhoff, 2015) xv.

[93] For summaries of current practice, see Richard Reaves, 'Continuing Education for Judges' (2016) 5 Judicial Education and Training 29 and Diana Richards, 'Current Models of Judicial Training: An Updated Review of Initial and Continuous Training Models across Western Democratic Jurisdictions' (2016) 5 Judicial Education and Training 41.

[94] Livingston Armytage, 'Educating Judges – Where to From Here?' (2015) 1(10) Journal of Dispute Resolution 167, 171.

[95] Duane Benton and Jennifer AL Sheldon-Sherman, 'What Judges Want and Need: User-Friendly Foundations for Effective Judicial Education' (2015) 1(10) Journal of Dispute Resolution 23, 31. See also SI Strong, 'Judicial Education and Regulatory Capture: Does the Current System Of Educating Judges Promote a Well-Functioning Judiciary and Adequately Serve the Public Interest?' (2015) 1(10) Journal of Dispute Resolution 1, 6–7.

[96] European Judicial Training Network, 'Handbook on Judicial Training Methodology in Europe' (2016) 2-3, available at <http://www.ejtn.eu/MRDDocuments/EJTN_JTM_Handbook_2016_EN.pdf> accessed 22 October 2021.

5.1.1 International Principles on Judicial Education and Training

According to Cowdrey, it is important to be clear on the purposes of judicial education:

> **Judicial education is a primarily applied field, not a philosophical one, and it is appropriate for those involved to focus on concrete questions. Yet, without a grasp of the underlying purpose and core principles of judicial education, there is no framework to answer these questions.**[97]

It is therefore useful to review briefly the principles that international organisations have agreed should underpin JET.

The EJTN was established in 2000 and has developed considerably since then. On 10 June 2016, the EJTN General Assembly unanimously approved the following judicial training principles:

1. Judicial training is a multidisciplinary and practical type of training, essentially intended for the transmission of professional techniques and values complementary to legal education.
2. All judges and prosecutors should receive initial training before or on their appointment.
3. All judges and prosecutors should have the right to regular continuous training after appointment and throughout their careers and it is their responsibility to undertake it. Every Member State should put in place systems that ensure judges and prosecutors are able to exercise this right and responsibility.
4. Training is part of the normal working life of a judge and a prosecutor. All judges and prosecutors should have time to undertake training as part of the normal working time, unless it exceptionally jeopardises the service of justice.
5. In accordance with the principles of judicial independence the design, content and delivery of judicial training are exclusively for national institutions responsible for judicial training to determine.
6. Training should primarily be delivered by judges and prosecutors who have been previously trained for this purpose.
7. Active and modern educational techniques should be given primacy in judicial training.
8. Member States should provide national institutions responsible for judicial training with sufficient funding and other resources to achieve their aims and objectives.
9. The highest judicial authorities should support judicial training.

The IOJT was established in 2002 in order to promote the rule of law by supporting the work of judicial education institutions around the world. In 2017, it adopted a declaration on judicial training principles:[98]

1. Judicial training is essential to ensure high standards of competence and performance. Judicial training is fundamental to judicial independence, the rule of law, and the protection of the rights of all people.

INSTITUTIONAL FRAMEWORK

2. To preserve judicial independence, the judiciary and judicial training institutions should be responsible for the design, content, and delivery of judicial training.
3. Judicial leaders and the senior judiciary should support judicial training.
4. All states should:
   (i) Provide their institutions responsible for judicial training with sufficient funding and other resources to achieve their aims and objectives; and
   (ii) Establish systems to ensure that all members of the judiciary are enabled to undertake training.
5. Any support provided to judicial training should be utilized in accordance with these principles, and in coordination with institutions responsible for judicial training.

TRAINING AS PART OF THE JUDICIAL ROLE

6. It is the right and the responsibility of all members of the judiciary to undertake training. Each member of the judiciary should have time to be involved in training as part of their judicial work.
7. All members of the judiciary should receive training before or upon their appointment, and should also receive regular training throughout their careers.

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[97] Diane E. Cowdrey, 'Educating into the Future: Creating an Effective System of Judicial Education' (2010) 51 South Texas Law Review 885, 889.
[98] For background on these, see Benoît Chamouard and Adèle Kent, 'Declaration of Judicial Training Principles: A Look Back at its Adoption and Forward to its Future Prospects' (2018) 6 Judicial Education and Training 43.

TRAINING CONTENT AND METHODOLOGY

8. Acknowledging the complexity of the judicial role, judicial training should be multidisciplinary and include training in law, non-legal knowledge, skills, social context, values and ethics.
9. Training should be judge-led and delivered primarily by members of the judiciary who have been trained for this purpose. Training delivery may involve non-judicial experts where appropriate.
10. Judicial training should reflect best practices in professional and adult training program design. It should employ a wide range of up-to-date methodologies.

From reports and academic literature on JET, the issues of recurring significance that merit consideration include the importance of administering JET needs assessments and evaluations, judge-led JET, and interactive skills-based training.[99]

5.1.2 Judicial Education and Training Needs Assessments and Evaluations

Benton and Sheldon-Sherman stress the need to 'ground judicial education in judicial preferences', saying

> **… a one-size-fits-all approach to judicial education is insufficient. Content and delivery that is effective for appellate judges may not necessarily be effective for district judges. What helps younger, newer judges may not help older, veteran judges.[100]**

The Annual Report of the Judicial Council of Ireland 2020 noted that the Judicial Studies Committee (JSC) conducted a survey-based needs assessment of the Irish judiciary, which is to be welcomed. In response to the survey, a significant majority of the judiciary indicated what content they felt should be covered by training programmes and the method by which such content should be delivered. It was reported that the majority of the judiciary expressed a keen enthusiasm for judicial training as well as the desire to develop their own ability to direct the training of their colleagues. The JSC pledged to review and update the needs assessment of the judiciary on a regular basis.[101] This will be a key activity for the JSC as the need for renewing and reviewing needs assessments on an on-going basis has been well documented.[102]

The European Commission's *Advice for Training Providers: European Judicial Training* published in 2015 emphasised the importance of assessing the training needs of the European judiciary. The European Commission suggested that gaining insight into a judge's previous training has the potential to inform the future of JET programmes and defining learning needs and training objectives also has the potential to facilitate the success of JET programmes.[103]

Armytage in his publication addressing the '*Training of Judges: Reflections of Principal and International Practice*' contended that investing in methodical needs assessments particularly in transitional and developing jurisdictions is pertinent to the establishment of a solid education structure that supports the building of judicial training programmes in practice. He also highlighted that the methodologies of needs assessments typically incorporate some of the following approaches: face-to-face interviews of key stakeholders, standardised surveying on all or a sample of judicial officers, clinical observations of the performance of the judiciary in court, analysis of court performance data and expert consultation and assessment.[104] In addition to these approaches to training needs assessments, Cheryl Thomas also identified the use of court users and community assessment exercises, large-scale reviews of the judiciary and the role of research.[105] Thomas, in her 2006 *Review of Judicial Training and Education in Other Jurisdictions*[106] also specified that most jurisdictions tend to conduct needs assessments

[99] T Brettel Dawson, 'Judicial Education: Pedagogy for a Change' (2015) 1(10) Journal of Dispute Resolution 175.
[100] Duane Benton and Jennifer AL Sheldon-Sherman, 'What Judges Want and Need: User-Friendly Foundations for Effective Judicial Education' (2015) 1(10) Journal of Dispute Resolution 23, 34.
[101] The Judicial Council 'Annual Report 2020' (2020) 17, available at <https://judicialcouncil.ie/assets/uploads/documents/Annual%20Report%202020%20English.pdf> last accessed 27 October 2021.
[102] Cheryl Thomas, 'Review of Judicial Training and Education in Other Jurisdictions Report', May 2006, 13, available at <https://www.ucl.ac.uk/judicial-institute/sites/judicial-institute/files/judicial_training_and_education_in_other_jurisdictions.pdf> accessed 5 November 2021.
[103] European Commission, 'Advice for Training Providers: European Judicial Training' (2015) 3.
[104] Livingston Armytage, 'Training of Judges: Reflections of Principal and International Practice' (2005) 2(1) European Journal of Legal Education 21, 29.
[105] Cheryl Thomas, 'Review of Judicial Training and Education in Other Jurisdictions' (Judicial Studies Board 2006) 36.
[106] In this review Thomas provided a comparative overview of JET in Austria, Canada, Denmark, France, Finland, Germany, Italy, the Netherlands, Portugal, Spain, the United States and Australia.

by distributing feedback questionnaires to judges at the end of training sessions and analysing the responses received. In addition, she identified that general feedback from judicial organisations was sometimes requested and several countries including Denmark and Finland measure satisfaction with the judiciary through user surveys which are subsequently analysed to develop JET programmes.[107] However, as indicated in the *EJTN Handbook on Judicial Training Methodology in Europe* published in 2016, surveys and questionnaires should only be used as a tentative inquiry of training needs within the judiciary. The EJTN contended that the responsibility of conducting an extensive needs assessments should then rest with those responsible for upskilling the judiciary.[108]

Armytage appears to attribute significant weight to the practice of conducting needs assessments of the judiciary across his publications. In his 1993 piece on '*The Need for Continuing Judicial Education*', he notes it may not be feasible to conduct a needs assessment to ensure the successful planning of every continuous JET programme. However, he contends that the potential results of this practice should nonetheless be considered as they can bear 'major impact' for those coordinating JET and for those pursuing government investment in JET,[109] something which might be pertinent to the success of a newly established framework that aims to develop a formalised system of JET. In '*Training of Judges: Reflections of Principal and International Practice*' published in 2005, Armytage also noted that 'the determining element in the content of judicial training programmes is the training needs they are attended to address.'[110] Hence, training needs assessments essentially inform the training and curriculum to be provided to the judiciary to enhance judicial performance.[111] Therefore, it is the opinion of Armytage that those involved in the development of JET programmes should understand the knowledge, skills, and disposition to be enhanced by the judiciary to ensure the effective delivery of justice.[112]

An understanding of the judicial competencies to be developed may also inform the purpose of JET which Armytage suggests can be viewed in various guises. In one of his earlier publications '*Educating Judges: Towards a New Model of Continuing Judicial Learning*', he specified that the purpose of JET can be understood as a means for judges to ensure accountability, to allow judges to understand the needs of the community or to initiate 'judge-led change' to improve the administration of justice.[113] According to Armytage, beyond the obvious aim of promoting competence amongst the judiciary, the purpose of JET appears ambiguous. In his recent publication '*Educating Judges – Where to From Here?*' Armytage seems provoked by this ambiguity as he posed the question 'competence for what?' and went on to assert that '[w]ithout a clearly articulated answer to this question, judicial education has no goal; and in the absence of any answer, judicial education lapses into the pursuit of technocratic proficiency.'[114] Therefore, to ensure the success of JET it must be identified from the outset what success should look like.[115]

Armytage also pointed to a limitation of assessing the needs of the judiciary, that is, that the practice of needs assessment is not always wholly inclusive of members of the judiciary from all jurisdictions, those responsible for educating and upskilling the judiciary and members of society.[116] This is also reflected in the European Commission's *Advice for Training Providers on European Judicial Training* as it disregarded the significance of involving members of society and merely advocated for discussion to take place

[107] Cheryl Thomas, 'Review of Judicial Training and Education in Other Jurisdictions' (Judicial Studies Board 2006) 37.
[108] European Judicial Training Network, 'Handbook on Judicial Training Methodology in Europe' (2016) 13-14, available at <http://www.ejtn.eu/MRDDocuments/EJTN_JTM_Handbook_2016_EN.pdf> accessed 23 October 2021.
[109] Livingston Armytage, 'The Need for Continuing Judicial Education' (1993) 16(2) University of New South Wales Law Journal 536, 551.
[110] Livingston Armytage, 'Training of Judges: Reflections of Principal and International Practice' (2005) 2(1) European Journal of Legal Education 21, 28.
[111] Cheryl Thomas, 'Review of Judicial Training and Education in Other Jurisdictions' (Judicial Studies Board 2006) 36.
[112] Livingston Armytage, 'Training of Judges: Reflections of Principal and International Practice' (2005) 2(1) European Journal of Legal Education 21, 28.
[113] Livingston Armytage, *Educating Judges: Towards a New Model of Continuing Judicial Learning* (Springer, 1996) 35-36.
[114] Livingston Armytage, 'Educating Judges – Where to From Here?' (2015) 1(10) Journal of Dispute Resolution 167.
[115] Livingston Armytage, 'Educating Judges – Where to From Here?' (2015) 1(10) Journal of Dispute Resolution 167, 168.
[116] Livingston Armytage, 'Training of Judges: Reflections of Principal and International Practice' (2005) 2(1) European Journal of Legal Education 21, 28 - 29.

between legal practitioners and those who design EU law training programmes.[117] However, Armytage recognised that including members of civil society allows those who might be directly or indirectly affected by the administration of justice to inform the JET process.[118] Armytage accordingly opined that despite judicial independence concerns, including all three of the aforementioned parties to establish a collaborative process would enhance the assessment of the needs of the judiciary as evidenced by the success of the Australian experience of involving members of the bar and civil society in the needs assessment process.[119]

Thomas noted that needs assessment and curriculum development are much the same[120] as most jurisdictions develop training programmes through a process of appraising feedback provided by the judiciary on the content and delivery of JET programmes as well as other issues of relevance. From his research, Armytage found that the design of judicial training curricula 'is extremely uneven and usually unsystematic' in practice. He surmises that this is because 'of the newness of the discipline.'[121] However, Thomas did find that Canada and the United States give due consideration to the process of curriculum development. In 2004, Canada established the Canadian Judicial Learning Network Project (CJLN) to promote the development of a multi-stage approach to the development of the judicial curriculum. The CJLN gave rise to the Individualized Education Plan (IEP) which 'is a structured process by which judges identify their learning interests, set their learning priorities and plan their participation in judicial education seminars.'[122] This innovative judicial planning tool was further advanced by a version of the IEP tool known as the Court Education Planner (CEP) which as explained by Thomas:

> **aggregates input from individual judges' IEPs into a summary of learning needs and goals for all judges within a given court. The CEP then compares this list against a list of educational modules offered by the National Judicial Institute to produce recommended programming for conferences and court-based education.[123]**

Adding a United States-based perspective, Thomas outlined that the approach adopted when developing the Federal Judicial Centre's education programmes is generally a collaborative one as it brings together judicial education attorneys, advisory committees, programme faculty and in some instances centre staff and judges. The Federal Judicial Center's curriculum is frequently modified to reflect the feedback received from the judicial advisory committees as well as the outcomes of the evaluation forms distributed at the Center's JET programmes.[124] Hence, curriculum development also intersects with the evaluation of JET programmes.[125]

The authors of the *Review of the Judicial Studies Institute* in 2004, a report commissioned by the Chief Justice at the time, Mr Justice Ronan Keane, to advise on the future development of the Institute, emphasised the role of feedback and evaluation practices in the improvement of JET programmes.[126] According to the authors of this review, such practices provide for 'an evaluation of the strengths and weaknesses of the programmes and allow an assessment of the degree to which the content, organisation and administration of the programme contribute to increased self-confidence and improved professional performance.'[127] This review also made the argument that feedback and evaluation practices assist 'trainers in establishing the level of satisfaction with the programme, the

[117] European Commission, 'Advice for Training Providers: European Judicial Training' (2015) 3.
[118] Livingston Armytage, 'Training of Judges: Reflections of Principal and International Practice' (2005) 2(1) European Journal of Legal Education 21, 28 - 29.
[119] Livingston Armytage, 'The Need for Continuing Judicial Education' (1993) 16(2) University of New South Wales Law Journal 536.
[120] Cheryl Thomas, 'Review of Judicial Training and Education in Other Jurisdictions' (Judicial Studies Board 2006) 38.
[121] Livingston Armytage, 'Training of Judges: Reflections on Principle and International Practice' (2005) 2(1) European Journal of Legal Education 21, 31.
[122] Cheryl Thomas, 'Review of Judicial Training and Education in Other Jurisdictions' (Judicial Studies Board 2006) 39.
[123] Cheryl Thomas, 'Review of Judicial Training and Education in Other Jurisdictions' (Judicial Studies Board 2006) 39.
[124] Cheryl Thomas, 'Review of Judicial Training and Education in Other Jurisdictions' (Judicial Studies Board 2006) 39.
[125] Cheryl Thomas, 'Review of Judicial Training and Education in Other Jurisdictions' (Judicial Studies Board 2006) 40.
[126] Paul McCutcheon, Ray Friel and Dermot Coughlan, 'Review of the Judicial Studies Institute' (University of Limerick School of Law and Department of Lifelong Learning and Outreach 2004) 24.
[127] Paul McCutcheon, Ray Friel and Dermot Coughlan, 'Review of the Judicial Studies Institute' (University of Limerick School of Law and Department of Lifelong Learning and Outreach 2004) 24-25.

transferability of training and enables trainers to measure the cost-effectiveness of the training.'[128] It accordingly recommended that a review facility, ideally conducted by an external body should be established and provisions should also be implemented to allow success to be measured in Ireland.[129]

Armytage in his 1995 publication *'Evaluating the Impact of Judicial Education'* has also offered useful insights on the significance of formalising the evaluation of JET programmes, the practice of which he termed 'educational evaluation' and described as 'making informed judgements on the overall value of the learning programme and whether or not the programme accomplished what it set out to do.'[130] He also implied that formalised evaluation practices benefit the judiciary as well as public perception when he noted 'evaluation measures the quality of the learning process for the individual judge' and it also 'provides the means to demonstrate the worth of the educational endeavour for the judiciary as a profession.'[131] Armytage has argued that evaluation in this context is not only beneficial but is in fact 'essential to judicial education' and he thus shares his motivation to improve the process of evaluating judicial education as he argues it is 'generally inadequate, inappropriate and of limited utility.'[132]

In comparison to Armytage, Thomas appears more practical in her critique of JET evaluation processes. She submitted that the failings of evaluation practices are little wonder and can be attributed to the fact that it requires 'substantial commitment' in the form of 'time, funds, and willingness for the programme providers to accept what the results may reveal and for the judiciary to be evaluated.'[133] Thomas accordingly indicated that the United States has engaged with its responsibility to inform the evaluation of JET with national resource organisations including the National Association of State Judicial Educators and the Judicial Education Reference, Information and Technical Transfer (JERITT) project providing valuable guidance on approaching judicial education evaluation practices. Interestingly, Armytage also recognised the merit in the JERITT approach to evaluating JET as he identified it as 'the most responsive and sophisticated attempt yet to develop an evaluation model for continuing judicial education.'[134] However, he remained objective in his analysis and recognised that this approach also has shortcomings as he contended that it 'remains incomplete to the extent that it requires the addition of stronger mechanisms to visibly demonstrate impact and value to external funding bodies.'[135]

To correct the foregoing deficiencies without impinging on the concept of judicial independence, Armytage postulated a Judicial Systemic Performance model which incorporates methodologies that are capable of evaluating appropriate criteria of impact. He provided much guidance for the reader as he specified the criteria to be relied on namely, trial disposal rates and through-put times, appeal rates and disposal outcomes and lastly complaint rates. In terms of a lack of resources as pointed to by Thomas, it is notable that Armytage contends that such criteria are 'already available within the judicial management and administration system.'[136] Armytage's argument centres on a model which he asserts would ultimately ensure that continuing JET 'does promote learning which contributes to enhancing the quality of justice'[137] by providing the means to appraise and record the development of the judiciary's professional competence.[138]

This report therefore recommends that the Judicial Studies Committee

- **follow the example of Australian judicial education and widen the needs based assessments for JET to groups outside of the judiciary; and**
- **implement the recommendation of the 2004 report that JET be externally reviewed on a regular basis, such as every five years.**

[128] Paul McCutcheon, Ray Friel and Dermot Coughlan, 'Review of the Judicial Studies Institute' (University of Limerick School of Law and Department of Lifelong Learning and Outreach 2004) 25.
[129] Paul McCutcheon, Ray Friel and Dermot Coughlan, 'Review of the Judicial Studies Institute' (University of Limerick School of Law and Department of Lifelong Learning and Outreach 2004) 120-121.
[130] Livingston Armytage, 'Evaluating the Impact of Judicial Education' (1995) 4(3) Journal of Judicial Administration 143, 144.
[131] Livingston Armytage, 'Evaluating the Impact of Judicial Education' (1995) 4(3) Journal of Judicial Administration 143, 166.
[132] Livingston Armytage, 'Evaluating the Impact of Judicial Education' (1995) 4(3) Journal of Judicial Administration 143.
[133] Cheryl Thomas, 'Review of Judicial Training and Education in Other Jurisdictions' (Judicial Studies Board 2006) 40.
[134] Livingston Armytage, 'Evaluating the Impact of Judicial Education' (1995) 4(3) Journal of Judicial Administration 143, 164.
[135] Livingston Armytage, 'Evaluating the Impact of Judicial Education' (1995) 4(3) Journal of Judicial Administration 143, 164.
[136] Livingston Armytage, 'Evaluating the Impact of Judicial Education' (1995) 4(3) Journal of Judicial Administration 143, 165.
[137] Livingston Armytage, 'Evaluating the Impact of Judicial Education' (1995) 4(3) Journal of Judicial Administration 143, 166.
[138] Livingston Armytage, 'Evaluating the Impact of Judicial Education' (1995) 4(3) Journal of Judicial Administration 143, 165.

5.1.3 Judge-Led Training

The Annual Report of the Judicial Council of Ireland 2020 sets out that the JSC strives to implement international best practice on judges training judges where possible.[139] In an endeavour to do so, the Judicial Council stipulated that the Director appointed to serve the Judicial Studies Committee must be a sitting judge capable of devoting at least 50 per cent of their working time to judicial studies. This was reflected in the appointment of Ms Justice Mary Rose Gearty of the High Court in July 2020. Moreover, to facilitate the delivery of judge-led training, judges from every first instance jurisdiction have taken part in mentoring training which provides for the assignment of a trained mentor to all newly appointed judges.[140] In September 2021, over twenty Irish judges also received formal training from experienced European judicial trainers in pedagogical methods to enable them to train their colleagues and peers.[141]

The importance of judge-led JET has been consistently recognised in the literature as the general consensus is that '[j]udges themselves are best suited to conduct continuing professional development for their colleagues.'[142] It has been suggested by Thomas that such consensus might be influenced by the motivation to protect judicial independence and thus prevent perceptions of 'outside instruction.'[143] It may also be contended that the fear of indoctrination from pressure groups which is often instilled within the judiciary[144] has also manifested in support for judge-led training. The IOJT encourages judicial training institutions and those involved in designing JET programmes to implement judge-led training. Judge-led training is enshrined in principle nine of the *IOJT Declaration of Principles of Judicial Training* which states that: 'Training should be judge-led and delivered primarily by members of the judiciary who have been trained for this purpose. Training delivery may involve non-judicial experts where appropriate.'[145] Hence, the IOJT notes: 'Judge-led training does not preclude the involvement of experts, academics, and other specialists who can enhance and supplement training, providing that any such external involvement is at all times under the authority and management of the judiciary.'[146] This complements the assertion by Thomas that overly relying on judges as trainers of JET programmes can be problematic because not all judges have developed the skill set of an effective teacher throughout their legal career, perhaps not even those who have been appointed to academic posts.[147] Therefore, as suggested by the European Commission, trainers must engage in training to develop their ability to provide training to others and to learn specific skills such as actively involving all training participants in the JET sessions and facilitating group discussions and dynamics.[148] The conversation on trauma and vulnerable victims has also gained momentum in recent times resulting in increased demand for training on social issues from specialists within the relevant fields. Therefore, experts beyond the legal arena can ensure judicial educators are of a high calibre.[149] Armytage goes so far as to suggest that the collaboration of educators from various and relevant backgrounds 'will enliven judge-led education to attain full potential', and claims there is a gap to be filled: 'Now more than ever there is a need for more collaborative leadership to refine the vision of what judicial education should ultimately aim to achieve.'[150]

The IOJT in the *Declaration of Principles of Judicial Training* document explains that judge-led training would provide the judiciary with the responsibility for 'design, content, and delivery of training.'[151] To enable the judiciary to deliver on this responsibility the IOJT promotes the 'training the trainers' (ToT) programme which essentially requires the judiciary to 'be trained by their judicial training institution in

[139] The Judicial Council 'Annual Report 2020' (2020) 17.
[140] The Judicial Council 'Annual Report 2020' (2020) 17.
[141] 'Judicial Studies Committee', available at <https://judicialcouncil.ie/judicial-studies-committee/> accessed 25 October 2021.
[142] Paul McCutcheon, Ray Friel and Dermot Coughlan, 'Review of the Judicial Studies Institute' (University of Limerick School of Law and Department of Lifelong Learning and Outreach 2004) 119.
[143] Cheryl Thomas, 'Review of Judicial Training and Education in Other Jurisdictions' (Judicial Studies Board 2006) 47.
[144] Livingston Armytage, 'Educating Judges – Where to From Here?' (2015) 1(10) Journal of Dispute Resolution 168, 173.
[145] International Organisation for Judicial Training Principles, 'Declaration of Judicial Training Principles' 2.
[146] International Organisation for Judicial Training Principles, 'Declaration of Judicial Training Principles' 10.
[147] Cheryl Thomas, 'Review of Judicial Training and Education in Other Jurisdictions' (Judicial Studies Board 2006) 47.
[148] European Commission, 'Advice for Training Providers: European Judicial Training' (2015) 4.
[149] Cheryl Thomas, 'Review of Judicial Training and Education in Other Jurisdictions' (Judicial Studies Board 2006) 47.
[150] Livingston Armytage, 'Educating Judges – Where to From Here? (2005) 1(10) Journal of Dispute Resolution 167, 173.
[151] International Organisation for Judicial Training Principles, 'Declaration of Judicial Training Principles' 10.

the principles of adult learning and the wide range of learning formats.'[152] Armytage's understanding of the purpose of ToT provides more insight as he notes it:

> **Provides a faculty of judicial trainers with the capacity – the knowledge, skills and understanding – to train other judges effectively. This capacity is required at two levels: (i) directing and managing the education programme, and (ii) delivering training activities using active learning and related participatory presentation skills.[153]**

It has been suggested that the benefits of this training are manifold. The IOJT outline that the implementation of the ToT programme will enhance the independence of the judiciary and ensure that JET addresses the professional needs of judges.[154] This was echoed by Armytage as he identifies this practice as a means to promote sustainable JET and 'balance judicial ownership and authenticity with educational effectiveness', thereby promoting independence in the judiciary.[155] The success of ToT in Austria was recorded by Thomas. She noted the Austrian Ministry of Justice established a train the trainer seminar series in 1997 which received positive feedback as the judiciary indicated that the seminars enhanced their in-service training experience.[156] However, reflecting on ToT programmes in practice, Armytage highlighted that there tends to be a lack of investment in ToT. He is also critical of the fact that ToT programmes generally tend to overlook the judge's role as a director and manager of JET programmes and suggested that a judicial trainers' handbook might be a useful resource for those with the responsibility of training their colleagues.[157]

The literature also identifies alternatives that do not follow the ToT model but involve the judiciary in the delivery of JET programmes. The idea of involving senior judges in JET as proposed by principle three of the *IOJT Declaration of Judicial Training Principles* is relevant to this practice of judge-led training. The IOJT asserts that senior judges must be involved in judicial training to 'devote their experience, moral authority, and hindsight—which are irreplaceable and necessary—to the training of their fellow judges.'[158] The IOJT thus encourage all jurisdictions to consider the positive influence senior judges can have on JET. The judicial peer education model is also a common method used to involve judges in the delivery of JET programmes. The Canadian National Judicial Institute has developed one such model. This model does not encourage judges to train their peers rather it strives to provide judges with the knowledge and skills to deliver JET and establish educational initiatives in their courts.[159] Mentoring programmes are also a popular means of involving judges in the delivery of JET. In Denmark, judges appointed to the role of mentor appear to take on much responsibility. Mentor judges in Denmark are required to provide their peers with a training programme, attend some of their court hearings, review some of their judgments, offer advice, review their skills once a year and subsequently submit a written evaluation of their performance to the Council for the judiciary.[160] However, it should be noted that Thomas is of the opinion that such mentor programmes are generally not very successful because of 'the ad hoc nature of mentoring and a lack of specific training for mentors.'[161]

5.1.4 Interactive Skills-based Training

The literature on JET indicates that the focus has shifted away from enhancing substantive legal knowledge to the development of judicial skills. The IOJT recognised this in principle eight of its *Declaration of Judicial Training Principles* which states: 'Acknowledging the complexity of the judicial role, judicial training should be multidisciplinary and include training in law, non-legal knowledge, skills, social context, values and ethics.' In support of this principle, the IOJT

[152] International Organisation for Judicial Training Principles, 'Declaration of Judicial Training Principles' 10.
[153] Livingston Armytage, 'Training of Judges: Reflections on Principle and International Practice' (2005) 2(1) European Journal of Legal Education 21, 34.
[154] International Organisation for Judicial Training Principles, 'Declaration of Judicial Training Principles' 10.
[155] Livingston Armytage, 'Training of Judges: Reflections on Principle and International Practice' (2005) 2(1) European Journal of Legal Education 21, 34; Livingston Armytage, 'Educating Judges – Where to From Here?' (2015) 1(10) Journal of Dispute Resolution 167, 172.
[156] Cheryl Thomas, 'Review of Judicial Training and Education in Other Jurisdictions' (Judicial Studies Board 2006) 47.
[157] Livingston Armytage, 'Training of Judges: Reflections on Principle and International Practice' (2005) 2(1) European Journal of Legal Education 21, 34.
[158] International Organisation for Judicial Training Principles, 'Declaration of Judicial Training Principles' 6.
[159] Cheryl Thomas, 'Review of Judicial Training and Education in Other Jurisdictions' (Judicial Studies Board 2006) 48.
[160] Cheryl Thomas, 'Review of Judicial Training and Education in Other Jurisdictions' (Judicial Studies Board 2006) 49-50.
[161] Cheryl Thomas, 'Review of Judicial Training and Education in Other Jurisdictions' (Judicial Studies Board 2006) 49.

contended that the Bangalore Principles of Judicial Conduct necessitate JET programmes to address non-legal knowledge, skills, social context and values and ethics in addition to substantive law. It is thus suggested that such training will allow the judiciary to conduct their work in an effective, efficient, and fair manner.[162] The *EJTN Handbook on Judicial Training Methodology in Europe* echoes this same point and noted that the foregoing skills have recently been called 'judgecraft.'[163]

It has been suggested that skills-based JET training should be practice-oriented to enable success. Therefore, theoretical knowledge is not enough, and it must be supplemented with training on how to apply it in practice.[164] This point was captured by a judge in Slovakia who noted: 'Theory is necessary, but finding practical solutions to model situations increases the attractiveness and efficiency of education.'[165] In the same vein, a judge in Denmark noted that 'Judges are used to acquiring knowledge on new areas by self-study and prefer active participation instead.'[166] This also struck a positive chord with Armytage as he has explored this line of thinking along philosophical lines. Armytage concluded that JET programmes should be structured around principles of adult learning by drawing on the work of Knowles.[167] Such principles comprise 'autonomy, self-direction, and preference to build on personal experience, the need to perceive relevance through immediacy of application, its purposive nature, and its problem-orientation.'[168] He believes such principles to be relevant because he views judges as 'rigorously autonomous, having an intensely short-term problem-orientation, and being exceptionally motivated to pursue competence for its own sake rather than for promotion or material gain.'[169] He also astutely pointed out that judges of the common law tradition generally have impressive professional abilities as they tend to be appointed after leading a career practising as a solicitor or barrister. Armytage also recognised the important value of Catlin's work[170] which contends that judges as 'professionals are also distinctive learners' and went on to provide several examples which cause them to be such including: '(a) the processes and criteria of judicial appointment and the nature of tenure; (b) judges' preferred learning styles and practices; (c) doctrinal constraints of on judicial independence, the formative nature of the judicial role, and the environment surrounding the judicial office, and (d) judges' needs and reasons for participating in continuing education.'[171] Hence, Armytage argues that JET should provide the judiciary with continuing 'procedural knowledge,' a term usually referenced by professional educators which essentially means that judges should develop an understanding of 'how' as opposed to 'what'.[172]

Moving away from viewing this issue theoretically, the authors of the *Review of the Judicial Studies Institute* provide a cogent outline of the competencies to be developed in judicial skills training. They broke judicial skills into three categories and listed the skills to be developed under each category. Accordingly, work-based skills training should focus on the development of competencies in the areas of court management, judicial writing, and ethical conduct. Personal-skills development should strive to enhance the flexibility, time management and priority setting of the judiciary and training with a relational component should be formalised to improve empathy, listening and communication skills on the bench.[173] To ensure the judiciary reap the full merits of skills-based training it has been advised that sessions be attended by small groups to enhance didactical delivery.[174] The literature indicates that skills-based

[162] International Organisation for Judicial Training Principles, 'Declaration of Judicial Training Principles' 4.
[163] European Judicial Training Network, 'Handbook on Judicial Training Methodology in Europe' (2016) 18, available at <http://www.ejtn.eu/MRDDocuments/EJTN_JTM_Handbook_2016_EN.pdf> accessed 22 October 2021.
[164] European Parliament, Judicial Training in the European Union Member States (2011) 51.
[165] European Parliament, Judicial Training in the European Union Member States (2011) 51.
[166] European Parliament, Judicial Training in the European Union Member States (2011) 52.
[167] Livingston Armytage, 'Educating Judges – Where to From Here?' (2015) 1(10) Journal of Dispute Resolution 167, 169.
[168] Livingston Armytage, 'Educating Judges – Where to From Here?' (2015) 1(10) Journal of Dispute Resolution 167, 169.
[169] Livingston Armytage, 'Educating Judges – Where to From Here?' (2015) 1(10) Journal of Dispute Resolution 167, 170.
[170] Dennis W. Catlin, 'An Empirical Study of Judges' Reasons for Participating in Continuing Professional Education' (1982) 7 Justice System Journal 236.
[171] Livingston Armytage, 'Educating Judges – Where to From Here?' (2015) 1(10) Journal of Dispute Resolution 167, 170; Livingston Armytage, *Educating Judges: Towards a New Model of Continuing Judicial Learning* (Springer, 1996) 149.
[172] Livingston Armytage, 'Educating Judges – Where to From Here?' (2015) 1(10) Journal of Dispute Resolution 167, 170.
[173] Paul McCutcheon, Ray Friel and Dermot Coughlan, 'Review of the Judicial Studies Institute' (University of Limerick School of Law and Department of Lifelong Learning and Outreach 2004) 26.
[174] European Judicial Training Network, 'Handbook on Judicial Training Methodology in Europe' (2016) 18, available at <http://www.ejtn.eu/MRDDocuments/EJTN_JTM_Handbook_2016_EN.pdf> accessed 22 October 2021.

training usually invites judges to take part in mock trials, role plays and court simulations to enhance their self-development.[175] Recent years have also seen an increased emphasis on e-learning and the use of information technology.[176] It may be assumed that the COVID-19 pandemic caused rapid upskilling in this area.

The National Judicial Orientation Programme for which responsibility lies with the National Judicial College of Australia places significant emphasis on skills-based JET. This programme coordinates training sessions that are generally interactive and focus on addressing the judge's ability to manage trials, deal with evidentiary and ethical issues, engage in judgment writing, manage time, their own psychological and physical health, social issues as well as expert witnesses.[177] New South Wales also address judgecraft training in the form of role-plays during judicial orientation and induction.[178] This report therefore recommends that:

- **the Judicial Studies Committee should ensure that its training programmes include interpersonal and communications skills, including the use of clear and plain language.**

5.1.5 An Understanding of the Social Context

The European Commission's *Advice for Training Providers* noted that JET programmes that focus on developing non-legal skills should also provide the judiciary with the necessary tools to be receptive to modern society and those who occupy it.[179] The significance of having such tools at the disposal of the judiciary was appreciated by the IOJT as it stated:

It is also critical to acknowledge that the law and legal principles do not exist in a vacuum. Judges operate publicly within society, and interact on a day-to-day basis with other human beings—litigants, witnesses, and legal representatives. Judicial training should therefore not be limited to addressing principles of law.[180]

To engender a broadly open-minded and inclusive judiciary the IOJT recommends judicial training bodies provide social context training.[181] Thomas, in her comparative overview, found that social context JET was provided in all of the jurisdictions she considered, and it usually addressed issues of gender, race, age and disability discrimination within the legal process.[182]

The social context area is key and is becoming more and more important. According to the Chief Justice of Missouri, 'it is vital that judicial education position judges to know the world from which their cases will emerge, and to understand the world in which their rulings will be enforced'.[183] This includes issues such as gender, race, age and disability discrimination in the legal process. The National Judicial Institute in Canada is particularly well-known for its social context education which covers the impact of diversity and equality jurisprudence in the day-to-day work of judges and issues related to judicial independence, impartiality, discretion, decision-making and the judicial process.[184] Matthew Weatherson has emphasised the importance of social context area by describing it as one of the 'three dimensions of learning' for judicial education along with substantive law and skills development.[185] For Richard Reaves, the most important topics for judicial education focus upon the 'tone, demeanor, and engagement

[175] Paul McCutcheon, Ray Friel and Dermot Coughlan, 'Review of the Judicial Studies Institute' (University of Limerick School of Law and Department of Lifelong Learning and Outreach 2004) 26.
[176] European Commission, 'Advice for Training Providers: European Judicial Training' (2015) 6 – 7; Cheryl Thomas, 'Review of Judicial Training and Education in Other Jurisdictions' (Judicial Studies Board 2006) 59; Paul McCutcheon, Ray Friel and Dermot Coughlan, 'Review of the Judicial Studies Institute' (University of Limerick School of Law and Department of Lifelong Learning and Outreach 2004) 26.
[177] Paul McCutcheon, Ray Friel and Dermot Coughlan, 'Review of the Judicial Studies Institute' (University of Limerick School of Law and Department of Lifelong Learning and Outreach 2004) 11.
[178] Paul McCutcheon, Ray Friel and Dermot Coughlan, 'Review of the Judicial Studies Institute' (University of Limerick School of Law and Department of Lifelong Learning and Outreach 2004) 106.
[179] European Commission, 'Advice for Training Providers: European Judicial Training' (2015) 6.
[180] International Organisation for Judicial Training Principles, 'Declaration of Judicial Training Principles' 10.
[181] Principle 8 of the International Organisation for Judicial Training Principles, 'Declaration of Judicial Training Principles' 2.
[182] Cheryl Thomas, 'Review of Judicial Training and Education in Other Jurisdictions' (Judicial Studies Board 2006) 59.
[183] Mary R Russell, 'Toward a New Paradigm of Judicial Education' (2015) 1(10) Journal of Dispute Resolution 79, 80.
[184] Cheryl Thomas, 'Review of Judicial Training and Education in Other Jurisdictions' (Judicial Studies Board 2006), 58.
[185] Matthew Weatherson, 'Forging Collaborative Partnerships: Judges, Judicial Educators and the Academy' (2016) 5 Judicial Education and Training 19, 19.

styles that judges bring to resolution of disputes.' He explains: 'The parties and their lawyers, if any, already bring law, opinions about case resolution, and plenty of conflict, so diffusing its presence by the manner in which the court treats these individuals is key. Professional competence with these skills is at least equal to, yet probably more important than, legal correctness of result or dispositional efficiency.'[186]

It is suggested that such training has the potential to equip the judiciary with the knowledge and skills necessary to develop 'an appreciation of the human condition and the society within which judges operate.'[187] Encompassing social context training in JET programmes will result in a multidisciplinary framework and training that provides the judiciary with a safe space to challenge their values, opinions, preconceptions, and prejudices.[188] This will consequently ensure that the judiciary administers justice fairly.[189] This report therefore recommends that the Judicial Studies Committee should ensure that its training programmes include:

- **material on the broader social context; and**
- **unconscious bias and diversity for judges.**

5.2 Balancing Independence and Accountability: The Challenges of Judicial Conduct and Ethics

The international literature on JCE is plentiful, but in Ireland it is somewhat underdeveloped. The lack of Irish literature can be attributed to the fact that Ireland has only recently made strides towards establishing a formalised regulatory framework on JCE. Nevertheless, Ireland has witnessed many reform proposals on JCE. The *Report of the Constitution Review Group* which was published in 1996 criticised Ireland's structure for judicial discipline at the time. This report noted that the constitutionally enshrined removal from office provision is inadequate. It proposed that a judicial council should be established to regulate judicial conduct by amending Article 35 of the Constitution. *The Fourth Progress Report of the All-Party Oireachtas Committee on the Constitution* also published in 1996 supported the majority of the Constitution Review Group's recommendations. The report also recommended the establishment of a judicial council to regulate judicial conduct. However, it suggested that the judicial council should have a constitutional foundation and comprise judges, retired judges, and lay members. It emphasised its support for moral rather than legal sanction. Hence, it highlighted that the judicial council should not be empowered to administer legal sanctions to safeguard the independence of the judiciary but rather it could 'express its disapproval and/or propose counselling/ training, make administrative arrangements to avoid a repetition of the problem, issue a written apology to the complainant or publish a summary of its findings'.[190]

The Sixth Report of the Working Group on a Courts Commission (widely known as the Denham Report) was published in 1998 and recommended the establishment of a Committee on Judicial Conduct and Ethics that would be obliged to prepare a code of ethics for judicial conduct and address matters of complaints, judicial discipline, and judicial studies. It noted that in the interests of judicial independence a pre-emptive, objective, and non-statutory judicial body controlled by the judiciary would be best placed to consider complaints made against judges through a structured but informal complaints procedure. It also suggested that a code of ethics should be drawn up.

This was followed by the *Report of the Committee on Judicial Conduct and Ethics*, otherwise known as the Keane Report. This report, as highlighted by Cahillane, 'contains the most detailed set of recommendations for the establishment of a disciplinary system for the judiciary.'[191] The overarching conclusion reached in this report was that the Judicial Council should be established and comprise all members of the judiciary, a board and three committees namely, the Judicial Conduct and Ethics Committee,[192] the Judicial Studies and Publications Committee and the General Committee.

The most recent report which made recommendations

[186] Richard Reaves, 'Continuing Education for Judges' (2016) 5 Judicial Education and Training 29, 29.
[187] International Organisation for Judicial Training Principles, 'Declaration of Judicial Training Principles' 10.
[188] International Organisation for Judicial Training Principles, 'Declaration of Judicial Training Principles' 10.
[189] International Organisation for Judicial Training Principles, 'Declaration of Judicial Training Principles' 10.
[190] *Fourth Progress Report: The Courts and the Judiciary* The All-Party Oireachtas Committee on the Constitution (Stationery Office 1999) 25.
[191] Laura Cahillane, 'Ireland's System for Disciplining and Removing Judges' (2015) 38(1) Dublin University Law Journal 28-29.
[192] Cahillane provides a concise overview of what form the Judicial Conduct and Ethics Committee should take according to the Keane report in Laura Cahillane, 'Ireland's System for Disciplining and Removing Judges' (2015) 38(1) Dublin University Law Journal 29-30.

on the reform of JCE is the *Justice Matters: Independence, Accountability and the Irish Judiciary Report of the Irish Council for Civil Liberties.* The report also recommended the establishment of a judicial council and included material arising from interviews of present and past members of the judiciary and other persons from within the legal profession to inform their synthesis of judicial discipline.

In light of the key Irish and international literature on JCE, the competing values in JCE regimes and some of the controversial arguments and indicators of best practice in the area of disciplinary proceedings will be explored.

5.2.1 Competing Values in Judicial Conduct and Ethics Regimes

The literature on JCE indicates that an effective and enforceable regulatory framework of JCE requires a balancing act. Across many jurisdictions, measures have been taken to uphold the six Bangalore principles, namely judicial independence, impartiality, integrity, propriety, equality of treatment to all and competence and diligence as the document which sets out the principles explicitly states that 'effective measures shall be adopted by national judiciaries to provide mechanisms to implement these principles if such mechanisms are not already in existence in their jurisdictions.'[193] However, the principles of judicial independence and impartiality appear to receive the most consideration across the literature.

When considering how such principles operate in the JCE regulatory frameworks of other jurisdictions, it is important to bear in mind that Shetreet and Turenne in *Judges on Trial: The Independence and Accountability of the English Judiciary* noted that 'judicial independence is underpinned by a cluster of principles whose weight varies against the history and constitutional background of any given society',[194] a point which David Fennelly explored from an Irish context.[195] Shetreet and Turenne went on to note that

> **it will have a different meaning in a jurisdiction where judges are appointed from the ranks of practising lawyers in comparison to a jurisdiction where there is no distinction between barristers and solicitors, and where judges are appointed and trained for their roles from graduation. Thus, the contemporary features of the English judiciary are its constitutionalisation under the Constitutional Reform Act 2005 (CRA), the managerialism that is now attached to the judicial office and its professionalisation.[196]**

The rationale behind safeguarding an independent and impartial judiciary is that everyone before the courts will benefit from a fair and public hearing and the rule of law also requires judicial independence. Hence, 'independence is not a prerogative or privilege of judges but a guarantee of everyone's right to a fair trial.'[197] Dejo Olowu in *'Quest for Universal Standards of Judicial Integrity: Some Reflections on the Bangalore Principles'* suggested that for the judiciary to be 'virile', judicial accountability must accompany judicial independence[198] because as Cyrus Das, the former President of the Commonwealth Lawyers Association said:

> **Justice is a consumer product and must therefore meet the test of confidence, reliability and dependability like any other product if it is to survive market scrutiny. It exists for the citizenry 'at whose service only the system of justice must work.' Judicial responsibility, accountability and independence are in every sense inseparable. They are, and must be, embodied in the institution of the judiciary.[199]**

However, Appleby and Le Mire's article titled *'Judicial Conduct: Crafting a System that Enhances Institutional Integrity'* noted that judicial misconduct

[193] The Bangalore Principles of Judicial Conduct, 2002.

[194] Shimon Shetreet and Sophie Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary* (Cambridge University Press 2013) 419-420

[195] David Fennelly, 'Reluctant Reformers? Formalizing Judicial Regulation in Ireland' in Richard Devlin and Adam Dodek (eds), *Regulating Judges: Beyond Independence and Accountability* (Edward Elgar, 2016).

[196] Shimon Shetreet and Sophie Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary* (Cambridge University Press 2013) 419.

[197] OSCE Office for Democratic Institutions and Human Rights, Note on International Standards and Good Practices of Disciplinary Proceedings Against Judges' (2018) 4.

[198] Dejo Olowu, 'Quest for Universal Standards of Judicial Integrity: Some Reflections on the Bangalore Principles' (2013) 69(2) India Quarterly 179, 186.

[199] Cyrus Das, 'Judges and Judicial Accountability' (1999) quoted in Thomas Masuku, 'Professional Conduct and Judicial Accountability: Issues and Possible Enforcement Issues' (2010) 5.

arises infrequently but a failure 'to acknowledge and address it can damage the integrity of the courts and undermine their ability to fulfil the judicial function.'[200] However, they also noted that the creation of a system that holds judges to account can sometimes be seen as a grave threat to the judicial process and that excessive accountability can undermine judicial independence.'[201] To support this assertion they rely on a point made by Chief Judge Irving R Kaufman:

> **Our judicial system can better survive the much-discussed but rarely existent senile or inebriate judge than it can withstand the loss of judicial independence that would ensue if removal of judges could be effected by a procedure too facile or a standard too malleable.[202]**

However, Appleby and Le Mire also recognised independence is not the only value at stake and that judicial accountability can 'strengthen institutional integrity and even independence by ensuring judges act consistently with the institution's underlying values.'[203]

Olowu has also squared judicial accountability with the Bangalore principles as follows:

> **In recent years, the Bangalore Principles bear testimony to the amplified awareness within international judicial principles and instruments regarding accountability. These principles should therefore be considered to be a leading instrument on the subject of judicial accountability. The Principles set forth standards for the ethical conduct of judges and 'presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial.'[204]**

Similarly, Appleby and Le Mire posed reasons for the increasing concern for judicial accountability:

> **Judicial power is a significant aspect of public power wielded on behalf of the community. There has been an increasing acceptance that the judicial method requires judges to go beyond the law to resolve disputes, and they will often be forced to draw upon personal values. This acceptance has, therefore, emphasised the conduct and integrity of the individual involved … Since the 1970s, community concerns about the integrity of those wielding executive and legislative power led to the establishment of transparent and formalised accountability mechanisms that have largely supplanted traditional mechanisms. The exercise of judicial power has traditionally been subject to scrutiny through a number of mechanisms, both ad hoc and informal, and formal. But the predominance of these assumes 'judges can be wrong but not bad'. The significance of, and changes in, the judicial role, and the potential for judges to be subject to the normal range of human frailties, suggest these traditional mechanisms are insufficient, and that there should be a transparent and rigorous way to address judicial misbehaviour and incapacity.[205]**

However, they conclude that: 'A transparent and rigorous accountability system is therefore an important pillar that supports public confidence in the judicial system and the integrity of the courts' and that these ideals are also supported by a number of other pillars: 'most notably a judicial appointments framework that ensures candidates have the capacity and integrity to perform the judicial function, and that is sufficiently transparent to ensure public confidence in the process; and a system of ongoing judicial education.'[206]

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[200] Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' (2014) 38(1) Melbourne University Law Review 1, 3.
[201] Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' (2014) 38(1) Melbourne University Law Review 1, 37.
[202] Chief Judge Irving R Kaufman, 'Chilling Judicial Independence' (1979) 88 Yale Law Journal 681, 715–16.
[203] Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' (2014) 38(1) Melbourne University Law Review 1, 38.
[204] Dejo Olowu, 'Quest for Universal Standards of Judicial Integrity: Some Reflections on the Bangalore Principles' (2013) 69(2) India Quarterly 179, 186.
[205] Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' (2014) 38(1) Melbourne University Law Review 1, 4.
[206] Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' (2014) 38(1) Melbourne University Law Review 1, 39

As specified by the Organization for Security and Co-operation in Europe (OSCE) several measures have been developed over the years to protect the independence and impartiality of judges and guard against undue influence of judges. These include having appointments and dismissals carried out by bodies that are 'neither too corporatist nor too heavily influenced by the executive or legislature', safeguarding the tenure and irremovability of judges from the executive, and ensuring disciplinary processes do not unduly impinge on the independence and impartiality of the judiciary.[207] These accountability measures enhance public confidence in the judiciary.[208] It has accordingly been contended that judicial accountability 'reassures a sometimes-skeptical public that judges are doing their jobs properly'.[209] Appleby and Le Mire also highlighted the importance of transparency in accountability mechanisms particularly in terms of enhancing public confidence in the judiciary and institutional integrity.[210] A JCE framework that overlooks transparency has the potential to result in a judiciary that is unaware of standards to be maintained when exercising the role of the judge, the public may be reduced to 'an uninformed bystander' and complaints may not be dealt with in a meaningful manner.[211]

5.2.2 Judicial Independence in The Disciplinary Process

On the issue of sanctions, the OSCE noted that a range of offences and concomitant penalties to be conducted by an independent body that adheres to the right to a fair trial and provides recourse to appeal should be clearly provided for by law.[212] It was also set out in the OSCE report that sanctions should be proportionate to the determined offences and judges should only be dismissed in 'gravest of circumstances, and under no condition for simple errors in judgments.'[213] Formulating precise disciplinary provisions will enable the respective judges to appropriately carry out their judicial function and 'foresee the given consequences that a given action may entail, but also to avoid arbitrary application of the law.'[214] However, Harrison in his article *'Judging the Judges: the New Scheme of Judicial Conduct and Discipline in Scotland'* noted that 'the principle of judicial independence limits the types of action that can be taken against the judiciary.'[215] In support of this assertion, he highlighted that there are statutory safeguards in place to ensure that the removal of a judge cannot be precipitated too easily.[216] The OSCE accordingly noted that vague disciplinary offences may result in arbitrary application and an infringement of judicial independence.[217] The OSCE advice in this regard is to make use of 'prophylactic measures such as explanatory memoranda on the provisions on disciplinary offences and by appointing judicial bodies or officers whom judges can contact for guidance on whether a given conduct is permissible or not.'[218] In addition, the OSCE set out a brief but informative scale of offences and corresponding sanctions:

[207] OSCE Office for Democratic Institutions and Human Rights, Note on International Standards and Good Practices of Disciplinary Proceedings Against Judges' (2018) 4-5.
[208] Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' (2014) 38(1) Melbourne University Law Review 1, 39.
[209] Charles Gardiner Geyh, 'Rescuing Judicial Accountability from the Realm of Political Rhetoric' (2006) 56 Case Western Reserve Law Review 911, 916.
[210] Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' (2014) 38(1) Melbourne University Law Review 1, 39.
[211] Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' (2014) 38(1) Melbourne University Law Review 1, 40.
[212] OSCE Office for Democratic Institutions and Human Rights, Note on International Standards and Good Practices of Disciplinary Proceedings Against Judges' (2018) 5-6.
[213] OSCE Office for Democratic Institutions and Human Rights, Note on International Standards and Good Practices of Disciplinary Proceedings Against Judges' (2018) 5-6.
[214] OSCE Office for Democratic Institutions and Human Rights, Note on International Standards and Good Practices of Disciplinary Proceedings Against Judges' (2018) 6.
[215] James Harrison, 'Judging the Judges: The New Scheme of Judicial Conduct and Discipline in Scotland' (2009) 13(3) Edinburgh Law Review 427, 429.
[216] James Harrison, 'Judging the Judges: The New Scheme of Judicial Conduct and Discipline in Scotland' (2009) 13(3) Edinburgh Law Review 427, 429.
[217] OSCE Office for Democratic Institutions and Human Rights, Note on International Standards and Good Practices of Disciplinary Proceedings Against Judges (2018) 16.
[218] OSCE Office for Democratic Institutions and Human Rights, Note on International Standards and Good Practices of Disciplinary Proceedings Against Judges' (2018) 16.

Minor misconduct would be cases involving, e.g., disrespectful conduct to superiors or other court staff, not following orders or notices, or short, but unjustified terms of absence. Acts such as violations of the Constitution, or the failure to recuse oneself in cases of bias, failure to disclose assets, violations of provisions on incompatibilities, extensive absences from work or length delays in procedures, abuse of power, or the disclosure of confidential data or professional secrets would constitute more serious misconduct, which will be sanctioned accordingly.[219]

The OSCE noted that the law should also clearly detail the measures to be taken during disciplinary proceedings to protect judicial independence.[220] This was also recognised by Shetreet and Turenne as they noted 'it is imperative that the grounds and procedures for judicial discipline and removal are stated in clear terms'[221] and 'the power to remove and discipline judges directly affects individual judges as well as the judiciary as a whole, thus the grounds and mechanisms for the discipline and removal of judges are of vital importance to the independence of the judiciary.'[222]

Cynthia Grey in her article titled '*How Judicial Conduct Committees Work*' stated that the main aim of the judicial conduct commissions in the United States is not to sanction the judiciary but to protect the public.[223] Such issues impact the regulation of judicial conduct as indicated by Colin Scott as he stated from an Irish perspective that '[t]he design of an effective new system for the regulation of judicial conduct is a significant challenge, given the constraints of judicial independence.'[224] However, the Court of Appeals for the 11th Circuit in the United States said:

a credible internal complaint procedure can be viewed as essential to maintaining the institutional independence of the courts. If judges cannot or will not keep their own house in order, pressures from the public and legislature might result in withdrawal of needed financial support or in the creation of investigatory mechanisms outside the judicial branch which, to a greater degree than the [Judicial Councils Reform and Judicial Conduct and Disability Act of 1980], would threaten judicial independence.[225]

Hence, a complaints system should enhance institutional integrity without undermining independence.[226]

5.2.3 Procedural Safeguards in the Disciplinary Process

Appleby and Le Mire stated that the inclusion of the following considerations in the judicial complaint system is indicative of best practice:

- 'provision for a designated complaints-handling body separate from the court structure;
- the decision-making body has an appropriate composition;
- the system sorts complaints so that those involving substantive misconduct are considered;
- the standards against which judicial conduct is measured are apt to determine the types of incapacity and misbehaviour that must be addressed;
- an adequate opportunity to be heard is afforded to both the complainant and the judicial officer;
- the range of consequences provides options that suit varying types of relevant incapacity and misconduct;
- the system is sufficiently transparent to the public and judicial officers;

[219] OSCE Office for Democratic Institutions and Human Rights, Note on International Standards and Good Practices of Disciplinary Proceedings Against Judges' (2018) 16.
[220] Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' (2014) 38(1) Melbourne University Law Review 1, 5.
[221] Shimon Shetreet and Sophie Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary* (2nd ed, Cambridge University Press 2013) 284.
[222] Shimon Shetreet and Sophie Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary* (2nd ed, Cambridge University Press 2013) 271.
[223] Cynthia Grey 'How Judicial Conduct Committees Work' (2007) 28(3) The Justice System Journal 405.
[224] Colin Scott, 'Regulating Judicial Conduct Effectively' in Eoin Carolan (ed), *The Judicial Power in Ireland* (Institute of Public Administration 2018.
[225] Re Certain Complaints under Investigation; Williams v Mercer, 783 F 2d 1488, 1507 (Campbell CJ for Campbell CJ, Kearse J and Pell SJ) (11th Cir, 1986), citing Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 28 USCS §§ 331–2, 372.
[226] Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' (2014) 38(1) Melbourne University Law Review 1, 38.

- mechanisms exist to protect the integrity of the complaints process; and
- the administration of the scheme is fair, accessible and timely.'[227]

They accordingly emphasised the importance of a well-functioning judicial complaint system when they highlighted that an appeal cannot resolve judicial misconduct:

> **Appeals may correct legal errors and thus provide redress for the aggrieved litigant, but there is no additional consequence for the judicial officer, and no systemic solution that prevents ongoing misconduct. It provides no support for change, or even follow up as to whether such change has taken place. Further, the conduct's impact on confidence in the judiciary is not addressed.[228]**

Shetreet and Turenne took a similar position and argued that an appeal to a higher court does not provide 'an official acknowledgement of the misconduct of an identified judge accompanied by a sanction'.[229] Appleby and Le Mire highlighted that an effective disciplinary process can protect the judiciary by facilitating the resolution of false complaints made against judges. On the other hand, it can vindicate the rights of complainants who have actually been impacted by judicial misconduct. It also reinforces the idea that no one is above the law and the judiciary will be punished if they fail to heed the standards of judicial conduct.[230]

5.2.4 The Need for a Code of Judicial Conduct

The body or parties responsible for investing complaints tend to have the benefit of what Daniela Cavallini has referred to as 'a code of judicial conduct' in her chapter titled *'Independence and Judicial Discipline: The Italian Code of Judicial Conduct'*, published in Shimon Shetreet and Christopher Forsyth's *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges*.[231] Cavallini noted that a code of conduct essentially fixes standards for judicial conduct.[232] Cavallini's recognition of the increasing significance of judicial codes of conduct across many jurisdictions coincides with the OSCE report which noted that legislation on the disciplinary process should set down a range of offences and concomitant penalties for judicial misconduct to be investigated by an independent body that adheres to the right to a fair trial and provides recourse to appeal.[233] Appleby and Le Mire contended that the formulation of precise disciplinary provisions will discourage improper judicial behaviour and thus enable the judiciary to appropriately carry out the judicial function[234] by enabling the judiciary to 'foresee the given consequences that a given action may entail.'[235] Cavallini made a similar point when she emphasised the importance of an 'exhaustive' code of conduct in Italy:

> **All possible forms of misconduct are listed in the Code and any other form of behaviour, not mentioned in the list, cannot be punished as a disciplinary violation … In the opinion of the people working on the reform, general provisions are not consistent with a Code because they would reduce its effects and do not support judicial independence. So, the need for firm rules was considered much more important than the need for flexibility.[236]**

[227] Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' (2014) 38(1) Melbourne University Law Review 1, 46.
[228] Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' (2014) 38(1) Melbourne University Law Review 1, 8.
[229] Shimon Shetreet and Sophie Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary* (2nd ed, Cambridge University Press 2013) 13.
[230] Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' (2014) 38(1) Melbourne University Law Review 1, 5.
[231] Daniela Cavallini, 'Independence and Judicial Discipline: The Italian Code of Judicial Conduct' in Shimon Shetreet and Christopher Forsyth, *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges* (Brill 2011) 329.
[232] Daniela Cavallini, 'Independence and Judicial Discipline: The Italian Code of Judicial Conduct' in Shimon Shetreet and Christopher Forsyth, *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges* (Brill 2011) 329.
[233] OSCE Office for Democratic Institutions and Human Rights, 'Note on International Standards and Good Practices of Disciplinary Proceedings Against Judges' (2018) 5-6.
[234] Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' (2014) 38(1) Melbourne University Law Review 1, 5.
[235] OSCE Office for Democratic Institutions and Human Rights, 'Note on International Standards and Good Practices of Disciplinary Proceedings Against Judges' (2018) 6.
[236] Daniela Cavallini, 'Independence and Judicial Discipline: The Italian Code of Judicial Conduct' in Shimon Shetreet and Christopher Forsyth, *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges* (Brill 2011) 333.

This report therefore recommends that:

- **the Judicial Complaints Committee provides sample transgressions and potential consequences in the Guide to Judicial Conduct and Ethics, following the OSCE recommendations.**

5.2.5 Defining Misconduct

Appleby and Le Mire also explored differing categories of potential judicial misconduct to be considered by the judicial complaints system by considering whether the conduct in question would render the individual suitable to serve as a judge and maintain public confidence in the judiciary.[237] At the outset of this analysis, they recognised that judicial incompetence stemming from a lack of 'intellect, knowledge and training' usually only results in a judge being disciplined or removed from office if it gives rise to incapacity or misbehaviour and it is notable that 'incapacity can often manifest in misconduct.'[238] A distinction was made between incapacity and misconduct. Misconduct was described as 'improper or unprofessional' behaviour with an 'intentional element' and by contrast, it was said that behaviour resulting from incapacity is not intentional, rather it is the result of a 'physical or mental' predisposition that impedes one's ability to serve as a member of the judiciary.[239] Appleby and Le Mire also referred to Shetreet in his book *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary*, who noted that the lack of provision to dismiss a judge from office due to incompetence is:

> **an inevitable price which society has to pay for maintaining the independence of judges. As it would be difficult to draw the line, if judges were to be removed for incompetence, this standard could be used as a pretext for removing from office judges who were perfectly competent but for some reason or another do not enjoy the support of those who control the machinery of removal …**[240]

Moreover, judicial incapacity must be dealt with in a manner that protects both the welfare of the judge in question and public interest in the judiciary.[241] Hence, Appleby and Le Mire recommended that if a serving judge does demonstrate incompetence from the bench 'a judicial complaints system must be able to provide a proportional and tailored response for the judge concerned.'[242] Nevertheless, efforts should be made to counter judicial incompetence through the judicial appointments process, continuous JET and leave to appeal[243] because an incapacitated judge may stymie confidence in the judiciary.

Appleby and Le Mire continued by noting that judicial misconduct may arise before a judge is appointed to the bench, during their time on the bench, and over the course of their retirement. They highlighted that misconduct arising before a judge takes office may be an invaluable indicator as to that judge's 'fitness for judicial office.'[244] Misconduct that occurs during a judge's time serving office was categorised into 'misbehaviour in official duties or off the Bench.'[245] Appleby and Le Mire specified that misconduct in official duties may take the form of:

(a) Failure of Interaction: Incivility, Rudeness, Bullying and Offence
(b) Partial and Biased Conduct
(c) Delay in Delivering Judgments
(d) Professional Misconduct
(e) Administrative Misconduct and
(f) Abuse of Judicial Power.[246]

They also provided examples of misconduct arising out of a judge's behaviour off the bench in their private capacity:

(a) Criminal Conduct and
(b) Reprehensible Behaviour.[247]

[237] Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' (2014) 38(1) Melbourne University Law Review 1, 6.
[238] Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' (2014) 38(1) Melbourne University Law Review 1, 9.
[239] Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' (2014) 38(1) Melbourne University Law Review 1, 9.
[240] Shimon Shetreet, 'Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary' (North-Holland Publishing 1976) 284-285 as noted by Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' (2014) 38(1) Melbourne University Law Review 1, 9.
[241] Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' (2014) 38(1) Melbourne University Law Review 1, 10.
[242] Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' (2014) 38(1) Melbourne University Law Review 1, 11.
[243] Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' (2014) 38(1) Melbourne University Law Review 1, 9.
[244] Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' (2014) 38(1) Melbourne University Law Review 1, 12.
[245] Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' (2014) 38(1) Melbourne University Law Review 1, 12.
[246] Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' (2014) 38(1) Melbourne University Law Review 1, 13-21.
[247] Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' (2014) 38(1) Melbourne University Law Review 1, 22-27.

6

ASSESSING JUDICIAL EDUCATION AND JUDICIAL CONDUCT IN IRELAND

TOWARDS BEST PRACTICE:
A REPORT ON THE NEW JUDICIAL COUNCIL IN IRELAND

Irish Council for **Civil Liberties**

6. Assessing Judicial Education and Judicial Conduct in Ireland

As part of the project that led to this report, we convened two online seminars to comprehensively explore whether the establishment of the Judicial Council will align the Irish approach to judicial education and training (JET) and judicial conduct and ethics (JCE) with best practice in other jurisdictions.

6.1 'Judicial Education and Training in Twenty-First Century Ireland: European and International Perspectives', Friday 17 September 2021

The Court and Court Services Act 1995 provided Irish judges with a legal obligation to engage in further education once they joined the bench. However, as highlighted by Ms Doireann Ansbro of the ICCL in her introductory remarks, training has generally been limited to conferences and seminars, bench books, limited induction, shadowing and funding for judges to attend courses abroad. The Director of Judicial Studies, Ms Justice Gearty made a similar point in an Irish Times article which happened to be published on the morning of this seminar, stating that a judge's mere experience of a courtroom environment is no longer adequate when exercising the role of the judge because 'training and professional development has evolved to the point where it is indefensible not to have continuing training'.[248]

Professor Paul McCutcheon and Dr Rónán Kennedy provided invaluable historical context on the development of JET in Ireland in both of their presentations. Professor McCutcheon reflected on a review of the Judicial Studies Institute which he and his colleagues Ray Friel and Dermot Coughlan of the University of Limerick were tendered by the Judicial Studies Institute to conduct in 2003. They submitted their Report in 2004. At this stage the Judicial Studies Institute had been renamed the Judicial Studies Committee and both of these bodies were essentially non-statutory committees set up to deal with JET in Ireland. The Judicial Council Act was impending when Dr Kennedy was commissioned by Chief Justice Frank Clarke to update the earlier review, and the Act was subsequently passed in 2019. As a result, the Judicial Studies Committee which strives to provide for the continuing education of judges in Ireland was established on 10 February 2020. The Report produced by Professor McCutcheon and his colleagues and that of Dr Kennedy both found that an investment in JET in Ireland would be an investment in the administration of justice. Interestingly, perhaps due to the passage of time, Dr Kennedy also saw increasing interest in developing judicial skills in an interactive manner.

Ms Ansbro highlighted that a Council of Europe Report on Efficiency of Justice in European Judicial Systems from 2018 found that Ireland is one of only three States that do not provide continuous training and is thus an outlier across Europe. After surveying the vast body of European law and human rights law in the context of JET Ansbro found that JET is necessary in Ireland to achieve an independent, impartial judiciary, with no bias or no perception of bias, that protects against discrimination and promotes equal treatment and remedies for acts of discrimination. In particular, these findings are very significant because Ansbro concluded that Ireland is 'perhaps not yet meeting international standards of best practice on training but change is happening and hopefully human rights will be a cornerstone of this change.' At the same time, she recognised the vast strides that have been made by the Judicial Council and the Judicial Studies Committee since their establishment and that the Annual Report of the Judicial Council is providing greater transparency and opportunity for greater analysis in terms of what training is being provided.

Dr Kennedy also recognised this progress and highlighted the work of the statutory JSC noted above in Section 3. On a positive and forward-looking note, Ansbro also pointed to the assertion made by Chief Justice Frank Clarke in July 2021 that 'building on what has been done to date, I am confident that, within a year, we will have made great strides towards

[248] Mary Carolan, 'New to the bench: judges to be trained for the first time' *The Irish Times* (Dublin, 17 September 2021).

putting in place a modern training scheme up to the best international training standards.'

6.1.1 A Move Beyond Substantive Law

A common theme throughout the seminar was how the judiciary might better engage with those who come before them in a court of law. It did not centre on concerns of the judiciary's knowledge of substantive law, but rather the focus shifted to the development of the soft skills of the Irish judiciary. Dr Mark Coen eloquently encapsulated this point. The interview-based research that he conducted and analysed with his co-presenter Dr Niamh Howlin, which considered judges experiences of dealing with jury trials and errors in the charge, led him to conclude that 'it's not just a question about errors in law, but about communication.' He attributed this to the fact that 'judges are human' and even those with extensive experience as criminal law practitioners reported interacting with the jury as a 'frightening' and 'daunting' experience.

It thus became apparent that enabling a judge to develop their non-legal skills including their interpersonal and communication skills through formalised and continuous judicial education and training may provide Irish judges with the ability to effectively preside over a case and deal with a jury which in turn has the potential to ensure excellence and public confidence in the administration of justice. Ms Justice Adèle Kent, in her presentation on teaching judicial skills addressed how judges can develop the skills necessary to become effective communicators in the courtroom. She discussed the model used to teach this skill in Canada, the jurisdiction in which she is the Chief Judicial Officer Emerita of the National Judicial Institute. This model specifies that participating judges must be provided with theory on the subject area; someone who has already developed the skill must model it for the judges and those attending the education and training session must practice the skill. The judge's practicing performance is evaluated by a facilitator and the judge is again required to practice the skill. It was submitted by Ms Justice Kent that for this model to be a success the judges engaging with the training must be provided with a well-considered scenario that can be used by them to practice the skill of effective courtroom communication. It was noted that actors practise these scenarios with judges. This allows judges to learn how and when to intervene in various scenarios, how to communicate with persons in the courtroom such as counsel and upset, emotional and vulnerable complainants. It was noted that developing effective scenarios for these exercises is a time-consuming but worthwhile endeavour in terms of furthering the skills of the judiciary. She also cautioned that the facilitation of this training is labour intensive as a group of thirty judges require between six and seven training facilitators. It is also facility and technology intensive as many training sessions require breakout rooms and recording facilities.

Similarly, Mr Justice Gerard Tangenberg, president of the training and study centre for the judiciary in the Netherlands (SSR) and senior justice of the Court of Appeal of the Hague, noted 'legal and procedural knowledge is important but not the sole qualifier of a well-trained judge.' The judiciary in the Netherlands is thus required to be 'clear communicators' in addition to having the capability to preside over court cases and deliver sound legal judgments. The SSR provide courses that promote communication skills and centre around the following four themes: court session and preparation, judgments and decisions, professionalism and policy, and cooperation, communication, and peer-to-peer review. In particular, it is notable that trainee judges in the Netherlands can develop their communication skills by engaging in a targeted session in which they practice analysing communication through communication models which enable them to become consciously competent or consciously incompetent with regard to general communication skills. The SSR also organise workshops that provide judges with training on relaying judgments on camera. During these workshops trainee judges are recorded delivering mock judgments and a media trainer provides feedback and practical tips on their verbal and non-verbal communication throughout the recording. This provides judges with the skills required to communicate their judgments clearly and confidently on camera and benefits the public perception of the judiciary as a whole.

The use of clear and concise language is necessary to ensure the effective delivery of justice. This has become a critical issue in judicial training as pointed out by Professor Cheryl Thomas of University College London. In the UK, she noted that provisions have been made to ensure all parties can understand the proceedings and the judgments. One measure that was taken to achieve this was the radical revision of the England and Wales bench book to provide sample directions to be delivered in clear language. In the Netherlands, training is also provided to promote the judiciary's ability to present legal arguments in

a clear and concise manner. Judicial trainees in the Netherlands have access to a general course taught by a Dutch language expert that specialises in the judicial sector. A prize is also awarded to the judge that uses plain language most frequently throughout the year which essentially encourages judges to engage in this practice.

It may be suggested that the development of non-legal skills ties in well with the expressed support for judgecraft training and in particular the recent implementation of role-playing in Irish judicial education and training as noted by a member of the audience, Kevin O'Neill, who is the secretary to the Judicial Council. Mr Justice John Edwards, another member of the audience, reflected on his experience of role-playing at a judicial education course in Scotland, saying that although it was a 'scary' exercise it was indeed 'valuable'. Mr Justice Richard Humphreys echoed a similar point while Professor Thomas noted that role-playing has presented itself as a common practice in the judicial college in the UK which she submitted is because role-playing was such an integral part of the judicial appointments process in the UK and therefore it was a natural extension to introduce it into judicial education and training courses. Interestingly, Dr Laura Cahillane noted that this is a point of relevance to be considered from an Irish perspective due to the reluctance to introduce role-playing into the judicial appointments process. This reluctance was most apparent at the recent Oireachtas Committee which engaged in pre-legislative scrutiny of the Judicial Appointments Commission Bill 2020 when the Committee strongly resisted this idea. Hence, there may be lessons to be learned from our neighbouring jurisdictions that might also be useful in the reform of the law on judicial appointments.

The point that judges are human facilitated a natural segue in discussion to arguments in favour of combating bias and prejudices on the bench, traits that judges – like all other human persons – are not immune from. Coen emphasised this when he indicated that 'everyone has prejudices' and 'everyone has biases'. Such prejudices and biases were said to give rise to issues such as social distance between judges and those who appear before them which in some circumstances is more pronounced than others and may even be exacerbated by physical distance within the courtroom. Dr Rachel Cahill-O'Callaghan elaborated on the ramifications of implicit or social bias within the courtroom. She contended that such biases have the potential to pervade judicial outcomes and may even influence jury trials. Cahill-O'Callaghan did acknowledge the argument regarding safety in numbers on a twelve-person jury and that this group dynamic is said to neutralise biases as suggested by Coen and Howlin's research. However, Cahill-O'Callaghan went so far as to suggest that one would be naïve to believe that even a diverse jury could escape their own implicit biases. This statement coincided with a comment made by Michael Finucane from the audience when he suggested that a biased judge can influence a jury in such a subtle manner that the bias cannot be detected by reading the transcripts of the case.

Therefore, as highlighted in the joint presentation of Dr Amanda Haynes and Dr Jennifer Schweppe, which dealt with instances of prejudice from the judge, there is a need for judicial training to address bias and there is much to be considered in this regard. It was advanced throughout this seminar that unconscious bias and diversity training have the potential to enable all members of the judiciary to facilitate a positive experience in the courtroom for persons at all levels of Ireland's social stratification, but in particular for those who are 'more likely to end up in court in the first place' and perhaps occupy diverse backgrounds or have endured adverse life experiences. The Irish judiciary must therefore strive to cater for multiculturalism and diversity on the bench, something which the judiciary in the Netherlands is currently addressing as highlighted by Mr Justice Gerard Tangenberg.

Ansbro argued that this training will promote impartiality amongst the judiciary and thus benefit judicial decision-making and procedural fairness in the courtroom. Cahill-O'Callaghan, on a thought-provoking note, furthered this argument when she asserted that judges need to be 'much more explicit about the implicit'. She accordingly suggested that it is not enough for judges to engage in unconscious bias or diversity training without putting it into practice on the bench, which in her opinion could be achieved (for example) through how a judge communicates with the jury. The judiciary should accordingly assume the duty of explicitly raising awareness of the possible biases that might occur throughout a jury trial when directing the jury. Therefore, as Dr Brian Barry commented from the audience, practical tools used on the bench to combat bias are just as significant as the judicial training itself. However, caution was also raised regarding the possible tools that might be relied on including

set practices such as publicly available bench books because it was argued that these may perpetuate and embed biases that need to be challenged. Therefore, the approaches adopted to combat bias must be closely considered.

6.1.2 Emotion and Well-being in the Courtroom

Dr Jane Mulcahy argued that 'we all have the ability to grow our compassion' and in addition to having this ability, judges also acquire the responsibility to cultivate compassion because there is a need for more love and empathy from the bench. Mulcahy and Saoirse Enright both advocated for a judiciary that is trauma aware and responsive because, as Mulcahy suggested, the 'denigration of emotion within the legal system and its elevation of reason' can have devasting consequences on the nervous system of a dysregulated and often vulnerable person. This state of dysregulation is often exacerbated by the bullying tactics that are sometimes used by counsel in sexual offence cases for example which consequently precipitates re-traumatisation. However, Mr Justice John Edwards highlighted a recent Court of Appeal decision which required counsel who wish to rely on trauma or mental health issues in pleas for mitigation of sentence to put evidence of these before the court and went on to argue that the crux of the issue in this context is that the judiciary can only act on evidence of trauma. Therefore, it was his view that the real contest is 'not the willingness of the court to take this material into account but the weight that is afforded to it' and that this may be an issue for the Judicial Council's Sentencing Guidelines and Information Committee.

The importance of providing for all vulnerable persons who come before the court was also echoed by Tom O'Malley when he highlighted the significance of the use of the phrase 'vulnerable witnesses' instead of 'vulnerable complainants' throughout his research to cater for accused persons as they are also entitled to an intermediary if necessary as they also have a right to give evidence. In this regard, it is notable that O'Malley's recommendation in his recent review of the role of intermediaries in the investigation and trial of sexual offences that training is provided for judges and legal practitioners around dealing with vulnerable witnesses and awareness of trauma is currently being implemented by the Judicial Studies Committee.

Mulcahy also outlined that research suggests that judges who are exposed to trauma on the bench can experience secondary traumatic stress and overwhelm. The trauma awareness that comes with trauma-responsive education and training will provide judges with the skills necessary to identify when they have been negatively impacted by indirect exposure to trauma and to seek help with maintaining their well-being and improving their self-care routine. Thomas noted that the UK judicial attitudes survey indicated that the judiciary reported feeling increasingly vulnerable on social media and suggested that judicial education and training on the use of social media may also benefit the well-being of the judiciary. In particular, the judiciary suggested that guidance on how to respond and cope with a social media campaign that individually targets them would be most beneficial. Media training is thus becoming a leading issue amongst the judiciary and merits consideration in an Irish context to safeguard the safety and well-being of the judiciary.

6.1.3 Time, Resources and Workload Dilemmas

The lack of time and resources available to the judiciary was a recurrent theme of concern throughout this seminar. Dr Kennedy pointed to Ireland's limited number of judges and their heavy workload which means that training is often an 'extra' to be done at evenings and weekends.

This concern was also addressed in an international context with speakers on judicial education and training in the UK, Netherlands and Canada sharing their understanding of the time limitations experienced by the judiciary in their respective jurisdictions. In Canada, there are two judicial training programmes run each year which take place over three days and require the attendance of the judiciary. The federally appointed judges receive ten days out of court to attend their court's education programmes. However, some judges might only receive six to seven days to complete their days of training with provincial judges receiving even less which compels them to take time out of their writing weeks or vacation time to complete their training which is clearly problematic. In the Netherlands, judges receive a set number of days to complete required and mandatory education programmes. However, it was suggested that this is merely effective in theory because although the court system in the Netherlands has developed professional standards, judges require time to prepare cases, sit in court, prepare judgements, attend conferences and educational activities. Therefore, due to the pressure

of the primary role of the judge, judges often take their courses during holiday time which again is undoubtedly challenging for members of the judiciary and their well-being. The UK judicial attitudes survey also indicated that time is a significant issue for judges in terms of attending and preparing for training. The latter was referred to as a 'crunch point' largely because of budget cuts which have reduced the duration of judicial education courses but not the content. The courts also experience backlogs which creates a work-education dilemma for judges.

Nevertheless, the UK appears to be rather advanced in this regard as judges receive guarantees of protected time to complete education and training courses. It differs by jurisdiction but generally speaking there is the expectation, certainly of salaried judges, that they avail of their protected time and attend judicial college courses. Training take-up is also monitored which promotes attendance. The establishment of mandatory training in narrow subject areas for well-established judges and not just newly appointed judges also ensures that judge's complete education and training courses continuously. The mandatory training applies to judges with certain 'tickets'. For example, for a judge to preside over a sexual offences case they are required to complete the serious sexual offences course. It was submitted that this is quite a development in the history of judicial education and training in the UK because prior to the development of mandatory training, judicial engagement was always voluntary.

It is thus imperative that judicial education and training in Ireland is properly resourced to ensure its success. This was also recently recognised by His Honour Judge John O'Connor, a member of the Irish judiciary who was quoted in a newspaper article as saying 'It's not just for us, there is a realisation that, experienced as we are, we do need some assistance and that has been a huge learning curve. Judges are always very professional and we try to do our best but we lacked the resources and structure.'[249] Therefore, as Kennedy contended the Irish government must engage with their responsibility to provide for the effective delivery of education and training courses, resource Irish courts with more judges and provide them with training in basic human resources. In this regard, McCutcheon pointed out that due consideration must be given to the cost involved in the digitisation of judicial training and education packages which was estimated at 1.2 million euros in 2004 and can only have since increased due to technological advancements and demand. Kennedy mentioned his recommendation that the JSC should hire learning technologists to ensure judicial education and training courses are packaged and received well by the judiciary.

Reflecting on previous discussions he had with judges for his research Kennedy also noted that some judges raised concerns regarding the lack of induction training for the judiciary, leading to 'learning on the job', which may be inefficient. Hence, better training coupled with an increase in judicial appointments would provide judges with the time to be discharged from their primary role as a judge and adequately engage in training and education. Cahill-O'Callaghan also emphasised that such resourcing is necessary to ensure that judges can slow down and challenge biases and thus enjoy a holistic judicial education. Moreover, this is vital in terms of mandatory training as such provisions will also promote a work-life balance amongst the judiciary.

This report therefore recommends that:

- **sufficient time available for judges to attend training courses, by appointing an adequate number to the bench; and**
- **adequate financial resources for the Judicial Council to staff its training function and to engage external experts as necessary.**

6.1.4 Conclusion

Thomas closed the seminar on a forward-looking and hopeful note. She suggested that the provision of training on empirical skills in law schools is essential. This echoes an earlier point raised by Haynes and Schweppe when they noted that there is currently very little secondary data available to inform research within this area. Moreover, Thomas highlighted the importance of researchers creating relationships of trust with the judiciary as this is also likely to better inform research on this topic. These closing remarks promoted embracing best practice in civil law jurisdictions, something which has not been a focal point in Ireland to date in terms of JET as there has been a tendency to focus only on common law jurisdictions. However, Mr Justice Tangenberg

[249] Mary Carolan, 'New to the bench: judges to be trained for the first time' *The Irish Times* (Dublin, September 17, 2021).

commented that 'it doesn't matter whether you are in a civil law or common law jurisdiction - the role of the judge is mostly the same and the skills needed are the same', which merits some reflection as Ireland is now the only fully common law jurisdiction in the EU.

6.2 'Judicial Conduct in Ireland: A Framework Fit for Purpose?', Friday 22 October 2021

This seminar opened with a keynote presentation from Mr Justice Frank Clarke, who had very recently retired from his role as Chief Justice of Ireland. He informed the audience that although the precise structure of a Judicial Council of Ireland has been the subject of much debate for a quarter of a century, a Judicial Council with a conduct element was always on the horizon. He broadly attributed the need for a Judicial Conduct Committee (JCC) to the well-established shortcoming that the only procedure currently available in Ireland to discipline judges is the Constitutional provision set down in Article 35.4 of the Constitution which provides that a judge will be removed from office as a result of a resolution passed by both houses of the Oireachtas in respect of incapacity or stated misbehaviour.

Mr Raymond Byrne, who presented on the significance of the Bangalore principles also acknowledged that one of the main driving forces behind the Judicial Council Act, 2019 which Dr Laura Cahillane termed a 'landmark' was 'the need to replace the stark all or nothing of the constitutional removal provision which did not provide the confidence-building framework that the 2019 Act now promises.' The audience was informed that this provision has never been fully invoked[250] and it essentially overlooks the possibility that the judiciary would engage or should be disciplined for engaging in judicial conduct that would warrant intervention but would fall short of the conduct that might justify removal from office. Hence, Ms Doireann Ansbro, speaking from an international human rights perspective, highlighted that connecting conduct with accountability is essential to ensure confidence in an independent and impartial judiciary. In support of this, she referred to a statement made by the Special Rapporteur on the Independence of Judges and Lawyers:

> **The principle of the independence of the judiciary is not aimed at benefitting judges themselves, but at protecting individuals from abuses of power and ensuring that court users are given a fair and impartial hearing… Judges must therefore be accountable for their actions and conduct, so that the public can have full confidence in the ability of the judiciary to carry out its functions independently and impartially.**

While in discussion with the audience and her fellow panellists, Ms Ansbro also highlighted that the international standards and frameworks on JCE are developed in the context of ensuring that the judiciary have ownership over them in order to protect their independence and prevent interference from the executive in particular.

Mr Justice Clarke noted that despite the defect of an absence of lesser sanctions for judicial misconduct, international surveys have identified that the Irish judiciary have been placed in the upper echelons of public confidence due to their maintenance of judicial independence and how they exercise their role. Presenter Ms Caoimhe Kiernan, who provided a comparative overview of the bodies responsible for investigating complaints against the judiciary, noted that Ireland currently ranks twelfth out of one hundred and forty countries for judicial independence in the global competitiveness report. Mr Justice Clarke suggested that it is fair to view the Judicial Council's proactive implementation of a series of measures as a means to maintain rather than establish high levels of confidence in the judiciary. He grouped these measures into two regimes. He first identified the strides taken by the Judicial Council to provide consistency and transparency when addressing matters of sentencing and the award of general damages in personal injuries claims. The second regime which was identified by Mr Justice Clarke and bears more significance for the theme of discussion at this seminar was the identification of the Judicial Council's role in promoting JET, JCE and judicial welfare.

[250] Minister for Justice initiated a motion for the removal of Judge Curtin from office in 2002. A Joint Oireachtas committee was subsequently established to investigate the alleged misconduct and a resolution for the removal of Judge Curtin was proposed in both Houses of the Oireachtas. Judge Curtin applied for judicial review of the entire proceedings. The case went to the Supreme Court, which held that the Committee and Houses of the Oireachtas were required to accord full rights of constitutional justice and fair procedures to the applicant. In November 2006, just as the Committee was swearing in its first witnesses, Judge Curtin resigned on grounds of ill-health and the inquiry did not proceed.

Mr Byrne also recognised a high standard amongst the judiciary in terms of public perception. He suggested that this may be because the judiciary take the issue of judicial independence very seriously and are also prepared to instruct the other branches of government to carry out their function as seen in the *Friends of the Irish Environment* case. He noted that public perception was deemed to be strong despite the Irish judiciary having received poor ratings from the Group of States Against Corruption (GRECO) due to Ireland's failure to establish a regulatory framework although the Bangalore principles provide sufficient guidance on how to do so. He went on to note that GRECO again recently emphasised this point in their 2020 report as it noted that in the absence of a finalised code of JCE its recommendations on standards for JCE remain 'not implemented.' Mr Byrne highlighted that this was striking as the 2019 Act has been implemented and the Judicial Council set up. He sounded a note of caution as he recognised that we also live in a society in which institutions that were previously held in high regard have 'dropped like stones.' Hence, he suggested that trust can be lost, and we must accordingly acknowledge that the judiciary have not been immune from scandal. He therefore viewed the Bangalore principles and the procedures in the 2019 Act as very important, and contended that they promote excellence in judicial conduct and not merely a reaction to misconduct which is imperative for continued confidence in the independence of the Irish judiciary.

As well as setting the context for the remainder of the seminar, Mr Justice Clarke reflected on the success of the work of the Judicial Council thus far while also pondering on its future. It was outlined that the JCC convened its first meeting as soon as was practicable following the appointment of lay members and the complaint procedures which Mr Justice Clarke suggested measure well in terms of international standards, have also been established. Mr Justice Clarke was of the opinion that Ireland was coming up to international standards in terms of JCE and as pointed out by Mr Byrne the Judicial Council and its accompanying legislation now embody what the Bangalore principles set out to achieve, namely transparency, a regulatory framework, and the prevention of corruption.

However, Ms Ansbro added that it is fair to say that Ireland is quite behind the times in terms of international standards. She drew on the implementing mechanism of the Bangalore principles which was elaborated almost twenty years ago and sets out in its first principle that standards of conduct and ethics should be elaborated at the national level, thus indicating that recent advancements are long overdue. Ms Ansbro, therefore, suggested that Ireland's success in this regard remains to be seen especially as the JCE guidelines which Mr Justice Clarke indicated have now been adopted by the JCC remain to be finalised. Mr Justice Clarke expected that the final version of the guidelines will go before a full meeting of the Judicial Council early next year and perhaps even at the Annual Meeting of the Judicial Council which is due to take place in February 2022. It was recommended by Ms Ansbro that practical guidance should accompany the guidelines on JCE to make them clear and accessible to judges, decision-makers, and the public. This again reinforces the importance of promoting confidence in the judiciary through transparency. Mr Justice Clarke noted that once the guidelines are adopted the Minister for Justice will then be in a position to commence the relevant sections of the legislation on complaints and the Judicial Council will be required to have in place the information technology and personnel structure to manage incoming complaints. However, he added that the Judicial Council is well-positioned in that regard.

6.2.1 A Holistic Approach to Judicial Conduct and Ethics

The idea that the Judicial Council has the potential to ensure the success of the JCE regulatory framework by adopting a holistic approach to the issue of judicial conduct appeared as a recurring theme throughout the seminar. It was broadly identified that striving for a holistic approach to JCE would protect the judiciary and its independence while also maintaining public confidence as measures would be in place to promote excellence within the judiciary. It is most interesting that this issue was recognised from the outset of the seminar when Mr Justice Clarke grouped JCE, JET and judicial welfare concerns as measures implemented by the Judicial Council to promote excellence within the judiciary. He accordingly provided those in attendance with much intellectual nourishment by identifying the potential for interaction between these three elements. Mr Justice Clarke furthered this point by stating 'that there can be no doubt that better training and an effective welfare system may divert some cases out of existence as it were by preventing them from arising in the first place.' He highlighted

that there is a provision in the legislation that specifies that there is the possibility of a complaint being diverted into a welfare issue if the JCC is of the view that a judge's welfare was the cause of misconduct. Hence, the legislation indicates that dealing with health issues and avoiding a conduct route where appropriate would be more beneficial for all involved. Mr Justice Clarke surmised that fewer complaints might materialise in the long run due to measures such as enhanced judicial training being provided by the Judicial Council. Perhaps, he was confident speculating in this regard as he further noted that judicial training is now well underway with judges engaging in induction training which have involved court simulations.

Dr Sophie Turenne presented on some of the key features and issues of judicial conduct, complaints and discipline in England and Wales and posed a concurring argument. She suggested that disciplinary issues are best addressed in their broader context where training, monitoring and support of judicial performance can be reinforced. This point was again raised at a later stage in the seminar by Dr Patrick O'Brien in his presentation on disentangling the formal and informal in judicial conduct processes. He noted that there can be multiple responses to the same problem and instances of treating welfare issues formally and excessively should be avoided where appropriate. Dr Turenne referred to a 2015 social benefit case in which the appellant complained afterwards about the judge's questioning. The judge in question had expressed to his colleague who was assessing the complaint that he wished for the complaint to be dealt with informally, but his colleague was not in a position to do so as per the rules. This resulted in a breakdown in relations between the judges. Nevertheless, the Judicial Conduct Investigations Office (JCIO) dismissed the complaint but the cover letter to the decision stated that 'it might be some comfort to the appellant in a social benefit case to know that all judges can benefit from training in judgecraft and that the judge will be offered some informal advice in that regard.' It was noted that efforts were then made 'luckily' to enrol the judge on a suitable training course. However, the judge complained that the advice to enrol him on such course was detrimental, improper, and even unlawful. He complained that he was now a 'problem judge.' Dr Turenne suggested that this brings several issues to light. First, although the disciplinary rules came into force in 2013 at the time of the complaint in 2015, no training about the disciplinary rules had been provided to the judges handling the complaint. Dr Turenne contended that this was reflected in how the case was handled and that this was also true for numerous other cases.

In keeping with the theme of adopting a holistic approach to JCE, Dr Turenne noted that context matters. To emphasise this point Dr Turenne relied on a case in which the judge made an adoption order and also showed sarcasm and anger while dealing with the matter before the court. The adoption order was later overturned in 2019 as a result of the judge's behaviour and management of the case. It was suggested that it is not a coincidence that such cases amongst other similar cases relate to publicly funded work as every branch of the public sector is 'overweighed to the point of breaking.' Such issues informed Dr Turenne's conclusion that creative solutions are required to support judges who work in highly volatile and underfunded conditions and shifting informal support measures to pre-empt complaints rather than belatedly introducing them when a complaint has been made would be a step in the right direction. While in discussion with her colleagues, Dr Cahillane recognised that there is the potential for JET to impinge negatively by becoming reactive. However, she shared a positive outlook on the provision of measures that have been provided thus far on JET and JCE and suggested that these will be received well by the public as they will suggest that the judiciary like all other persons are not 'untouchable.'

The presentations of Dr David Fennelly and Dr Brian Barry also exemplified this theme of discussion. They both illuminated the interdependence of JCE and JET and highlighted that the role of the JCC is to be proactive rather than reactive or as Dr Barry put it 'to proactively grab the nettle.' Dr Fennelly accordingly examined the issue of equality of treatment of all persons before the courts and how the 2019 Act which now provides the tools to deal with misconduct in this regard might give effect to it in practice. He noted that the Bangalore principles usefully indicate what this might mean in the practical functions of the judiciary. He also recognised that the equality of treatment debate is very much alive in the form of the Me Too Movement in the United States while UK studies have indicated that the judicial system is riddled with casual racism. Dr Fennelly thus suggested that although such issues may not be as widespread within the Irish judiciary, there is no

doubt Ireland has not escaped. He suggested that misconduct in this area must be viewed through a holistic lens. He argued that misconduct arising out of a failure to be equal before all persons before the courts is an issue that cannot be addressed through the conduct structures alone and JET should also be provided on these issues. He therefore welcomed the recent strides made by the JSC and in particular, the provision of unconscious bias training which he suggested can play an important role in the context of equality of treatment of all persons before the courts. He also suggested that a bench book on equal treatment might assist the judiciary in maintaining high standards in this regard.

Dr Barry's presentation, which examined the conduct principle of judicial impartiality, also recognised the potential for collaboration between the JCC and the JSC to ensure that the training being provided to the judiciary supports judges in their endeavour to be more 'impartial' and less biased. He emphasised that providing the judiciary with the opportunity to uphold and exemplify impartiality in this way will enable the JCC to be more proactive rather than reactive. He exemplified the impact of training on this issue by referring to our previous seminar on JET and Mr Justice Richard Humphrey's account of the benefits he obtained from participating in role-playing exercises. Furthermore, he noted that unconscious bias training is perhaps only effective when it is personalised and interactive. In support of this point, Dr Barry accordingly provided a interesting example of training addressing judicial impartiality in Slovenia by drawing on a series of experiments which were carried out on the judiciary there. These experiments which used vignettes based on the judges' day-to-day activities revealed the cognitive and social biases that the judiciary was susceptible to and may consequently affect their judging. He stressed that there was much enthusiasm for further training as he noted that 'those judges kept coming back for more and more in a similar vein.' In keeping with the idea of promoting equality in judging and judicial impartiality through training, it was also suggested in this presentation that the JCC could also consider the issue of judicial demeanour, how judges communicate with litigants in court and their judgments. Dr Barry recommended that this end could also be facilitated by scaling up Mr Justice Barrett's 'commendable initiative' to write short letters to litigants explaining the consequences of his judgments.

6.2.2 Misconduct and the Aftermath: A Balancing Act

During his presentation, Mr Byrne highlighted that the general principles on judicial conduct set out in section 7(1)(b) of the 2019 Act can be traced to the Bangalore principles which comprise independence, impartiality, integrity, propriety, equality and competence and diligence. The presentations of Dr Fennelly and Dr Barry are also of relevance to these issues because of the notion of judicial accountability. Each of their presentations highlighted that if the judiciary fail to uphold the principles of equal treatment of all persons before the courts or impartiality then section 43(2) of the 2019 Act could be called into question. Dr Fennelly noted that the principle of equal treatment of all persons before the courts can manifest in very obvious ways including the language used by the judiciary. However, Dr Fennelly noted that it also has the potential to manifest in more subtle ways. Likewise, Dr Barry highlighted that misconduct could arise if a judge failed 'to suppress preconceptions and leanings of the mind' or worse still fail to acknowledge the existence of such characteristics in the first place. He noted that a failure to be impartial could impact judgments, in-court interactions, and extra-judicial statements. He went on to assert that it could even be argued at a broader level that an unrepresentative judiciary in the sense of judicial appointments and its composition in an increasingly pluralist society may give rise to perceptions that, as a whole, the judiciary (because it may not be representative) gives the appearance of not being impartial.

To ensure public confidence and that the judiciary maintains the standards highlighted by Mr Byrne and in particular those explored by Dr Fennelly and Dr Barry while exercising its judicial function, Dr Cahillane's presentation, which analysed the new judicial conduct framework in Ireland, highlighted legislative measures that have been implemented to essentially fill a gap in judicial accountability and transparency, something which she noted must be carefully balanced with the independence of the judiciary. Similarly, Professor Daniela Cavallini in her presentation on Italy's case highlighted that the Italian judicial system has also undertaken several actions over the last decade to improve accountability and efficiency within the judiciary. It was noted in Professor Cavallini's presentation that such efforts were reflected in Italy's 2006 legislative reform of judicial discipline as it strives to provide effective mechanisms of accountability without undermining

judicial independence. She pointed out that Italy saw the introduction of a code of discipline which has enhanced the predictability of disciplinary offences and magistrates are now much more aware of the violations which they would have to account for. She also noted that the legal definition of misconduct also provides further clarity and during the discussion session Dr Cavallini also noted that despite the code of discipline the disciplinary commission retains discretion in terms of how judicial misconduct is defined.

In like manner, Dr Cahillane welcomed the Irish definition of misconduct set out in the 2019 Act and expressed hope that it will offer much clarity around questions of misconduct. However, she viewed the lack of further guidance in the Act on how serious the misconduct must be to lead to a recommendation for removal, for example, as a shortcoming. In addition, Ms Eunice Collins, whose presentation looked at defining judicial misconduct, noted that the meaning of the phrase 'acknowledged standards' in the definition of judicial misconduct in the 2019 Act is not yet clear. Ms Collins thus looked to international common law jurisdictions in an endeavour to define 'acknowledged standards of judicial conduct.' In particular, she emphasised the usefulness of Appleby and Le Mire's ten categories of judicial misconduct. After considering these categories she set out three conclusions. She noted that criminal conduct in itself is not always grounds to remove a judge, cumulative conduct could be considered when assessing whether misconduct has occurred, and sexual harassment and bullying can be difficult to deal with. In furtherance of the latter point, Ms Collins relied on an assertion made by Professor Delahunty that in England, lawyers are reluctant to make formal complaints about judges in fear of such complaints hindering their careers.

However, on judicial accountability, Dr Turenne informed the audience that there is now an online confidential reporting tool available in England known as TalktoSpot which gives barristers the option to record and report their complaints anonymously. Dr Turenne also noted that on the judicial side, there is a whistleblowing policy in place since 2020. In terms of clarifying morally reprehensible behaviour, Ms Collins again relied on examples provided by Appleby and Le Mire. On a final note, she noted that Mr Justice Clarke in his capacity as Chief Justice publicly stated that 'if there is a reasonable public perception that a judge has breached the law this could bring the courts into disrepute.' Nevertheless, Ms Collins contended that the use of the phrase 'bringing the administration of justice into disrepute' in part b of the definition of judicial misconduct is the vaguer element of the two-part definition of misconduct in the 2019 Act.

In terms of sanctions, Professor Cavallini noted that before the introduction of the code of conduct in Italy the criteria applied were not transparent and the Disciplinary Commission relied too heavily on minimum sanctions even in situations of very serious misconduct which interfered with the integrity of judges and prosecutors. Censure is now on the lesser scale of sanctions available with expulsion being the most serious sanction to be employed. This can be compared with the current situation in Ireland as Dr Cahillane noted that voluntary reprimands set out in the 2019 Act are welcome in theory in terms of balancing judicial independence and accountability. Professor Colin Scott, who presented on regulating judicial conduct responsively, noted that before the 2019 Act and the introduction of reprimands 'there was a hole in the heart of judicial oversight.' Ms Kiernan similarly noted that this remains to be the position in New Zealand today as removal is the only sanction available. Dr Cahillane also stated that it is important that there are avenues for dealing with complaints that will not have adverse effects on a judge's reputation and potentially their ability to administer justice. However, Dr Cahillane highlighted that these sections in the Act are 'worryingly vague' and to affect confidence in the administration of justice it is essential that a complainant feels that due process has occurred. She continued by noting that the danger with this particular voluntary reprimand section is that it might be seen as an escape mechanism especially as the consent of the complainant is not required and the detail of the reprimand is never made public. Dr Cahillane also contended that because it is so unclear as to what a reprimand currently entails there is the potential danger for a loss of confidence in this regard. However, Professor Scott noted that he anticipates that the guidelines being prepared by the JCC will introduce a set of 'intermediate sanctions' which he noted might not be viewed as sanctions by everyone. Nevertheless, he expects such 'sanctions' to include informal dispute resolution, a judge consenting to a reprimand, admonishment, informing the media, fines, and suspension.

Professor Cavallini, and Dr Silvio R. Vinceti who presented a comparative overview of the Irish and the Italian disciplinary systems, highlighted that no formal procedure exists for addressing complaints

against judges and prosecutors in Italy. Professor Cavallini also noted that there is a high dismissal rate with only five to ten per cent of cases giving rise to disciplinary action. Dr Vinceti described this as one of the main problems with the system in Italy. Professor Cavellini suggested that a formal and transparent system would provide more certainty and clarity for complainants and would increase public awareness on the issue of complaints. Moreover, she envisaged that it would encourage complaints but at the same time reduce the number of groundless complaints. She thus advocated for the restructuring of the complaints process and the establishment of a specific complaint's office. Hence, in discussion, Professor Cavallini noted that she is interested in monitoring the progress of Ireland's judicial oversight committee. Such an assertion overlaps with the presentation of Ms Kiernan which is also relevant to the recurring theme of striking a balance between the interests of the judiciary and the administration of justice with those of the public. Ms Kiernan highlighted this from the outset of her presentation as she noted that the overarching purpose of judicial conduct oversight committees is to protect judicial independence, public confidence in the judiciary and judicial accountability and fairness. Ms Kiernan, like Professor Cavallini, also appeared to be eagerly awaiting 'how the judicial conduct process works itself out' as she noted from her comparative overview that in comparison to Ireland which will have a thirteen-member JCC consisting of eight judicial office holders and five lay members, the corresponding processes in New Zealand and England and Wales include multiple offices and individuals.

Interestingly, Dr Cahillane expressed satisfaction with how the 2019 Act sets out the formal complaint procedure. However, she did take issue with the process for informal resolutions in the 2019 Act and stated that she hopes the guidelines which are currently being prepared by the JCC will address this area as it is currently very 'confusing' and thus lacks transparency. The Act provides that the JCC will request one or more designated judges to undertake the resolution of a complaint by informal needs; however, it does not currently specify who or how the judges are to be designated. The designated judge or judges can then appoint up to three judges from the relevant court to undertake the resolution by informal means on behalf of the designated judge or judges. Dr Cahillane indicated a sense of uncertainty about the foregoing step as it appears 'needlessly convoluted.' The judges must then report back to the JCC and as Dr Cahillane noted there is no further information contained in the Act on this process.

Dr O'Brien also noted that there are some ambiguities in this process in relation to the requirement of consent to resolution. Dr O'Brien explored this issue and highlighted that if consent is obtained before the matter is referred to the designated judge it appears that the committee will be obliged to refer the matter to a panel. However, if consent is taken after a referral, then the committee may decide not to refer it to a panel. Dr O'Brien expressed concerns with this process because, as he stated, the cases that are likely to be regarded as suited to informal resolution under the 2019 Act are those that involve the lower end issues and he suggested that it would be 'problematic' if a complainant who has unreasonably refused consent to an informal resolution can force this into a formal disciplinary route. Hence section 62(1) of the 2019 Act is silent on when consent should be taken. He highlighted that the other alternative is if the designated judge asks for consent and there is also a lack of clarity around this. This presentation suggested that the latter alternative may be covered by section 63(4) of the 2019 Act and would be regarded as an unsuccessful attempt at informal resolution. Dr O'Brien also highlighted that it is not apparent whether consent is required from both parties for an informal resolution to be successful under the Act, and thus whether buy-in from the complainant is necessary. He likened the informal process under the Act to mediation and recommended that the guidelines that are currently being prepared by the JCC should consider requiring consent to be obtained after the referral to the designated judge to allow the JCC to consider whether consent has been refused unreasonably by the complainant or the judge. On a final note, he commented on the need for a balancing act to be facilitated between the trust of judges and judicial accountability to the public and in achieving this to avoid the impression that the seriousness of the response to a complaint depends on whether a member of the public complains about it. Interestingly, unlike Dr Turenne's lack of support for informality in the complaints process, Dr O'Brien opined that 'informal resolution is a good thing'. He thus welcomes that the 2019 Act has the potential to allow for more of it in a structured way. In keeping with the issue of disciplining the judiciary, Dr Cahillane also praised the detail set down in the Act regarding how the JCC could address a removal motion but was

however critical of the lack of procedure for when a motion for removal is proposed in the Oireachtas.

6.2.3 Conclusion

The seminar closed with an brief reflective session during which Dr Cahillane noted that the overlap of JCE and JTE recurred throughout the seminar and invited Dr Turenne to provide the audience with some concluding remarks. Dr Turenne, on a forward-looking note, stated that with the creation of the Judicial Council Ireland has the tools to forge an effective JCE process. She noted, in terms of establishing a holistic approach to JCE, that Canada looks like a very promising jurisdiction to consider because for a long time now they have made huge efforts to implement JET. However, Dr Turenne suggested that this may be attributed to the significant emphasis which Canada places on multiculturalism. Dr Turenne also shed some light on important practical considerations to bear in mind such as having an appropriate budget to bring about change in Ireland's JCE regime especially as the JCIO in England and Wales is notoriously known for being understaffed, which has consequently created many delays. Dr Turenne noted that it is also well and good to have great intentions in terms of striving for a holistic approach, but again sufficient funds are needed for JET and similar measures.

Dr Turenne also provided much food for thought by drawing on an issue which she described as appearing 'a little bit' throughout the seminar. She noted that it is important to remember that Ireland is a common law jurisdiction with EU membership and that this has given rise to some tension as reflected in the GRECO report due to Ireland's lack of a regulatory framework. She thus suggested that there is a European model that is based on a particular understanding of Judicial Councils which does not yet correspond to the common law model and as a result, there may be issues with the jurisdictions that have been examined during the seminar. Hence, Dr Turenne encouraged an awareness of the traditional differences between the European model and the common law system, and that Ireland should aim to establish a model that fits within its legal and political history. Moreover, during the discussion with his colleagues, Dr Vinceti distinguished the importance of legal culture from differences between the common and civil law systems of justice by drawing on an assertion made by Anthony Scalia, that common law and civil law is today not as important as it used to be. Dr Cahillane noted that it was interesting to conclude that there are differences between the jurisdictions in terms of JCE that should be heeded because in the earlier seminar on JET, it was concluded that Ireland should be looking at the civil law jurisdictions because there was little difference in terms of the role of the judge and what was necessary for JET. But as Dr Rónán Kennedy noted, there remain differences between the common and civil law jurisdictions and perhaps no one legal system or culture has all the answers, but the Judicial Council may now give the Irish people the opportunity to properly exercise sovereignty over the administration of justice in their own context as the centenary of the establishment of the State approaches.

7

RECOMMENDATIONS

TOWARDS BEST PRACTICE:
A REPORT ON THE NEW JUDICIAL
COUNCIL IN IRELAND

Irish Council for
Civil Liberties

7. Recommendations

7.1 Recommendations for Judicial Council

The JUDICIAL STUDIES COMMITTEE should ensure that its training programmes include material on

•	interpersonal and communications skills, including the use of clear and plain language;
•	the broader social context;
•	unconscious bias and diversity for judges;
•	specific human rights topics;
•	EU, Council of Europe and UN human rights instruments; and
•	the issues raised by vulnerable witnesses, which has already been identified as a priority.

The JUDICIAL STUDIES COMMITTEE should also consider

•	widening the needs based assessments for JET to groups outside of the judiciary, as recommended by the international experience; and
•	engaging external reviewers on a regular basis, such as every five years.

The JUDICIAL COMPLAINTS COMMITTEE should ensure that

•	there is clarity on informal resolution and what it entails;
•	there is clarity on sanctions and reprimands, particularly admonishments, and what exactly they will involve;
•	the names of judges who consent to a reprimand are published in the Council's Annual Report;
•	it provides guidance on when the Council will regard misconduct to be so serious as to amount to stated misbehaviour; and
•	it provides sample transgressions and potential consequences, in the Guide to Judicial Conduct and Ethics, following the OSCE recommendations;.

The JUDICIAL CONDUCT COMMITTEE when finalising the Code of Ethics and Conduct should consider including requirements that judges should:

•	be aware of the diversity of society and differences linked with background;
•	by words or conduct, a judge should not manifest bias towards persons or groups on the grounds of their racial or other origin;
•	carry out their duties with appropriate consideration for all persons such as parties, witnesses, lawyers, court staff and their colleagues, without unjustified differentiation; and
•	oppose the manifestation of prejudice by the persons under their direction and by lawyers or their adoption of discriminatory behaviour towards a person or group on the basis of their colour, racial, national, religious or sexual origin, or on other irrelevant grounds.

7.2 Recommendations for Oireachtas

The OIREACHTAS should

•	provide a precise process for when a removal motion is proposed; and
•	ensure that the Judicial Appointments Commission Bill gives due weight to the appropriate characteristics of a good judicial candidate in the context of the selection of candidates for the bench, as clarity and detail on the desired personality and temperament may reduce future complaints regarding judicial misconduct.

7.3 Recommendations for Government

The GOVERNMENT, in its role in resource allocation, should ensure there is

•	sufficient time available for judges to attend training courses, by appointing an adequate number to the bench; and
•	adequate financial resourcing for the Judicial Council to staff its training function and to engage external experts as necessary.

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