



Judicial Appointments Review Committee

Preliminary Submission
to the Department of Justice and Equality's
Public Consultation on the Judicial Appointments Process

30th January 2014

Membership of the Committee

Court Presidents

The Hon. Mrs. Justice Susan Denham, Chief Justice of Ireland, Chairperson
The Hon. Mr. Justice Nicholas J. Kearns, President of the High Court
The Hon. Mr. Justice Raymond Groarke, President of the Circuit Court
Her Honour Judge Rosemary Horgan, President of the District Court

Committee members representing colleagues

The Hon. Mr. Justice Donal O'Donnell, The Supreme Court
The Hon. Mr. Justice Peter Kelly, The High Court and President of the Association of Judges of Ireland
The Hon. Mr. Justice Paul Gilligan, The High Court and President of the European Network of Councils for the Judiciary
Her Honour Judge Jacqueline Linnane, The Circuit Court
Judge Cormac Dunne, The District Court

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The Hon. Mrs. Justice Susan Denham,
Chief Justice of Ireland
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The Hon. Mr. Justice Nicholas J. Kearns,
President of the High Court

The Hon. Mr. Justice Donal O'Donnell,
The Supreme Court

The Hon. Mr. Justice Peter Kelly,
The High Court
President of the Association of Judges
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The Hon. Mr. Justice Paul Gilligan,
The High Court
President of the European Network of
Councils for the Judiciary

The Hon. Mr. Justice Raymond Groarke,
President of the Circuit Court

Her Honour Judge Jacqueline Linnane,
The Circuit Court

Her Honour Judge Rosemary Horgan,
President of the District Court

Judge Cormac Dunne,
Judge of the District Court

RECOMMENDATIONS OF THIS PRELIMINARY SUBMISSION

1. **The present system of judicial appointments is unsatisfactory. The opportunity should now be taken to appoint a high level body to carry out research, receive submissions and within a fixed timescale develop comprehensive detailed proposals in a structured, principled and transparent way to make a radical improvement in the judicial appointments process in Ireland.**

In advance of any such comprehensive review there are a number of steps which can and should be taken immediately:

2. **As a matter of principle, political allegiance should have no bearing on appointments to judicial office. Early acceptance of this principle is essential to a transformation of the appointments process.**
3. **The merit principle should be established in legislation.**
4. **A properly resourced judicial education system should be established without delay with a mandate to provide education to members of the judiciary on all matters bearing on the administration of justice.**
5. **The creation of a Judicial Council is a much needed reform to support the judiciary. A Judicial Council should be established forthwith, with responsibility for representation of the judiciary, an independent disciplinary process, judicial education, and the judicial involvement in the appointment process. However, judicial appointments need not be part of a Judicial Council but can be conducted by a committee as envisaged in the European Network of Councils for the Judiciary “*Dublin Declaration*” of May 2012.**
6. **The key to reforming the judicial appointments system rests on reform and development of the Judicial Appointments Advisory Board.**

7. **The process of judicial appointments should first and foremost enhance the principle of judicial independence, upon which the rule of law in our democracy is built.**
8. **The Committee believes that all judges should be capable of performing and be seen to perform the full functions of their colleagues of the same court jurisdiction. Variations and inconsistency lead to lack of clarity and confusion where such should be avoided.**
9. **The number of candidates for a single judicial post submitted by the Judicial Appointments Board for Governmental decision should be reduced to three. Where there are multiple vacancies in a Court, the number of candidates should be increased by no more than the number of additional vacancies.**
10. **Where it is proposed to fill a judicial position by promotion, including the positions of Chief Justice and Presidents of the other Courts, the candidates should also be subject to the advisory process of the Judicial Appointments Advisory Board. Applications from serving judges to advance between different courts should be processed through application to the Judicial Appointments Advisory Board.**
11. **The Judicial Appointments Advisory Board should be empowered to rank candidates and to designate any particular candidate as “outstanding”.**
12. **The Judicial Appointments Advisory Board should be specifically empowered to inform the Government when it considers that there are either no, or no sufficient candidates of sufficient quality.**
13. **The Judicial Appointments Advisory Board requires adequate financial resources to enable it to carry out its functions. A reformed appointments system will require adequate resources. It is**

recommended that there be consultation with the Judiciary on this matter.

14. **The current statutory minimum periods of practice as a barrister or solicitor for appointment to all Courts should be extended to fifteen years.**
15. **It is essential that high quality experienced candidates are attracted to the bench. Recent changes to pension provisions, both public and private, as they apply to entrants to the judiciary, may have little fiscal benefit to the State, yet create a wholly disproportionate disincentive to applicants for judicial posts, and deter high quality applicants from seeking appointment. It is desirable that such provisions should be immediately reviewed to assess the benefit if any to the State, and assessing their impact on the quality of candidates for appointment to the judiciary.**
16. **The current requirement for Judges of the District Court to apply for yearly renewal from age sixty five to age seventy should be abolished. Judges of all jurisdictions should have the same retirement age on judicial appointment.**

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Introduction to preliminary submission

17. Since the foundation of the State, the Courts have been an important and vital institution which has contributed significantly to the establishment and maintenance of the State as a stable modern democracy founded on the rule of law. The administration of justice in Ireland has, in broad terms, been one of the successes of the State. This is not to ignore individual personal failings, but such individual lapses also serve to highlight the fact that the history of the Irish judiciary has largely been one of diligent work, often with poor resources, carried out by persons who have demonstrated on a daily basis high qualities of integrity, fairness and learning, and in doing so have sought to administer justice in hundreds of thousands of cases “without fear or favour, affection or ill will towards” any litigant.¹

18. The importance and difficulty of this task should not be underestimated. At an individual level every litigant is entitled to have confidence that his or her dispute whether large or small, popular or unpopular will receive a scrupulously fair hearing by an impartial judge at every level of the Courts system, and will be decided only on the evidence and submissions made almost always in public, and where reasons will be given for the decision which has been reached. Public confidence that justice will be administered fairly by persons of high quality and integrity, is important in maintaining the confidence of its citizens in the State, but is also important in encouraging external confidence so that persons who come to this country whether to visit, to work or to do business or make investments, can expect and have confidence in the impartial administration of justice according to law.

¹ Article 34.5.1° of the Constitution provides that every person appointed a judge shall make and subscribe the following declaration: “In the presence of Almighty God, I _____, do solemnly and sincerely promise and declare that I will duly and faithfully and to the best of my knowledge and power execute the office of Chief Justice (or as the case may be) without fear or favour, affection or ill-will towards any man, and that I will uphold the Constitution and the laws, May God direct and sustain me.”

19. Without in any way minimising difficulties or inadequacies within the system, or individual instances of failure, it is nevertheless worth recognising that by international standards Ireland has a deservedly high reputation in this regard. The *European Union Justice Scoreboard for 2013* records the findings of the World Economic Forum that Ireland has the third highest perception of independence of the judiciary in the then 27 member states of the European Union, and is ranked fourth among 144 countries surveyed.² Any reformed system of judicial appointment must at a minimum seek to maintain and ideally enhance those qualities of the Irish judicial system while addressing deficiencies in the appointment and selection process.
20. It is increasingly clear that the relative success of the administration of justice in Ireland has been achieved in spite of, rather than because of the appointment system. The system of judicial appointment in Ireland is by now demonstrably deficient, fails to meet international standards of best practice, and must be reformed if in more challenging times it is to achieve the objective of securing the selection of the very best candidates for appointment to the Irish judiciary and thus contributing to the administration of justice in a manner which will sustain and enhance public confidence.
21. There are a number of important and distinct features to the process of judicial appointment which distinguish it from the task of recruitment, both in the private and public sectors even for positions of significant responsibility. First, there are relatively few judges in Ireland – a total of 154. This is the lowest per capita in the EU and within the Council of Europe member states. Since an average judicial career may be between

² As the *EU Justice Scoreboard 2013* notes “The independence of the judiciary is also a growth enhancing factor. As the independence of the judiciary assures the predictability, certainty, fairness and stability of the legal system on which business is operated, a perceived lack of independence can deter investments. As a general rule, justice must not only be done, it must be seen to be done. The independence of the judiciary is also a requirement stemming from the right to an effective remedy enshrined in the Charter of Fundamental Rights of the EU”. See http://ec.europa.eu/justice/newsroom/news/130327_en.htm.

15 and 20 years, the turnover is slow and there are relatively few vacancies per annum.

22. The current glut of vacancies is unusual, and caused by factors which may deserve separate attention. Normally the task of judicial appointment is often the case of finding the individual best suited at that time for a single, individual post. Secondly, it is noteworthy that applications for appointments follow what might at least in the abstract appear a surprising pattern. The largest number of applications is for positions at the lower level of the judiciary, and the smallest number for appointment to the higher courts. For example, in 2012 there were 8 vacancies in the District Court which attracted 193 applicants. There were 7 vacancies in the Circuit Court which attracted 155 applicants, while there were two vacancies in the High Court which attracted 20 applicants.³ Again, this factor in itself is worthy of further research but it is an unmistakable feature.
23. Thus the task of devising a system for appointment to the judiciary is not a single uniform task. Ideally it involves devising a system which will allow the best candidates to be found from the numerous applications for the District and Circuit Courts, and on the other hand facilitate an approach akin almost to headhunting either to increase the number of highly qualified applicants for the High and Supreme Courts, or at least to ensure that the applicants contain candidates of the highest possible calibre and ability.
24. A third and related issue is the fact that a judicial career is embarked upon after a career in practice. That is a feature of the common law system, and has clearly contributed to the generally high respect in which the judiciary in those systems are held. It is a feature which enhances the independence, and competence, of the judiciary. But the skill set required for the judicial task, which ideally comprehends factors such as learning in the law,

³ See the 2012 *Annual Report of the Judicial Appointments Board* available at www.jaab.ie.

experience in its practical application in courts, common sense, balance, sympathy, even temper, and a capacity for hard work are qualities which are necessarily highly valued in the market for legal services. Thus appointment to the bench cannot rely on remuneration attracting candidates by itself: on the contrary the process of judicial appointment involves attracting candidates who will in all probability be earning significantly more than the salary attaching to the post. The pool of qualified, even well qualified, individuals to fill a single post is already large: the significant difficulty lies not necessarily in widening the pool of potential appointees, but rather in ensuring that the best qualified members of that pool become applicants.

25. Fourthly, judicial appointment is not simply the filling of a judicial post from the candidates that happen to come forward at any given time. High judicial quality is an essential and invaluable component in securing the best and efficient determination of individual cases, and thereby generally maintaining public confidence, and securing the fairest and most efficient administration of justice. Furthermore, it creates a virtuous circle and encourages further applicants for future vacancies. But the requirement of judicial independence necessarily carries with it a significant security of tenure. Once appointed a judge cannot be removed other than for reasons of serious misconduct which are mercifully rare.
26. The once and for all nature of the appointment places increased emphasis on getting it right at the only point in which there is significant choice – on appointment. Poor decisions and decision makers create a high cost in terms of personal impact on litigants, economic cost as well as the costs of litigation, general cost to society and the economy and the damage to public confidence. The importance of having a system that will select the best possible candidate, and generate public confidence that this is so, should be clear. Decisions are, almost by definition, unsatisfactory to at least one party, and may be unpopular more generally. But it is essential to the stability of society that judicial decisions, once final, are accepted.

Public confidence in the process is important in maintaining public trust.
Trust in the judge begins with trust in the appointment process.

Independence of the Judiciary:

27. The independence of the judiciary is often referred to by judges, but it does not exist for the benefit of judiciary. It is a bedrock value for the foundation of public confidence in the administration of justice. It is the independence of the judge from the parties and from the subject matter of the dispute which contributes towards an acceptance (both individual and public) of an outcome which will undoubtedly be unsatisfactory to at least one party, and with which they may profoundly disagree. It is independence from the other organs of government which in turn create the condition of public confidence in the administration of justice generally.

28. Judicial independence is guaranteed by Article 35.2 of the Constitution, and it is clear from the structure of the Constitution, that that independence is particularly from the legislative and executive organs of government. For example, the immediately succeeding Article 35.3 provides that no judge shall be eligible to be a member of the Houses of the Oireachtas or to hold any other office or position of emolument. It is essential to that concept of separation of powers which underlies the Irish form of government, that the weakest and least dangerous branch of government – the judiciary, provide a balance with the other branches of government, something which is particularly important in the Irish context because of the close relationship between the legislative and executive branches. One litmus test of any system of judicial appointment therefore is whether it is compatible with and enhances the independence of the judiciary. That is in turn best achieved by a process which itself is demonstrably independent.

The present system of judicial appointments is unsatisfactory: A High Level Body should be established to develop comprehensive proposals in a structured, principled and transparent way to make a radical improvement in the judicial appointments process in Ireland:

29. Therefore, while there is recognition of the necessity to reform the judicial appointment process, and this consultation process is welcome, it is apparent that viewed from this perspective, and indeed international best practice, the process is itself flawed and deficient. It is regrettable that there has been no prior consultation with the judiciary on the methodology and structure of this consultation process in advance of public advertisement. No proposal or proposals have been put forward for discussion purposes. One practical consequence of this is the fact that the call for submissions did not include among the proposed criteria the need to attract candidates of proven quality, something of obvious importance and current concern. All submissions from any source will it appears, be made at the same time, and it would seem that there is no possibility of commenting on other submissions. Therefore, a proposed change may be adopted without itself having been the subject of any comment or consultation with the judiciary, the legal profession, other interested parties or the public more generally. Most fundamentally of all however the process itself is being initiated by a member of the Executive, and will apparently be decided upon by the Executive without further discussion. This is not consistent with the principles of the European Network of Councils for the Judiciary, Council of Europe, or international best practice.
30. The importance of the process of appointment of members of the judiciary in a liberal democracy founded on the rule of law is such that the topic deserves comprehensive scrutiny by an independent body composed of members of the highest standing and respect. Furthermore, there is considerable expertise and information available both within Ireland and in other common law countries, and it would be a significant lost opportunity, if this was not availed of.

31. There is no single, standard procedure of judicial appointment available which can be guaranteed to be the best and simply applied in Ireland. Procedures intended to ensure fairness can sometimes have the effect of deterring applicants. It is submitted that a review body could take evidence, receive submissions and consult in public and in private with relevant appointment bodies and interested parties in other jurisdictions, and obtain a detailed analysis of the strengths and weaknesses of the system. Any such review would also be able to take account of the specific challenges which might be encountered in a smaller jurisdiction such as Ireland. Any proposal or proposals could then be the subject of submissions and debate. It is essential that any proposed change should command the respect of the judiciary and the broader legal profession, and should inspire public confidence. The process of deciding on such change should itself be an important step in inspiring such confidence.
32. *The present system of judicial appointments is unsatisfactory. The opportunity should now be taken to appoint a high level body to carry out research, receive submissions and within a fixed timescale develop comprehensive detailed proposals in a structured, principled and transparent way to make a radical improvement in the judicial appointments process in Ireland.*
33. This is the first submission made on behalf of the Irish judiciary and any subsequent observations are made subject to it. There are however some immediate changes which could be made which would enhance the process even on a temporary basis, and pending a comprehensive review.

Political allegiance should not be a factor in the appointments process:

34. It appears that the area of the judicial appointments process which has attracted most public comment, and criticism, and which, it may perhaps be inferred, is the matter of greatest public concern, is the fact, that the appointment decision is still largely a political decision made by the Cabinet, and the fact that it is perceived that to a greater or lesser extent, political connection with, or allegiance to, the parties then in Government, can favourably affect the appointment decision.
35. This has not been true for all appointments but it is sufficiently true to attract public comment. By reason of a series of factors however, the appointment process in Ireland has not led to a polarised or a politicised judiciary.⁴ Ireland has in general been very well served by its judiciary, which has a high reputation for independence. Some public commentary has been simplistic and on occasions unfair. But all of this, while true is not relevant to the present discussion. Public confidence in the system of appointment is essential. It is simply wrong in principle that consideration of political considerations should form any part of the decision process. As the late Justice Thurgood Marshall, of the United States Supreme Court once said, one can think of no task that judges are properly called upon to perform that requires prior experience as a friend or backer of the appointing official or his party.⁵
36. Furthermore, the perception of political appointment is corrosive of public confidence in the administration of justice which is itself a vital component in ensuring acceptance of decisions, and at a more fundamental level, the stability of the State. The problem it is submitted is twofold. First, a perception that political allegiance influences the appointment

⁴ For a discussion of this phenomenon in a US context, see Sunstein “The Hidden Stakes of the Election” *New York Review of Books*, 9th October 2012 at www.nybooks.com/?insrc=log.

⁵ Marshall “Remarks at the American College of Trial Lawyers Spring Meeting” 14th March 1977 in Tushnet (ed) *Thurgood Marshall: His Speeches, Writings, Arguments, Opinions, and Reminiscences* (Chicago, Lawrence Hill Books, 2001), 262 at 263.

decision, and second the lack of any identifiable criteria designed to ensure that the appointment made is of the highest quality.

37. Political affiliation is a matter which is logically irrelevant for appointment to a judicial post. No one now suggests that the political affiliation or support for a political party is in any way indicative of judicial merit. But if appointment is made by the Cabinet which is necessarily highly attuned to political considerations, then if political affiliation is relevant, it becomes a significant and potentially dominating factor. This is damaging in a number of ways. Most obviously it undermines public confidence, but it also has an impact in dissuading highly qualified candidates from applying for appointment, or precluding or inhibiting their appointment. If a judge is constitutionally required to be independent of the sitting Government, it makes no sense to include as a qualification of appointment, his or her attachment to or support of the sitting Government. It is for these reason that modern best practice requires that political considerations not be a factor in judicial appointment.
38. It is sometimes said that the present system should be maintained because to do otherwise would be to unfairly exclude candidates who have a grounding in politics. This is manifestly false. If political affiliation is no longer a criterion, a politically active candidate can still apply and be considered on merit. The candidate is not excluded from consideration; their political affiliation is. Indeed, under a system where politics plays a part, small or large, in the appointment process, then candidates are either disadvantaged in, or in the worst case excluded from, consideration because their political allegiances are deemed unfavourable. This is unacceptable in principle, and wasteful inefficient and damaging in practice.
39. It has also been suggested that it is either not possible, or may be difficult, to reform this system because of the fact that appointment to the judiciary is made under Article 35.1 by the President on the advice of the Government. This did not prevent the enactment and amendment of the

legislation which established the Judicial Appointments Advisory Board, and at a minimum should not preclude study of the best and most effective system for the appointment of judges which will command the widest public confidence.

40. However, a significant step can be taken immediately without the necessity for constitutional or indeed even legislative change. Prior to 1945, judicial appointments in the United Kingdom were made on the basis of political allegiance. Historically that had not prevented appointment of persons of quality. The 1945-1951 Labour Governments made it clear however that judicial appointments would be made solely on the basis of merit. In the ensuing seventy years that has been the rule for Governments of all configurations and has become the long standing convention. Indeed, the merit principle has been encapsulated in legislation in recent years. Whatever other observations may be made about the appointment process in the United Kingdom, the quality of appointments particularly to the higher judiciary has never been doubted.
41. *As a matter of principle, political allegiance should have no bearing on appointments to judicial office. It is submitted therefore, an immediate step which would transform both the appointment process and the context in which any debate on its amendment took place, would be a public declaration by the Government that henceforth political allegiance would play no part in the selection for appointment of the judiciary.*

Appointments should be made on Merit: The merit principle should be enshrined in legislation:

42. A closely related issue is the widespread perception within the legal profession, that it is increasingly difficult to attract candidates of the highest calibre. The question of what encourages applications for judicial appointments is itself worthy of some study. It seems however, that public service, and the implicit recognition of merit, can form part of the matrix. It is particularly important to reinforce those components in the context where there has been a significant reduction in remuneration and pension.
43. A newly appointed judge of the High Court will receive take home pay of less than 50% of that paid in 2008, and will face an accrual period 1/3 longer to accrue a full pension, and while at the same time incurring substantial additional liability to tax in respect of the judicial pension, and any savings for private pension provision made in practice. In such a context it is particularly important to enhance the significance of judicial appointments as recognition of quality. The converse is also true. If it is perceived that persons of quality are not being appointed then such candidates will be further dissuaded. Furthermore, the entire concept of a learned judiciary requires that by and large the persons deciding cases be more experienced and more knowledgeable than the persons arguing them.
44. In other jurisdictions the principle of merit has been enshrined in legislation concerning the appointment of judges. For example, in England and Wales section 63(2) of the *Constitutional Reform Act 2005* provides that “selection must be solely on merit”. In Northern Ireland, section 5(8) of the *Justice (Northern Ireland) Act 2002*, as amended by the *Justice (Northern Ireland) Act 2004* provides that “the selection of a person to be appointed, or recommended for appointment, to a listed judicial office (whether initially or after reconsideration) must be made solely on the basis of merit”. In Scotland, section 12 of the *Judiciary and Courts (Scotland) Act 2008* which provides that “selection must be solely on merit”.

45. *Therefore, it is submitted that the merit principle should be established in legislation.*

Diversity:

46. Among the issues raised in the consultation has been the question of diversity. This appears to be an echo of a larger debate in other jurisdictions particularly the United Kingdom and the United States. It appears that the demand for diversity in the appointment process in those jurisdictions is a reflection of particular conditions in those societies. It is not apparent that the same conditions necessarily apply in Ireland or in relation to entry to the legal profession and appointment to the judiciary. Certainly the degree of commentary in relation to diversity within the judiciary does not appear to be commensurate with that in other jurisdictions. If there are indeed problems of integration of any group they appear societal rather than specific to the judicial appointment process and accordingly the remedy, if any, may lie at the level of society or at the point of entry to the legal profession. However this is in the first place a matter of even basic empirical research. It would be an error to adopt without analysis steps advocated in other jurisdictions in different social and professional conditions. This is a matter upon which a top level commission could be empowered to take evidence, and to consider.
47. Certainly, there is significant evidence of permeability of the judiciary once a person becomes a member of the legal profession and little evidence of any inhibition or adverse discrimination at the point of appointment. Taking the most obvious examples of recent social changes in Irish society, there has, for example, been a significant increase in the number of appointments of women to the judiciary. For example, a 1971 study found that there were no women judges in the Superior Courts *i.e.* the High and Supreme Courts.⁶ In 2004, a study showed that female

⁶ Bartholomew, *The Irish Judiciary* (1971).

judges of the Superior Courts represented 13.5%.⁷ As of 30th January 2014, there are 9 women judges of the Superior Courts which represent over 20% of the 44 serving High Court and Supreme Court Judges, and in the Circuit Court the trajectory of female appointments is quite markedly upwards, since 19 judges representing over 43% of the Court's Judiciary are female. Over 30% of judges are female which represents the highest percentage of females ever in the Irish Judiciary. There is little, indeed no, evidence of restriction or inhibition of appointment to the judiciary on the grounds of gender. By the same token, it does not appear that there is any significant issue in relation to the appointment of persons of different sexual orientation, marital status, religious belief or lack of it, or different social origins. It is important therefore to ascertain the extent to which there is a real or perceived problem at the point of appointment.

48. In relation to recent immigrant groups, there may be an argument for targeted scholarships to enter the legal profession. There may be other wider societal issues. It is not however apparent that alteration of the structure at the point of appointment to the judiciary addresses a real problem. This is important because any such alteration is complex to devise and operate and creates a difficult intersection with the principle of appointment on the basis of demonstrable merit.
49. The claim for greater diversity in the judiciary, and a statutory bias in favour of appointment of persons from certain groups is put forward in certain countries as a necessarily crude solution to an entrenched problem which cannot be addressed otherwise. It is perhaps justified when there is a significant lack of public confidence in the judiciary because for example of a demonstrable under representation of an obvious social group itself perhaps indicative of a negative social attitude to that group. Hitherto appointments in Ireland have been made by successive Governments, and there does not appear to be any recent evidence of any such negative

⁷ Carroll "You be the Judge: Parts I and II – A Study of the Backgrounds of Superior Judges in Ireland in 2004" (2005) 10 *Bar Review* at 153 and (2005) 10 *Bar Review* at 182.

attitude towards distinctive social groups, although that is again a matter which could perhaps be studied.

50. It might be said, for example, that it would undermine public confidence if all judges were male, and a statutory quota of female judges should be established. But there are significant limits to the extent to which results can be engineered in this fashion. No one has a right to have their case determined by a judge drawn from any particular group or having any particular characteristic. Single judges make judgments on married people, young judges make decisions about older people, gay judges make decisions about heterosexuals, female judges make judgments about men, atheists and agnostics make decisions about believers and in each case, and obviously, vice versa. This is how it should be.
51. What is important is sympathetic and knowledgeable hearing of the individual case rather than the fact that the adjudicator comes from a particular group. It is suggested that it is important to ascertain the extent to which there is a significant problem which can only be addressed by an adjustment of the judicial appointment process. In the absence of any empirical evidence of a demand for diversity at the appointment stage, it is suggested that it may be more important, and in any event is desirable, that there should be a comprehensive and well resourced system of continuing judicial education along the lines which are now well established in comparable jurisdictions. That would permit regular attendance at courses which would not simply address developments in the law, but could also address psychological insight or matters as simple though important as the perception of different members of the public of their interaction with the courts system whether as witnesses, parties, jurors or observers.
52. *It is submitted that a properly resourced judicial education system should be established without delay with a mandate to provide education to members of the judiciary on all matters bearing on the administration of justice.*

Judicial Council:

53. The foregoing discussion only illustrates the damage caused by the absence of a judicial council with powers in relation to judicial representation, appointments, discipline, and responsibility for supervising judicial education. Judicial Councils may be found in many European countries.⁸ Ireland is now one of the few European countries which do not have a Judicial Council.⁹ In many countries the Judicial Council will elect or appoint the judicial members of the equivalent Judicial Appointments Board, which in itself further reinforces the independence of the process. A properly resourced Judicial Council is important to ensuring the best possible system for the appointment of judges, and for the best and most effective administration of justice by those judges when appointed. Indeed, one of the recommendations of the United Nations Special Rapporteur on the situation of human rights defenders, Mrs. Margaret Sekaggya in a report produced following her visit to Ireland in late 2012, is that a Judicial Council should be established by statute and that such a judicial council is provided with adequate financial and human resources.¹⁰

⁸ Note that the Venice Commission recommends that states which have not yet done so consider the establishment of an independent judicial council or similar body. In all cases the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges. With the exception of *ex-officio* members these judges should be elected or appointed by their peers. See 2010 *Report on the Independence of the Judicial System Part I: The Independence of Judges* www.venice.coe.int/webforms/events/ This recommendation is echoed by the Consultative Council of European Judges in its 2010 *Magna Carta for Judges* which notes that “to ensure the independence of judges, each State shall create a Council for the Judiciary or another specific body, itself independent from legislative and executive powers, endowed with broad competences for all questions concerning their status as well as the organisation, the functioning and the image of judicial institutions. The Council shall be composed either of judges exclusively or of a substantial majority of judges elected by their peers. The Council for the Judiciary shall be accountable for its activities and decisions”. See www.coe.int/t/DGHL/cooperation/ccje/default_en.asp.

⁹ A study conducted by Professor Tom Ginsburg of Chicago Law School for the United States Institute of Peace, which is an independent federal body, found that roughly 60% of countries studied have established a judicial council in some form. See Ginsburg “*Judicial Appointments and Judicial Independence*” 2009 at 4, available at www.usip.org and www.constitutionmaking.org. See also Garoupa and Ginsburg “*Guarding the Guardians: Judicial Councils and Judicial Independence*” Working Paper (2008).

¹⁰ See report of the Special Rapporteur at www.ohchr.org. Note also that the UN Special Rapporteur on the Independence of Judges and Lawyer’s has endorsed the concept of a Judicial Council in the *Annual Report 2009*. See www.ohchr.org.

54. The creation of an overarching Judicial Council which might encompass a Judicial Appointments Commission was recently discussed in a public lecture given by The Hon. Mr. Justice Clarke of the Supreme Court in 2013.¹¹ The Government has undertaken to legislate to establish a Judicial Council with lay representation, and it is being drafted by the Department of Justice and Equality.¹² The creation of a Judicial Council in Ireland is a much needed reform to support the judiciary. Indeed, The Hon. Mrs. Justice Denham, Chief Justice has frequently addressed this topic and has said that such a council will greatly enhance governance in the State.¹³
55. At the National Conference of the Judiciary held in November 2011, the Judiciary established an Interim Judicial Council, pending publication of the proposed Bill and its enactment. The Council is made up of all Judges and has a Board. The Council addresses support for judges such as education.
56. In May 2012, the Interim Judicial Council and the Courts Service of Ireland hosted the Annual European Network of Councils for the Judiciary's General Assembly. As a result of which, and as supported by all the participating members, the ENCJ approved its "*Dublin Declaration*" which followed upon a significant project which was finalised in Dublin, namely the "*Development of Minimal Judicial Standards II Report 2011-2012*".

¹¹ "Judge calls for judicial commission: proposed body would handle interaction between political sphere and judiciary" *Irish Times* 11th April 2013.

¹² As of 15th January 2014, the Government's Legislative Programme states that the Government expect to publish the Bill during the Spring/Summer session.

See
www.taoiseach.gov.ie/eng/Taoiseach_and_Government/Government_Legislation_Programme/SECTION_B1.html

¹³ Speech of The Hon. Mrs. Justice Denham "Councils for the Judiciary" UCD Constitutional Studies Group and Bar Council of Ireland seminar on aspects of judicial independence, The Distillery Building 24th May 2012.

57. This report is concerned with minimum standards regarding recruitment, selection, appointment and (where relevant) promotion of members of the judiciary in the Member States. The Report reaffirms the ENCJ's previous conclusion that:

“[a]ny system for the recruitment, selection and appointment of judges should be independent of political influence, fair in its selection procedures, open to all suitably qualified candidates and transparent in terms of public scrutiny. In other words, any system for the recruitment, selection and appointment of judges must be independent, fair, open and transparent.”

58. The Report states further that:

“[i]n order to avoid political influence, the procedures for the recruitment, selection or (where relevant) promotion of members of the judiciary ought to be placed in the hands of a body or bodies independent of government in which a relevant number of members of the judiciary are directly involved.”

59. It should be noted that unlike some civil law countries, it appears that no common law country has a judicial council which is solely involved in judicial appointments. For example the Judges' Council of England and Wales and the Tribunal Judges' Council of England and Wales nominate three judges to serve as members of the independent Judicial Appointments Commission of England and Wales. In terms of the competent body to decide on the recruitment, selection, appointment and (where relevant) the promotion of members of the judiciary, the Report notes that:

“[t]he body in charge of judicial selection and appointment could be the appropriate national Council for the Judiciary (or a specific committee or department within the Council for the Judiciary) or an independent national judicial appointments board or committee.”

60. As a result, the Dublin Declaration provides that the body in charge of judicial selection and appointment could be the appropriate national Council for the Judiciary (or a specific committee or department within the

Council for the Judiciary) or an independence national judicial appointments board or committee.

61. *It is submitted that a Judicial Council should be established forthwith, with responsibility for representation of the judiciary, an independent disciplinary process, judicial education, and the judicial involvement in the appointment process. However, judicial appointments need not be part of a Judicial Council but can be conducted by a committee as envisaged in the European Network of Councils for the Judiciary “Dublin Declaration” of May 2012.*

Background to the public consultation

62. Individual members of the Judiciary have expressed concern about the present system of judicial appointments for some time now.
63. In May 2012, the European Network of Councils for the Judiciary (hereafter “the ENCJ”) General Assembly was hosted by the Judiciary and the Courts Service of Ireland.¹⁴ At this gathering, The Hon. Mr. Justice Gilligan of the High Court was honoured by being elected President of this European organisation.
64. The ENCJ issued its *Dublin Declaration on Standards for the Recruitment and Appointment for Members of the Judiciary*. It is an instructive document which should be referred to in any consideration of judicial appointments in Ireland.¹⁵
65. When the ENCJ issued the Dublin Declaration, The Hon. Mrs. Justice Susan Denham, Chief Justice issued a public statement on the matter. The Chief Justice welcomed the contents of the Dublin Declaration and stated that it should be seen as a possible new standard for appointing judges and operating judicial councils across all of Europe’s democracies.
66. In late May 2012, the Minister for Justice and Equality, Mr. Alan Shatter T.D. replied to a parliamentary question regarding his view of the Dublin Declaration. The Minister stated that he very much welcomed the

¹⁴ The organisation unites the national institutions in the Member States of the European Union which are independent of the executive and legislature, and which are responsible for the support of the Judiciaries in the independent delivery of justice. Its aim is to improve co-operation between, and good mutual understanding amongst, the Councils for the Judiciary and the members of the Judiciary of the European Union (and candidate) member states.

¹⁵ See www.encj.eu/index.php?option=com_content&view=article&id=140%3Astandardsselectionpromotionjudges&catid=11%3Amutual-confidence&Itemid=229&lang=en.

Declaration as a clear and progressive contribution from the European Network of Councils for the Judiciary.

67. At that time, the Minister indicated that his Department was reviewing the position of the Judicial Appointments Advisory Board and the method of appointment, with particular reference to the practice in other jurisdictions. He noted that his review was wide-ranging and includes consideration of the following issues:

- The need to ensure and protect the principle of judicial independence.
- Eligibility for appointment.
- Composition of the Judicial Appointments Advisory Board.
- The appointments process.
- Accountability in respect of its functioning, and,
- Promoting equality and diversity.¹⁶

68. The Minister also made reference to judicial appointments at the Law Society of Ireland Annual Conference 2013. The Minister noted his experience of the Judicial Appointments Advisory Board since becoming Minister for Justice and Equality is that “it is very much of its time and we could do better”. The Minister stated his belief that a “better architecture can be put in place than exists at present”.¹⁷

69. In addition to the work of the ENCJ, the Chief Justice’s statement on the Dublin Declaration, and the Minister’s reply to a parliamentary question on the Dublin Declaration; Judges have commented on, and raised concerns about the judicial appointments process in Ireland.¹⁸

¹⁶ Written reply of the Minister for Justice and Equality to a parliamentary question of Deputy Ann Ferris TD concerning judicial appointments, 22nd May 2012.

See <http://debates.oireachtas.ie/dail/2012/05/22/00311.asp>.

¹⁷ See speech of Minister Alan Shatter T.D. “A Time of Change” delivered at the Law Society of Ireland Annual Conference, Killarney, Co. Kerry, 11th May 2013.

¹⁸ See The Hon. Mr. Justice Peter Kelly in the autumn 2012 edition of the Dublin Solicitors Bar Association *Parchment Magazine* at www.dsba.ie/parchments.267.html.

70. On 2nd December 2013, the Minister wrote a letter to the Chief Justice, which she received on 4th December 2013. The Minister outlined his Department's review of the judicial appointments process and invited the judiciary to make submissions on the topic. The Minister stated that he would like to focus the debate on a number of themes such as:

- the appointment process,
- eligibility criteria,
- the need to ensure and protect the principle of judicial independence,
- how to promote diversity and equality, and,
- the role of a Judicial Appointments body, including its membership and procedures.

71. The Minister also informed the Chief Justice that he intended to commence a public consultation on this matter to run until 31st January 2014. Attached to this letter was the draft public information notice announcing the Department of Justice and Equality's public consultation on the judicial appointments process.

72. An advertisement outlining the consultation was published in the national newspapers, and the public information notice and press release was published on the Department of Justice website on 6th December 2013. In the press release, the Minister stated that:

“The enhancement of the current system of judicial appointments is something which I have been considering for a while now. I would like to encourage public debate on elements of reform that should be considered in the public interest with regard to how we go about appointing judges”.

[...]

“While the JAAB process was a model of best practice in its day, it seems to me that it would be worthwhile now to review the operation of the judicial appointments system to ensure it

reflects current best practice, that it is open, transparent and accountable and that it promotes diversity.”

73. On 6th December 2013, the Chief Justice and the Presidents of the High, Circuit and District Courts, decided that they should establish a Judicial Appointments Review Committee. This Committee would provide a forum for the judiciary to formulate submissions following consultation with all of the judges, detailed research and study.
74. On 6th December, the Secretary to the Committee wrote to all members of the judiciary seeking their initial views on the current judicial appointments process so as to inform the Committee and its work. This was in addition to contacts made by the Presidents of the Courts seeking submissions from their colleagues.
75. The Chief Justice wrote to the Minister on 9th December stating that she and her colleagues would establish a Judicial Appointments Review Committee to consider the Minister’s review and to make submissions. In this letter the Chief Justice noted that one theme which should be central to the review is the need to recruit persons of the highest quality and ability to the Judiciary as it was not included as one of the themes to be considered in the public consultation as announced in December.
76. The Committee met on numerous occasions in December 2013 and January 2014 to discuss matters arising from the public consultation process, to consider submissions received from judges on the topic, and to formulate this preliminary submission to Department of Justice and Equality’s public consultation.

Historic overview of judicial appointments

77. At this point, the Committee wishes to reflect on the history of judicial appointments in the State.

78. The Constitution sets out a tripartite separation of powers: legislative, executive and judicial. The legislature or Oireachtas makes laws, the executive or Government, being the cabinet of Government Ministers, implements or executes those laws, while the Judiciary interprets and gives effect to those laws in the Courts of Ireland. The judicial power is held by judges who dispense justice in the Courts and it is considered to be “fundamental and far-reaching”.¹⁹

79. Article 6.1 of the Constitution states that the powers of government:

“derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.”

80. Reference is made to judicial appointment in Article 35.1 of the Constitution, and judges are appointed by the President of Ireland.²⁰ The President’s powers “shall be exercisable and performable only on the advice of the Government”.²¹ As The Hon. Mr. Justice Gerard Hogan and Professor Gerry Whyte note:

“The appointment of a judge, as Finlay P. said in *The State (Walshe) v Murphy*, is an act requiring the President’s

¹⁹ As per Finlay C.J. in *Attorney General v. Hamilton* [1993] I.L.R.M. 81 at 96.

²⁰ “The judges of the Supreme Court, the High Court and all other Courts established in pursuance of Article 34 hereof shall be appointed by the President.”

²¹ Article 13.9 of the Constitution.

intervention for its effectiveness in law, [but] in fact [it is] the decision and act of the Executive.”²²

81. Until the mid 1990s, the appointment of a judge was a matter solely for the Government.²³ In exercising its constitutional duties in this regard, the Government had the benefit of guidance from the Attorney General, who as well as being the Government’s legal advisor and chief law officer of the State, was and remains the leader of the Bar of Ireland, and therefore had knowledge of many candidates for judicial office.

82. The establishment of the Judicial Appointments Advisory Board by the *Courts and Court Officers Act 1995* was in response to a series of events which occurred in the early 1990s.²⁴ It provided a formal structure for advising suitable candidates for judicial office who in turn would be considered by the Government for appointment.

²² In *JM Kelly: The Irish Constitution* (Dublin, 4th ed, LexisNexis Butterworths 2003) at 998. See also *The State (Walshe) v Murphy* [1981] IR 275 at 283.

²³ Meaning the Executive / Cabinet of Government Ministers.

²⁴ Morgan *A Judgment too Far? Judicial Activism & The Constitution* (Cork, Cork University Press, 2001) at 112. See also Morgan “Selection of Superior Judges” *Irish Law Times* (2004), 22, at 42.

The Judicial Appointments Advisory Board

83. The Judicial Appointments Advisory Board was established by the *Courts and Court Officers Act 1995*.²⁵ It is an expert and experienced Board, as its membership consists of the Chief Justice, the three Presidents of the High, Circuit and District Courts, the Attorney General; a practising barrister representing the Bar Council of Ireland; and a practising solicitor representing the Law Society of Ireland. The Minister for Justice and Equality appoints not more than three persons engaged in, or having knowledge or experience of commerce, finance, administration or persons with experience of the services of the Courts. The three lay members and two lawyers representing their professional bodies are appointed for a three year term which may be renewed.
84. The Secretary to the Board is the Chief Executive Officer of the Courts Service.²⁶ Since the Board was formed, the Courts Service has provided the necessary financial, technical and administrative support to allow the Board to do its important work. In recent years the Courts Service has developed a dedicated website for the Board to inform the public about its role and to advertise judicial vacancies.²⁷
85. It should be emphasised at this point that resources voted by the Oireachtas in 2013 for allocation to the Courts Service represent 0.134% of the total net exchequer. To put this in context, for every euro of tax payers money spent on services provided by the State, just over one-tenth of one cent go towards funding the Courts Service.

²⁵ Section 13(1) of the *Courts and Court Officers Act 1995*.

²⁶ See Rule 6 of the Rules of the Judicial Appointments Advisory Board, Appendix (i) of the *Judicial Appointments Advisory Board Annual Report 2012*.

²⁷ See www.jaab.ie.

The Courts and Court Officers Act 1995

86. The Long Title of the *Courts and Court Officers Act 1995* includes amongst other things reference to it being an Act to establish a Judicial Appointments Advisory Board and to make provision in respect of that Board and to facilitate judicial training.
87. Part IV, sections 12 to 23 of the Act is entitled “judicial appointments”.
88. Section 13(1) of the Act states that for the purposes of identifying persons and informing the Government of the suitability of those persons for appointment to judicial office, there shall be established a body to be known as the Judicial Appointments Advisory Board.
89. Section 14 of the Act sets out the procedures of the Board. Section 14(1) provides that the Board may adopt such procedures as it thinks fit to carry out its functions under the Act, and may establish sub-committees of the Board to assist it.
90. In section 14(2) of the Act, the Board is permitted to:
- advertise for applications for judicial appointment,
 - require applicants to complete application forms,
 - consult persons concerning the suitability of applicants to the Board,
 - invite persons, identified by the Board, to submit their names for consideration by the Board,
 - arrange for the interviewing of applicants who wish to be considered by the Board for appointment to judicial office, and,
 - do such other things as the Board considers necessary to enable it to discharge its functions under this Act.

91. Section 16(1) of the Act provides that a person who wishes to be considered for appointment to judicial office shall so inform the Board in writing and shall provide the Board with such information as it may require to enable it to consider the suitability of that person for judicial office, including information relating to their education, professional qualifications, experience and character.
92. The practice of the Board is that once it receives an expression of interest from an aspiring judicial office holder, the Secretary of the Board provides them with a detailed application form in hard copy which must be completed and returned to the Secretary for the Board's consideration.
93. Section 16(2) of the Act provides that where a judicial office stands vacant, or before a vacancy in a judicial office arises, the Board shall submit to the Minister for Justice and Equality the name of each person who has informed the Board of his or her wish to be considered for appointment to that judicial office and the Board shall recommend to the Minister at least seven persons for appointment to that judicial office.
94. Section 16(3) of the Act provides that the Board shall provide the Minister with particulars of the education, professional qualifications, experience and character of the persons whom it recommends under this section.
95. Section 16(4) of the Act provides that where fewer than seven persons inform the Board of their wish to be appointed to a judicial office or where the Board is unable to recommend to the Minister, at least seven persons, the Board shall submit to the Minister the name of each person who has informed the Board of his or her wish to be considered for appointment to judicial office and the Board shall recommend to the Minister for appointment to that office such of those persons as it considers suitable for appointment.

96. Persons who wish to be considered for judicial office must meet certain statutory criteria. For example, the Board can only recommend persons with the relevant qualifications, such that for vacancies on the Supreme and High Court Benches, applicants must be a practising barrister or solicitor of not less than 12 years experience or a Judge of the Circuit Court of four year's standing. For the Circuit and District Court Benches, applicants must be a practising barrister or solicitor of not less than 10 years experience.²⁸
97. The Board shall not recommend the name of a person to the Minister unless, in the opinion of the Board:
- the person has displayed in his/her practice as a barrister or solicitor, as the case may be, a degree of competence and a degree of probity appropriate to and consistent with the appointment concerned;
 - is suitable on grounds of character and temperament;
 - is otherwise suitable; and
 - complies with the requirements of section 19 of the 1995 Act regarding an undertaking on courses of judicial training and education as directed by the Chief Justice or President of the Court to which the person is appointed.²⁹
98. The criteria for selection to the Supreme and High Courts were amended by section 8 of the *Courts and Court Officers Act 2002*. Section 8(7)(b) of the Act provides that the Board shall recommend a person to the Minister under this section only if the Board is of the opinion that the person:

²⁸ *Courts (Supplemental Provisions) Act 1961*, as amended by the *Courts and Court Officers Act 2002*.

²⁹ Section 16(7) of the *Courts and Court Officers Act 1995 Act*.

- has displayed in his or her practice as a barrister or a solicitor a degree of competence and a degree of probity appropriate to and consistent with the appointment concerned,
- in the case of an appointment to the office of ordinary judge of the Supreme Court or of ordinary judge of the High Court, has an appropriate knowledge of the decisions, and an appropriate knowledge and appropriate experience of the practice and procedure, of the Supreme Court and the High Court,
- is suitable on the grounds of character and temperament,
- complies with the requirements of section 19 of this Act (regarding an undertaking on courses of judicial training and education), and,
- is otherwise suitable.

99. In determining whether these requirements are satisfied, the Board shall have regard, in particular, to the nature and extent of the practice of the person concerned insofar as it relates to his or her personal conduct of proceedings in the Supreme Court and the High Court whether as an advocate or as a solicitor instructing counsel in such proceedings or both.

100. Persons interested in judicial office must also comply with section 22 of the *Standards in Public Office Act 2001*, as amended which requires applicants to certify that their tax affairs are in order. Section 22 (1) prohibits the Board from recommending a person for judicial office unless the person has furnished to the Board:

- a Tax Clearance Certificate that was issued to the person not more than eighteen months before the date of the recommendation, and,
- a Statutory Declaration made by the person not more than three months before that date to the effect that, at the time of the making of the declaration, the person is, to the best of his or her knowledge and belief, in compliance with the obligations specified in subsection (1) of section 25 and that nothing in

subsection (2) of that section prevents the issue to him or her of a tax clearance certificate.

101. Following a request from Secretary to the Board, the governing bodies of the legal professions *i.e.* the Bar Council of Ireland and the Law Society of Ireland are contacted to verify that those whom the Board propose to recommend to the Minister are in good standing with their professional organisations and are practising barristers or solicitors who satisfy the requirements of the legislation relevant to the judicial position in question.
102. Section 16(6) of the Act provides that in advising the President in relation to the appointment of a person to a judicial office the Government shall first consider for appointment those persons whose names have been recommended to the Minister pursuant to this section. However, section 16(8) of the Act provides that notice of an appointment to judicial office shall be published in the Irish State gazette *Iris Oifigiúil* and the notice shall, if it be the case, include a statement that the name of the person was recommended by the Board to the Minister pursuant to this section. Therefore, the Government may decide to appoint a person to judicial office who was not recommended by the Board.
103. Section 17 of the Act permits the Government to advise the President to appoint to judicial office a person who is already a serving Judge. Section 23 of the Act is concerned with the appointments of Chief Justice, and Presidents of the High, Circuit and District Courts and states that the Government shall have regard first to the qualifications and suitability of persons who are serving at that time as Judges in the Courts.

Analysis of section 16 of the 1995 Act

104. The Judicial Appointments Advisory Board is not an appointing body of judicial office holders. It is a recommending body. It considers applications received from persons interested in judicial office and advises the Government accordingly.
105. In construing the precise role of the Board, section 16(2) of the Act is significant in that it imposes on the Board an obligation to “recommend to the Minister at least seven persons for appointment to that judicial office”. Section 16(2) thus vests the Board with discretion to choose as between eligible candidates where there are more than seven such applicants for judicial office.
106. However, if there are less than seven applicants for a particular judicial office, or where the Board is unable to recommend to the Minister, at least seven persons, then the Board shall submit to the Minister the name of each person who has informed the Board of his or her wish to be considered for appointment to judicial office and the Board shall recommend to the Minister for appointment to that office such of those persons as it considers suitable for appointment.³⁰ Also, section 16(5) of the Act provides that where more than one judicial office in the same court stands vacant, or in advance of more than one vacancy arising in the same court, at the request of the Minister, the Board shall submit to the Minister the name of each person who has informed the Board of his or her wish to be considered for appointment to judicial office and shall recommend to

³⁰ Section 16(4) of the *Courts and Court Officers Act 1995*.

the Minister the names of at least seven persons in respect of each vacancy or such lesser number of names as the Minister shall specify following consultation with the Board.

107. Therefore, the Board may recommend a much reduced list of candidates which falls below the required statutory minimum number of seven. It is conceivable that the Board may recommend anything from one to six suitable candidates in these circumstances.

Reform of the Judicial Appointments Advisory Board

108. The Judicial Appointments Advisory Board was created as a result of certain events in the early 1990s. The Board was then a pioneer, in that it preceded a number of judicial appointments bodies which would be established in other common law jurisdictions, including Northern Ireland, Scotland, and England and Wales.
109. However, when compared to the appointments bodies now in place in other jurisdictions, the architecture supporting the judicial appointments process in Ireland requires reform and development.
110. This has been borne out by the views expressed by certain members of the judiciary in the last decade. For example, in a 2004 study based on interviews with Superior Court judges, one anonymous judge stated that the Judicial Appointments Advisory Board:

“was a good idea in theory, but in practice, it had made very little difference to the political patronage system of judicial appointments”.³¹

111. *In this preliminary submission, the Committee submits that that the key to reforming the judicial appointments system rests on the reform and development of the Judicial Appointments Advisory Board.*

³¹ Carroll “You be the Judge: Part II – A Study of the Backgrounds of Superior Judges in Ireland in 2004” (2005) 10 *Bar Review* 182 at 186.

Judicial Independence – individual and institutional

112. It is submitted that the process of judicial appointments should first and foremost enhance the principle of judicial independence, upon which the rule of law in our democracy is built. Judicial independence is a protection and a privilege of the People, and not of the Judges.

113. Article 35.2 of the Constitution provides a trenchant statement of the importance of judicial independence:

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

114. This independence must be independence of the Government, the Oireachtas and politics in general, as well as independence from the matter in controversy in any individual case. This is underlined by Article 35.3 of the Constitution which provides that:

“No judge shall be eligible to be a member of either House of the Oireachtas or to hold any other office or position of emolument.”

115. The importance of judicial independence is also clearly expressed in international law. For example, Article 10 of the *Universal Declaration of Human Rights* provides that:

“Everyone is entitled in full equality to a fair, and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

116. Article 14(1) of the *International Covenant on Civil and Political Rights* provides that:

“All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”.³²

117. Similarly, Article 6 of the *European Convention on Human Rights and Fundamental Freedoms* provides that:

“In the determination of his civil rights and obligations or of any charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...”

118. Article 47 of the *EU Charter of Fundamental Rights* provides that there is a right to an effective remedy and to a fair trial such that:

“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”

119. In 2010, the Council of Europe’s Consultative Council of European Judges adopted its *Magna Carta of Judges* which is a charter of fundamental principles. It states that:

“Judicial independence and impartiality are essential prerequisites for the operation of justice.

³² See www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx.

Judicial independence shall be statutory, functional and financial. It shall be guaranteed with regard to the other powers of the State, to those seeking justice, other judges and society in general, by means of national rules at the highest level. The State and each judge are responsible for promoting and protecting judicial independence.

Judicial independence shall be guaranteed in respect of judicial activities and in particular in respect of recruitment, nomination until the age of retirement, promotions, irremovability, training, judicial immunity, discipline, remuneration and financing the judiciary.”³³

120. The charter builds upon the organisations 2001 *Opinion No. 1 on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges*.³⁴

121. The Council of Europe’s Commission on Democracy through Law known as the Venice Commission, has also done important work advancing the fundamental principle of judicial independence. In its 2010 *Report on the Independence of the Judicial System Part I: The Independence of Judges* it notes that:

“the independence of the judiciary is not an end in itself. It is not a personal privilege of the judges but justified by the need to enable judges to fulfil their role of guardians of the rights and freedoms of the people.”³⁵

122. A judge’s primary functions are to administer justice, to remain neutral, to ensure that justice is done and to act fairly in all deliberations and rulings. The former President of the Supreme Court of Israel, Justice Aharon Barak wrote that:

“judging is not merely a job but a way of life...that includes an objective and impartial search for truth. It is... not an attempt to please everyone but a firm insistence on values and principles; not surrender to or compromise with interest groups but an insistence on upholding the law; not making decisions

³³ See www.coe.int/t/dghl/cooperation/ccje/meetings/plenary/2010plenary_special_file_EN.asp?

³⁴ See www.coe.int/t/dghl/cooperation/ccje/textes/Avis_en.asp

³⁵ See www.venice.coe.int/webforms/events/

according to temporary whims but progressing consistently on the basis of deeply held beliefs and fundamental values.”³⁶

123. Judicial independence falls to be preserved by the individual judge in the first instance, but also the judiciary as a collective body. Such a judicial system helps to create a stable society founded on the rule of law. This has many benefits not least of which are a healthy democracy, social cohesion, political stability and an economic stimulus. Indeed, it has been observed that:

“One overlooked feature of judicial independence is its role in informing and influencing our civic and economic culture. Judicial independence and expertise plays an important role in delivering the transparency, predictability and fairness which enables a modern society to flourish.”³⁷

124. Judicial independence encompasses a number of aspects. The first is the substantive independence which is displayed by a judge working independently in their Court and administering justice, in the words of the judicial declaration, without fear or favour, affection of ill will towards any man or woman. The independence of the individual judge also includes their personal independence in terms of security of tenure and conditions of tenure.

125. The second and sometimes overlooked aspect of the concept is the institutional independence of the judiciary as a whole. This is often referred to as the “corporate or institutional independence of the Judiciary”.³⁸ The wider concept of institutional independence was emphasised by Professor Shimon Shetreet:

“...modern conception of judicial independence cannot be confined to the individual judge and to his substantive and

³⁶ Barak *The Judge in a Democracy* (Princeton University Press 2006) at 110 cited by Justice Susan Kiefel of the High Court of Australia in a lecture entitled “On being a Judge”, 15th January 2013, delivered at the Chinese University of Hong Kong.

³⁷ See *Final Report of the 2010 British Columbia Judges Compensation Commission* at 2. See www.ag.gov.bc.ca/judicial-compensation/index.htm.

³⁸ Shetreet “The Limits of Judicial Accountability: A Hard Look at the Judicial Officers Act 1986” *UNSW Law Journal*, 1987, Volume 10, 4 at 7.

personal independence, but must include a collective independence of the judiciary as a whole.”³⁹

126. The concept has given rise to much jurisprudence of the Supreme Court of Canada. As stated by Le Dain J. in *Valente v. The Queen*,:

“[Judicial independence] connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.

[...]

It is generally agreed that judicial independence involves both institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government.”⁴⁰

127. The institutional independence of the judiciary ensures that the judiciary is “free of pressure from the State”.⁴¹ In other words the judiciary should be freed of being pressurised by the executive and legislative branches of government. It is also a manifestation of the separation of powers between the legislative, executive and judicial organs of government as ordained by Article 6.1 of the Constitution of Ireland.
128. The Supreme Court of Canada has referred also to the importance of depoliticising the relationship between the Government *i.e.* the executive, and the judiciary.⁴² It is vital that a reformed system of judicial appointments in Ireland does not impinge on the institutional independence of the judiciary and that it be maintained.

³⁹ Paper provided by Professor Shetreet, *Judicial Independence: The Contemporary Debate*, C. Shetreet and J. Deschênes, 1985 Martinus Nijhoff Publishers, at 516.

⁴⁰ [1985] 2 S.C.R. 673, at 685 and 687.

⁴¹ *As per* Lord Phillips, former President of the Supreme Court of the United Kingdom in a lecture entitled “Judicial Independence” delivered at the UCL Constitution Unit, launch of research project on *The Politics of the Judicial Independence*, 8th February 2011.

⁴² See Lamer CJ in *Reference re Remuneration of Judges of the Provincial Court* [1997] 3 S.C.R. 3.

129. *It is submitted that the process of judicial appointments should first and foremost enhance the principle of judicial independence, upon which the rule of law in our democracy is built.*

Avoiding the politicisation of judicial appointments

130. Depoliticising the relationship between the Government (executive) and the judiciary is an important objective mandated by the Constitution, and thus it should also be reflected in the system of judicial appointments in the State.

131. Membership of a political party does not disqualify a person from being appointed a judge. The disciplines of politics and law often overlap. Lawyers may very well represent and advise particular political parties and Governments of different political complexions in the course of their work. Ireland is a geographically small island with a low population base where the traditional political associations of individuals and their families can sometimes be traced over generations. Law and politics cannot but interact at some level. Former politicians have historically made for conscientious, impartial and independent minded judges throughout Irish legal history.

132. However, a retired judge, in a candid observation, remarked that:

“There is no question that for many years judicial appointments were viewed as a kind of tombola into which politicians or their activists might occasionally dip for a trophy or a reward.”⁴³

133. Similarly, one anonymous Superior Court Judge noted in a 2004 study that:

⁴³ Judge Mary Kotsonouris *Tis all lies, your worship... Tales from the District Court* (The Liffey Press 2011) at 110.

“very often the government pick their own supporters. So the idea that people are appointed purely on merit is not necessarily true”.⁴⁴

134. It has been remarked that the process by which judges are appointed is key to both the reality and the perception of judicial independence.⁴⁵ The Constitution of Ireland directs that judicial appointments are made by the President acting on the advice of the Government, when exercising its powers of government on behalf of the People. The appointment of a Judge is not, and should never be, considered a “perk” of the executive power of government. To do otherwise undermines constitutional principles.
135. As a matter of principle, political allegiance should have no bearing on appointments to judicial office. As already noted, the position of the 1945-1951 post war Labour Governments in the United Kingdom might be considered in this regard. That Government decisively put an end to the system of appointment of judges by reference to their support of the Government party of the day. Ever since, it has been regarded as an anathema that party political considerations should have any influence let alone be decisive.⁴⁶
136. Writing as a Senior Counsel in 2004, Mr. Justice O’Donnell of the Supreme Court, wrote that:

“It does not seem to me implausible that if the person to be appointed is required to be independent, that the appointment process can be required to guarantee or promote such independence. The fact that judicial appointments are subject to some statutory control itself shows that there is no

⁴⁴ Carroll “You be the Judge: Part II – A Study of the Backgrounds of Superior Judges in Ireland in 2004” (2005)10 *Bar Review* 182 at 186.

⁴⁵ Foreword of The Rt. Hon Jack Straw MP, Lord Chancellor and Secretary of State for Justice to *The Governance of Britain: Judicial Appointments* (October 2007) at 5.

⁴⁶ See O’Donnell, “A Comparison of Article 6 of the European Convention on Human Rights and the Due Process Requirements of the Constitution of Ireland” *Judicial Studies Institute Journal* Vol.4, No. 2, 37 at 65.

prohibition on the regulation of the manner in which appointments are made and leads me to suggest that it might be possible to further refine and tighten the appointment procedures and, in particular, to seek to exclude political considerations.”⁴⁷

137. The Judicial Appointments Review Committee strongly endorses this statement.

⁴⁷ See O'Donnell, “A Comparison of Article 6 of the European Convention on Human Rights and the Due Process Requirements of the Constitution of Ireland” *Judicial Studies Institute Journal* Vol.4, No. 2, 3 at 65.

Promotion and career progression within the Judiciary

138. In Ireland, promotion of judges to higher courts, and appointments as Court Presidents does not involve the Judicial Appointments Advisory Board.⁴⁸ Instead, the Government makes the appointment with the advice of the Attorney General. Section 17 of the *Courts and Court Officers Act 1995* permits the Government to fill a vacancy on a Court with someone who is already serving as a judge of another Court. For the four most recent vacancies that arose on the Supreme Court bench in 2012 and 2013, four High Court judges were appointed to fill them.
139. Alternatively, the Judicial Appointments Advisory Board may advertise a vacancy in a higher Court and call for applications from suitably qualified lawyers. For example, persons who are eligible to become a member of the Superior Courts include: Judges of the High Court (for appointment to the Supreme Court), Judges of the Circuit Court of four year's standing (for appointment to either the High or Supreme Courts), practising barristers of twelve year's standing, and practising solicitors of twelve year's standing once they have experience as an advocate or in instructing a barrister in the High Court and in the Supreme Court.
140. In October 2013, the Chief Justice wrote to all members of the Judiciary regarding elevation to higher courts and senior judicial appointments. The

⁴⁸ Section 23 of the *Courts and Court Officers Act 1995* provides that:

“Where the Government proposes to advise the President on an appointment to the office of Chief Justice, President of the High Court, President of the Circuit Court or President of the District Court it shall have regard first to the qualifications and suitability of persons who are serving at that time as judges in courts established in pursuance of Article 34 of the Constitution”.

Chief Justice issued guidance stating that if a serving Judge wished to express an interest in another judicial position such as elevation to a higher Court, or appointment as President of a Court when a vacancy arises, then expressions of interest should be made in writing by way of letter, and not otherwise, and sent in confidence, to the Attorney General. An up to date *curriculum vitae* should be attached to the letter.

141. *It is submitted that section 28(e) of the Courts and Court Officers Act 1995 should be amended to remove the anomalous provision whereby the only qualified lawyers in the State ineligible for appointment to the High Court or the Supreme Court are members of the District Court. A person otherwise eligible for appointment should not lose it by appointment to another court.*

142. *The Committee is of the view that where it is proposed to fill a judicial position by promotion, including the positions of Chief Justice and Presidents of the other Courts, the candidates should also be subject to the advisory process of the Judicial Appointments Advisory Board. Therefore, it is submitted that applications from serving judges to advance between different courts should be processed through application to the Judicial Appointments Advisory Board.*

Specialist Judges of the Circuit Court

143. Differences or anomalies in the terms, functions and description of judges at any level of the judiciary is unnecessary and has many unwelcome implications, particularly for any cadre of judges differentiated in this way from their colleagues. The recent creation of ‘Specialist Judge of the Circuit Court’ and the appointment of six County Registrars to those positions was designed to address particular problems under the new statutory regime for personal insolvency. The individual appointees are all persons of excellent calibre, but there are significant differences not only in their appellation but also between their terms of engagement and those of their ordinary judicial colleagues in the Circuit Court. This has given rise to apprehensions of an encroachment on judicial independence and also the impression that these appointees are in some way less than full judges, given that their functions are limited to those defined by one particular statute.
144. *The Committee believes that all judges should be capable of performing and be seen to perform the full functions of their colleagues of the same court jurisdiction. Variations and inconsistency lead to lack of clarity and confusion where such should be avoided.*
145. The *Assisted Decision-Making (Capacity) Bill 2013* proposes to devolve further functions to the Specialist Judges of the Circuit Court who would be coming without previous experience to quite different areas of adjudication, required by or under that legislation.
146. *It is the strong recommendation of the Committee that, before the Bill becomes law, the Specialist Judges of the Circuit Court be converted into*

full judges of the Circuit Court, engaged on terms identical to those of their colleagues in that court. Such a conversion would free those judges to also engage in other work. Further, it would remove any differentials between those judges and their colleagues and would not preclude those or any other judges being assigned or dedicated to specialist areas (such as Assisted Decision-Making) by the President of the Circuit Court.

Changes should be made to the Judicial Appointments Advisory Board Process

147. If the steps that have already been identified in this preliminary submission are taken, it becomes an easier task to make consequential amendments to the appointment process. By contrast, if these steps are not taken, it becomes an extremely difficult task to seek to achieve a merit based apolitical system of appointment merely by alteration of the structure of the advisory process. It is submitted however that it is desirable to make a number of changes to that process:

148.

(a) It is submitted that the process of judicial appointments should first and foremost enhance the principle of judicial independence, upon which the rule of law in our democratic society is built. The key to reforming the judicial appointments system rests on reform and development of the Judicial Appointments Advisory Board.

(b) The number of candidates for a single judicial post submitted by the Judicial Appointments Board for Governmental decision should be reduced to three. Where there are multiple vacancies in a Court, the number of candidates should be increased by no more than the number of additional vacancies.

(c) Where it is proposed to fill a judicial position by promotion, including the positions of Chief Justice and Presidents of the other Courts, the candidates should also be subject to

the advisory process of the Judicial Appointments Advisory Board. Also, it is submitted that applications from serving judges to advance between different courts should be processed through application to the Judicial Appointments Advisory Board.

(d) The Judicial Appointments Advisory Board should be empowered to rank candidates and to designate any particular candidate as “outstanding”.⁴⁹

(e) The Judicial Appointments Advisory Board should be specifically empowered to inform the Government when it considers that there are either no, or no sufficient candidates of sufficient quality.

(f) The Judicial Appointments Advisory Board requires adequate financial resources to enable it to carry out its functions. A reformed appointments system will require adequate resources and it is recommended that there be consultation with the Judiciary on this matter. The importance of adequate resources is underlined in the European Network of Councils for the Judiciary “Dublin Declaration” of May 2012 which provides that:

“The body in charge of the selection and appointment of judges must be provided with the adequate resources to a level commensurate with the programme of work it is expected to undertake each year and must have independent control over its own budget, subject to the usual requirements as to audit.”⁵⁰

⁴⁹ In its first *Annual Report 2002*, the Judicial Advisory Appointments Board noted that the legislation did not empower it to recommend applicants in any order of preference. It stated that this situation may render the recommendations less helpful, particularly in cases where there are a relatively limited number of applications for a particular vacancy. See www.jaab.ie.

⁵⁰ See the European Network of Councils for the Judiciary’s “*Dublin Declaration*” available at

Important principles to be considered in appointments

(1) *Merit*

149. The Committee has outlined how the only criterion upon which quality appointments can be made to the difficult and important job of judge, is merit.
150. An essential element of merit to which particular weight should be given is that of practical experience in the conduct of litigation and advocacy. There is no substitute for this and no amount of formal academic training in judicial skills or experience in other branches of the law can equate with actual practical experience of the conduct of litigation in court.
151. *The current statutory minimum periods of practice as a barrister or solicitor for appointment to all Courts should be extended to fifteen years.*
152. Merit may be thus broken down into its many other constituent elements, for example ability, work ethic, education, legal writing, decision making capabilities, leadership, professional development, and personal characteristics otherwise “the concept becomes almost wholly subjective, allowing each decision-maker to construct his or her own features which are significant”.⁵¹

www.encj.eu/index.php?option=com_content&view=category&layout=blog&id=24&Itemid=98&lang=en. The declaration is discussed further in this document.

⁵¹ See Roach Anleu and Mack cited in Evans and Williams, “Appointing Australian Judges: A New Model” (2008) 30(2) *Sydney Law Review* 295 at 297, cited in *New South Wales Judicial Appointments Briefing Paper No. 3/2012*.

Note that in Scotland, section 12 of the *Judiciary and Courts (Scotland) Act 2008* provides that “selection must be solely on merit. This is intended to prevent selection on other grounds (e.g. seniority). Merit has not been defined but would encompass the applicants’ abilities and competencies in respect of the criteria for the particular judicial office. It is wider than professional knowledge and would extend to attributes such as strong interpersonal skills”.

153. Publication of selection criteria can provide for greater transparency and public confidence by allowing candidates to be assessed against a common set of standards and values, which allows for a more realistic interpretation of what merit actually involves.⁵² This is done in numerous jurisdictions.⁵³ In 2008, the New South Wales Attorney General published an approved list of personal and professional criteria in selecting candidates for every judicial office.⁵⁴

154. In England and Wales, the Judicial Appointments Commission has developed a merit criteria which is set out as follows:

(1) Intellectual capacity

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

(2) Personal qualities

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

(3) An ability to understand and deal fairly

⁵²

Ibid.

⁵³

Note that the *Commonwealth (Latimer House Principles) on the Three Branches of Government (2003)* states that an independent judiciary can be secured by a judicial appointments process that is based on clearly defined criteria and by a publicly declared process which ensures that appointment is made on merit. See <http://secretariat.thecommonwealth.org/>.

⁵⁴

See www.lawlink.nsw.gov.au/lawlink.

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

(4) Authority and communication skills

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

(5) Efficiency

- Ability to work at speed and under pressure
- Ability to organise time effectively and produce clear reasoned judgments expeditiously (including leadership and managerial skills where appropriate).⁵⁵

155. Generally, in all European countries the criteria which a candidate must meet to become a Judge is written and publicly available. There is a variation in the detail of the criteria from country to country. The ENCJ “*Dublin Declaration*” of 2012 provides that:

“1. Judicial appointments should only be based on merit and capability. There requires to be a clearly-defined and published set of selection competencies against which candidates for judicial appointment should be assessed at all stages of the appointment process.

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

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

4. There should be personal skills of a high quality, such as the ability to assume responsibility in the performance of his/her duties as well as

⁵⁵

Referred to by the House of Lords Constitution Committee *Twenty-Fifth Report: Judicial Appointments (2012)* at paragraph 85. See www.publications.parliament.uk.

qualities of equanimity, independence, persuasiveness, sensibility, sociability, integrity, unflappability and the ability to co-operate.”

156. International best practice strongly suggests that judicial appointments should be made “on the merits”; based on “objective criteria” and that political considerations should be irrelevant. In January 2010, the high level Judicial Group on Strengthening Judicial Integrity which formulated the *Bangalore Principles on Judicial Conduct (2002)* met in Lusaka, Zambia and adopted *Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct*.⁵⁶ In terms of judicial appointment the Group stated that in order to ensure transparency and accountability in the process, the appointment and selection criteria should be made accessible to the general public, including the qualities required from candidates for high judicial office.
157. In the context of judicial promotions, the *United Nations Basic Principles on the Independence of the Judiciary* states at paragraph 13 that:

“Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.”⁵⁷

158. The *Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct* provide that promotion of judges, when not based on seniority, should be made by an independent body responsible for the appointment of judges, and should be based on an objective appraisal of the candidates performance, having regard to the expertise, abilities, personal qualities and skills required for initial appointment.

⁵⁶ The high level Judicial Group on Strengthening Judicial Integrity is under the auspices of the United Nations and Transparency International. See www.judicialintegritygroup.org/

⁵⁷ *Basic Principles on the Independence of the Judiciary* adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

159. Recommendation No. R (94) 12 of the Council of Europe’s Committee of Ministers on the *Independence, Efficiency and Role of Judges* is also instructive. It provides that:
- “All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency.”⁵⁸
160. *Opinion No. 1* of the Consultative Council of European Judges also states that recommends that the authorities responsible in member States for making and advising on appointments and promotions should introduce, publish and give effect to objective criteria, with the aim of ensuring that the selection and career of judges are “based on merit, having regard to qualifications, integrity, ability and efficiency”.⁵⁹
161. Similarly, the Venice Commission has stated that all decisions concerning appointment and the professional career of judges should be based on merit, applying objective criteria within the framework of the law and that this is indisputable.⁶⁰
162. In Ireland, the minimum criteria for judicial appointment is referred to in section 16 of the *Courts and Court Officers Act 1995*, as amended by section 8 of the *Courts and Court Officers Act 2002*. It should be noted that the Committee on Judicial Induction and Mentoring which is chaired by the Chief Justice is currently preparing a document on the *Role and Functions of a Judge* for newly appointed Judges which is modelled on similar documents from England and Wales and the Australian State of Victoria.

(2) *Impartiality*

⁵⁸ See <https://wcd.coe.int/ViewDoc.jsp?id=524871&Site=CM>.

⁵⁹ See www.coe.int/t/dghl/cooperation/cje/textes/Avis_en.asp.

⁶⁰ See 2010 *Report on the Independence of the Judicial System Part I: The Independence of Judges* www.venice.coe.int/webforms/events/

163. High on the list of desirable judicial attributes is ability to be impartial. The celebrated judge and jurist Lord Bingham who served as Lord Chief Justice of England and Wales as well as the Senior Law Lord, once wrote that the key to the successful making of appointments lies in an assumption shared by the appointor, the appointee and the public at large, that those appointed should be capable of discharging their judicial duties, so far as humanly possible, with impartiality. When a judge who is truly impartial, deciding each case on its merits as they appear to her or him, then they are of necessity independent.⁶¹

(3) *Integrity*

164. Another key attribute of a judge is that they are persons of integrity. This means that they are honest men and women who abide by an ethical code. Indeed, Principle 10 of the United Nations *Basic Principles on the Independence of the Judiciary*, is entitled “Qualifications, selection and training”. It notes that:

“Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.”⁶²

165. Also, the *Bangalore Principles of Judicial Conduct* which was drafted with the intention of establishing standards for the ethical conduct of judges emphasises the importance of judicial integrity.⁶³ This

⁶¹ Bingham “Judicial Independence” in *The Business of Judging: Selected Essays and Speeches* (Oxford University Press 2000) at 59. See also Bingham *The Rule of Law* (Allen Lane 2010).

⁶² *Basic Principles on the Independence of the Judiciary* adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

⁶³ *The Bangalore Principles of Judicial Conduct* 2002. See www.judicialintegritygroup.org/

international code of conduct for judges outline six core values being: independence, impartiality, integrity, propriety, respect for equality and competence and diligence.

166. It describes integrity as being “essential to the proper discharge of the judicial office”. It is applied in practice by a Judge who ensures that his or her conduct is above reproach in the view of a reasonable observer. The *Principles* state that the behaviour and conduct of a judge must reaffirm the people’s faith in the integrity of the judiciary, and that justice must not merely be done but must also be seen to be done.

(4) *Diversity and Equality*

167. Equality must be at the core of any judicial appointments system. In terms of diversity, this has been a regular topic of debate in the United Kingdom where there is concern that there are not enough women, black, Asian and ethnic minorities serving on the bench. Diversity has been the subject of some academic commentary in Ireland. A 1969 research study found that the typical Irish judge of the Superior Courts was white, male, upper middle-class, urban, a barrister, with a background in politics.⁶⁴
168. A 2004 study showed that there were 13.5% female judges in the Superior Courts, and there was a drop of nearly 30% in those with a legal family background, although it still accounted for 40% of judges.⁶⁵ There was an increase of 3% in those with a background as a solicitor reflecting the legislative changes made in 2002. 62% of respondents reported no political affiliation as against 12% in 1969.

⁶⁴ Bartholomew, *The Irish Judiciary* (Dublin, Institute of Public Administration, 1971).

⁶⁵ Carroll “You be the Judge: Parts I and II – A Study of the Backgrounds of Superior Judges in Ireland in 2004” (2005) 10 *Bar Review* at 153 and (2005) 10 *Bar Review* at 182. See also Irish Council for Civil Liberties, *Justice Matters: Independence, Accountability and the Irish Judiciary* (2007) and Feenan “Judicial Appointments in Ireland in Comparative Perspective” 28 *Judicial Studies Institute Journal* [2008:1] at 37.

169. In terms of female and solicitor representation on the Superior Courts in 2014, the Judicial Appointments Review Committee has calculated that of the 44 judges serving in the High and Supreme Courts as of 30th January 2014, there are 9 women (representing over 20%) and 6 with a background as a solicitor (representing nearly 14%). These figures illustrate a quite rapid change in the composition of the judiciary.
170. Strides have been made in terms of greater numbers of women serving at all levels of the Judiciary of Ireland. At present over 30% of judges are female which represents the highest percentage of females ever in the Irish Judiciary. Over 43% of the Circuit Court Judiciary is female. Five women serve on the Judicial Appointments Advisory Board which represents 50% of its membership.
171. The former Lord Chief Justice of Northern Ireland, and current Justice of the United Kingdom Supreme Court, Lord Kerr of Tonaghmore who previously served as Chairman of the Northern Ireland Judicial Appointments Commission, said when giving evidence to a House of Lords Select Committee on the Constitution that he was “embarrassed” by the lack of female representation on the High Court of Northern Ireland. However, he noted that:
- “if someone believes that by introducing some form of parliamentary dimension you are going to increase diversity magically overnight, I think that is most misconceived”.⁶⁶
172. The U.K. Government has recently introduced a legislative provision, by way of its “tie-break” or “tipping factor” provision in the recently enacted *Crime and Courts Act 2013*, which now applies section 159 of the *Equality Act 2010* to judicial appointments. Under the *Constitutional Reform Act 2005*, the Judicial Appointments Commission has three key statutory duties: to select candidates solely on merit; to select only people of good

⁶⁶ Lord Kerr giving evidence to the House of Lords Select Committee on the Constitution: Judicial Appointments Process 13th July 2011.

character; and to have regard to the need to encourage diversity in the range of persons available for selection for appointments. The equal merit provision within the *Crime and Courts Act 2013* clarifies that making selections “solely on merit” does not prevent a candidate being chosen on the basis of improving diversity when there are two candidates of equal merit.

173. On the topic of diversity, Professor Shetreet is of the view that:

“An important duty lies upon the appointing authorities to ensure a balanced composition of the judiciary, ideologically, socially, culturally and the like... The judiciary is a branch of the government, not merely a dispute resolution institution.”⁶⁷

174. However, Sir Anthony Mason, the former Chief Justice of Australia, downplays the diversity argument:

“While I subscribe to the ideal of appointing a judiciary whose composition is reasonably balanced, and I consider that it is an important factor which the appointing authorities should have in mind in the making of judicial appointments, it is simply not practicable to appoint a judiciary that approximates in make-up the composition of society as a whole. For one thing, the possession of professional legal skills, like the possession of professional medical skills, is not evenly distributed throughout the community. Indeed, such skills are unevenly distributed. For another thing, the appointment of judges who are not highly skilled is much more likely to undermine public confidence in the administration of justice than the appointment of an unrepresentative judiciary. In other words, it would be a serious mistake to concentrate on the goal of fair representation to the detriment of seeking candidates with a high order of professional skills. Such an approach would compromise both the pursuit of efficiency and public confidence in the courts.

Not that the goal of fair representation should be abandoned. A candidate having the requisite professional skills and other qualities who would enhance the representative character of the

⁶⁷ Shetreet “Who will judge: reflections on the judicial process and standards of judicial selection” (1987) 61 ALJ 776.

judiciary should be preferred to another candidate who simply has the requisite skills and other qualities.”⁶⁸

175. Diversity is an important consideration in shaping a judiciary which reflects the society it serves. However, as stated previously in this submission it is important to ascertain the extent to which there is a real or perceived problem at the point of appointment which is based on empirical research. In the more immediate term, a comprehensive and well resourced system of continuing judicial education along the lines which are now well established in comparable jurisdictions would greatly assist in the education of, and developing greater awareness in the judiciary regarding those appearing in the Courts.

(5) *Attracting persons of the highest quality and ability to the Judiciary*

176. Ireland has 154 Judges which represent the entire third branch of government in the State. The European Commission for the Efficiency of Justice report entitled “*Evaluation of European Judicial Systems*” 2012 is based on data from 2010 sources from the 47 member states of the Council of Europe, shows that per head of the population, Ireland has the lowest number of judges in all 47 member states of the Council of Europe. For example, for every 100,000 people there are 3.2 Irish judges. This shows that Ireland’s judges carry a heavy case-load. Yet the Irish Judiciary and Courts system continues to be highly regarded which is evidenced by a number of research studies.

177. The *European Union Justice Scoreboard 2013* includes a scale of “perceived independence of the judiciary”. Ireland was ranked 3rd in the EU. It was ranked 4th in 144 countries in the world in information attributed to the *World Economic Forum’s Global Competitiveness Report* in the context of economic growth.⁶⁹

⁶⁸ Mason “The Appointment and Removal of Judges” in Cunningham (ed) *Fragile Bastion: Judicial independence in the nineties and beyond* (Judicial Commission of New South Wales 1997). See www.judcom.nsw.gov.au/publications/education-monographs-1/monograph1.

⁶⁹ Note also the World Bank initiative, “*Worldwide Governance Indicators*” reports on six

178. Persons of the highest quality and ability must be recruited to the judiciary for the benefit of Irish citizens, all those engaged by the Courts system, and the country's international reputation which is vital for economic development. The judiciary must attract outstanding lawyers at the height of their abilities. The quality and reputation of any judicial system depends on the willingness of outstanding individuals to accept appointment.⁷⁰ For solicitors and barristers, by the time that they have built up their practice and developed expertise, they are generally aged in their 50s.
179. The Committee is concerned that recent changes to pension provisions may have little fiscal benefit and may disproportionately deter excellent candidates from applying for judicial office. Since 2008 there have been seven distinct changes to the pay and pension provision of judges, all of them adverse. The cumulative effect is severe. The take home pay of a new High Court Judge for example is 50% of an equivalent in 2008, and is now for example very considerably less in gross and even more so in net terms than comparators in other common law countries.
180. This submission does not question in any way the need to make severe adjustments to the public pay bill or any of the reductions in judicial pay and pension in the past years. There has however been no comprehensive review of the cumulative impact of all changes, and no opportunity for a consideration of the impact on recruitment. Some changes which affect

broad dimensions of governance for over 200 countries during the period 1996-2011. One such dimension is the rule of law. Ireland has a consistently high score of between the 90th and 100th percentile in the rule of law index.

See http://info.worldbank.org/governance/wgi/mc_chart.asp.

The 2013 *Index of Economic Freedom* survey is also of interest. It states that Ireland has an efficient, non-discriminatory legal system that protects the acquisition and disposition of all property rights with a score of 90. The survey notes that contracts are secure, and expropriation is rare. The survey shows that Ireland has one of Europe's most comprehensive legal frameworks for the protection of intellectual property rights. See www.heritage.org/index/. The Index is organised by the Wall Street Journal and the Washington based think tank The Heritage Foundation.

⁷⁰ See Sumption "The Constitutional Reform Act 2005" in *Judicial Appointments: Balancing Independence, Accountability and Legitimacy* (2010), 31 at 42. available at <http://jac.judiciary.gov.uk>.

only the judiciary, or have a disproportionate impact on the judiciary such as the imposition of penal taxation provisions on private pension provision made while in private practice, may have little fiscal benefit, but may be a significant deterrent to applicants. A provision which imposes an unquantifiable, unpredictable, but substantial tax charge upon an appointee with private pension savings, is likely to be a serious deterrent to such applicants.

181. *It is essential that high quality experienced candidates are attracted to the bench. Recent changes to pension provisions, both public and private, as they apply to entrants to the judiciary, may have little fiscal benefit to the State, yet create a wholly disproportionate disincentive to applicants for judicial posts, and deter high quality applicants from seeking appointment. It is desirable that such provisions should be immediately reviewed to assess the benefit if any to the State, and assessing their impact on the quality of candidates for appointment to the judiciary.*
182. *It is submitted that provisions such as section 22 of the Public Service Pensions (Single Scheme and Other Provisions) Act 2012, and section 787TA of the Taxes Consolidation Act 1997 as amended, should be reviewed with a view to determining the benefit to the State from such provisions as they apply to the judiciary, and their impact on the quality candidates for appointment to judicial posts.*
183. *It is also submitted that the current requirement for Judges of the District Court to apply for yearly renewal from age sixty five to age seventy should be abolished. Judges of all jurisdictions should have the same retirement age on judicial appointment.*
184. The Committee notes that the principles outlined in this submission for appointment to the national courts, are principles which should also apply to appointments of Irish persons as judges of international courts, and the

European courts such as the General Court, the European Court of Justice and the European Court of Human Rights.

Appendix 1: Comparative analysis overview

185. The selection of judges is a subject of constitutional significance in Ireland and in other jurisdictions.⁷¹ This preliminary submission considers the judicial appointments process in common law countries and gives a general overview of the civil law Member States of the European Union. Where possible, the Committee has ascertained how senior judicial posts are applied for in other jurisdictions as well.
186. However, care must be taken when deciding what aspects of these comparative systems might be worth considering in an Irish context. As Professor Maleson has noted that comparison with other jurisdictions does not have the objective of importing an external model of judicial appointments.⁷² Similarly, Bell states that comparative law does not offer blueprints, and the area of judicial appointments is no exception. There are numerous different methods, and many work quite satisfactorily.⁷³
187. Ireland is a small country and any reform of our judicial appointments system must be done in a way which is compatible with the Irish legal system. A reformed appointments procedure could have a judicial appointments body in which the voices of judges would continue to be heard alongside the Government in the form of the Attorney General, lay

⁷¹ See The Hon. Sir Gerard Brennan, former Chief Justice of Australia “The Selection of Judges for Commonwealth Courts” lecture as part of the Senate Occasional Lecture Series at Parliament House, Canberra, 10th August 2007. See www.aph.gov.au.

⁷² Maleson, “Creating a judicial appointments commissions: which model works best” (2003) *Public Law* 102

⁷³ Bell, “European Perspectives on a Judicial Appointments Commission” *Cambridge Yearbook of European Law* 2003-2004, Volume 6, chapter 2.

persons and the legal professions as is currently the case. The Judicial Appointments Advisory Board could be reformed in terms of its mandate and procedures.

Overview of systems

188. Within the European Union, the relatively few common law jurisdictions are outnumbered by their civil law counterparts. In many civil law countries, an aspiring judge would attend a judicial training college immediately after university, and once qualified as a judge typically continue serving as a judge for the rest of their working life.⁷⁴ The German legislature is involved in election of judges. In Israel, judges are selected by a committee comprising representatives of the legislature, the Government, the judiciary and the Bar.⁷⁵ In South Africa, a similar system operates. Candidates are interviewed and voted upon by parliament.
189. It is a completely different system to that of the common law countries where judges are appointed from the ranks of lawyers with years of practical experience. In fact some civil law countries look to common law jurisdictions such as England and Wales when reviewing their routes to becoming a judge.⁷⁶
190. In the United States, selection, confirmation by the legislature and, in some States, “election” is the common.⁷⁷ Appointees to federal courts are

⁷⁴ See The All Party Oireachtas Committee on the Constitution *Fourth Progress Report: The Courts and the Judiciary* at 5, available at <http://archive.constitution.ie/publications/default.asp?UserLang=EN>.

⁷⁵ See The Hon. Sir Gerard Brennan, former Chief Justice of Australia “The Selection of Judges for Commonwealth Courts” lecture as part of the Senate Occasional Lecture Series at Parliament House, Canberra, 10th August 2007. See www.aph.gov.au.

⁷⁶ See remarks of Lady Justice Hallett regarding France when giving evidence to the House of Lords Select Committee on the Constitution: Judicial Appointments Process 16th November 2011.

⁷⁷ The election of Judges has been criticised by one former US Supreme Court Justice, Sandra

nominated by the President. They are investigated by the Department of Justice, the FBI, the White House, the American Bar Association and community lobby groups prior to consideration by the Senate Judiciary

Committee. They must attend confirmation hearings before members of the Judiciary Committee of the United States Senate. There is then a vote of the 100 Senators on whether to confirm the nomination and so this is an example of a very public and politically partisan appointment process unique to the United States.

191. In other common law countries, written constitutions and legislation introduced new systems of appointment, usually involving a judicial services or appointments commission comprising representatives of the legal profession and of the judiciary, to remove total dominance in judicial appointments from political representatives. Professor Jeffrey Jowell QC has traced the growing international consensus in favour of independent judicial appointment commissions.⁷⁸

192. Justice Michael Kirby formerly of the High Court of Australia, and one time Chairman of the Australian Law Reform Commission notes that judicial appointments commissions are designed to formalise the protection of the judiciary against excessive politicisation, incompetence, corruption and other such vices. But he has often argued that care is needed that appointments by judicial appointments commissions do not pick the “safe” candidate so that they become a vehicle for judicial orthodoxy.⁷⁹

Day O'Connor. See “Ex-Justice says contested elections threaten fair judiciary” *Atlanta Journal Constitution* 12th August 2013 at www.ajc.com/news/news/local/ex-justice-says-contested-elections-threaten-fair-/nZMSC/

⁷⁸ Jowell, “The Growing International Consensus in favour of Independent Judicial Appointment Commissions”

⁷⁹ See Kirby “Modes of Appointment and Training of Judges - A Common Law Perspective” 8th June, 1999, Belfast, Northern Ireland.

193. In England and Wales, and Australia, appointment to the bench was traditionally in the gift of the elected Government of the day. A principal political officer sitting in the cabinet in the form of the Lord Chancellor in England, and the Attorney General in Australia would make the proposal following discreet soundings of the nominee a process which became known as “the tap on the shoulder”.⁸⁰ The cabinet would decide whether to appoint or not, or to select amongst candidates. The chosen appointee’s name would be forwarded to the Queen in the case of the United Kingdom, and by the Governor-General of Australia in Executive Council, for formal confirmation.
194. In both the United Kingdom, and Australia (at federal level) there has been a dilution of the overtly political nature of judicial appointments made by Government. There are now Judicial Appointments Commissions in the United Kingdom jurisdictions of Northern Ireland, Scotland, and England and Wales, while the Commonwealth Attorney General of Australia is statutorily obliged to consult widely with his State counterparts and legal colleagues.⁸¹
195. In England and Wales, the Blair Labour Governments placed much emphasis modernising the appointments process as part of its reform of the unwritten constitution. Prior to 2006, judges and Queens Counsel were selected by the Lord Chancellor and his departmental advisers following discreet soundings.⁸² There is evidence to suggest that it led to appointments of individuals who might not have put themselves forward for judicial office, yet who were very able.⁸³ In July 2003, the U.K.

⁸⁰ Sir Sydney Kentridge QC, “The Highest Court: Selecting the Judges”, *Cambridge Law Journal* 62(1) March 2003, at 55-71.

⁸¹ See www.nijac.gov.uk (Northern Ireland), www.judicialappointmentscotland.org.uk/Home (Scotland) and <http://jac.judiciary.gov.uk> (England and Wales).

⁸² For a comprehensive review and history of judicial appointments from the 1980s to 2010, see former Lord Chancellor Lord Mackay of Clashfern “Selection of Judges prior to the establishment of the Judicial Appointments Commission in 2006” in *Judicial Appointments: Balancing Independence, Accountability and Legitimacy* (2010) at 11 available at <http://jac.judiciary.gov.uk>.

⁸³ Legg “Judges for the new century” *Public Law* 2001, Spring at 62-76.

Government published a consultation paper on the appointment of judges. In his foreword to the document, Lord Falconer, the then Lord Chancellor stated that:

“In a modern democratic society it is no longer acceptable for judicial appointments to be entirely in the hands of a Government Minister. For example the judiciary is often involved in adjudicating on the lawfulness of actions of the Executive. And so the appointments system must be, and must be seen to be, independent of Government. It must be transparent. It must be accountable. And it must inspire public confidence.”⁸⁴

196. This consultation process led to the enactment of the *Constitutional Reform Act 2005* which established the Judicial Appointments Commission (JAC). Its members include judges, lawyers and lay persons. It was made responsible for operating the appointments process and making recommendations to the Lord Chancellor for judicial appointments up to and including the High Court. There is an application process for prospective judges involving written assessments and interviews which shall now be considered.

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See *Constitutional Reform: a new way of appointing judges* (July 2003) at 3-4.

Judicial Appointments in England and Wales

197. The Judicial Appointments Commission (hereafter “JAC”) is a permanent body supported by a secretariat.⁸⁵ There are 15 commissioners. The Chairperson must be a lay member. The Commission must be comprised of 5 judicial members, 2 professional members (1 barrister and 1 solicitor), 5 lay members, 1 tribunal member and 1 lay justice member. Three judicial members are chosen by the Judges’ Council and Tribunal Judges’ Council. The remaining 12 commissioners are recruited and appointed through open competition according to the principles applicable to public appointments. The Commission deals with applications ranging from the tribunals, to lower Courts and the High Court.⁸⁶

The process of appointment

198. JAC advertises for applications.⁸⁷ Short-listing of candidates is undertaken on the basis of written evidence or on the basis of tests designed to assess the candidates’ ability to perform in a judicial role. Short-listed candidates are invited to a selection day which may consist of

⁸⁵ See the *Constitutional Reform Act 2005* and the *The Judicial Appointments Commission Regulations 2013*. See also Baroness Prashar, the inaugural chairperson of the Judicial Appointments Commission in “Translating Aspirations into Reality: Establishing the Judicial Appointments Commission” in *Judicial Appointments: Balancing Independence, Accountability and Legitimacy* (2010) at 43 available at <http://jac.judiciary.gov.uk>.

⁸⁶ See speech of Lord Clarke of Stone-cum-Ebony, then Mater of the Rolls “Selecting Judges: Merit, Moral Courage, Judgment and Diversity” 22nd September 2009.

⁸⁷ See Her Honour Judge Frances Kirkham, former member of the Judicial Appointments Commission in “Encouraging and Supporting those Aspiring to be Judges” in *Judicial Appointments: Balancing Independence, Accountability and Legitimacy* (2010) at 77 available at <http://jac.judiciary.gov.uk>.

a panel interview; interview and role play; interview and presentation; or interview and situational questioning focusing on what a candidate would do in a hypothetical situation. Panel members assess all the information about a candidate and agree which candidates best meet the required qualities. The panel chair completes a report providing an overall panel assessment which forms part of the information presented to the JAC.

199. The JAC must as part of the selection process consult the Lord Chief Justice and another person who has held the judicial post, or has relevant experience of the post, about those candidates the JAC is minded to select. Their responses are considered by JAC. The JAC makes a final selection based on the information.

200. When reporting its final selections to the Lord Chancellor, the JAC must not say what the consultees comments were and whether it followed them or not, and give reasons. If the Lord Chancellor accepts the recommendation, the Prime Minister will make this recommendation to the Queen.

201. The Lord Chancellor can only reject a recommendation of the JAC on the grounds that the person is not suitable for the office concerned. The JAC is not permitted to re-select a candidate who has been rejected. The Lord Chancellor can also require the JAC to reconsider a selection but only if there is not enough evidence that the person is suitable for the office concerned, and there is evidence that the person is not the best candidate on merit. The Lord Chancellor must give the Commission reasons in writing for rejecting or requiring reconsideration of a selection.⁸⁸

Senior judicial appointments in England and Wales

202. For senior appointments to the Court of Appeal, and the offices of Head of Division, Lord Chief Justice, and the President, Deputy President and

⁸⁸ See *Judicial Appointments Briefing Paper No. 3/2012*, New South Wales Parliamentary Library Research Service.

Justice of the United Kingdom Supreme Court, separate provision was made for special panel recommendations to the Lord Chancellor.⁸⁹ For each appointment, the JAC or the specially constituted panel is required to make one recommendation to the Lord Chancellor. The Lord Chancellor has three options: accept the recommendation; reject, on grounds that the person is unsuitable for the office; or, ask for it to be reconsidered on the grounds either that there is not enough evidence that the person is suitable, or that there is evidence that the person is not the best candidate on merit.⁹⁰ He may also be consulted prior to the start of the selection process for appointments at Court of Appeal level and above. For lower-level appointments below the High Court, the *Crime and Courts Act 2013*, transfers this role from the Lord Chancellor to the Lord Chief Justice, or the Senior President of Tribunals as appropriate.

Supreme Court Appointments in the United Kingdom

203. The Secretary of State for Justice (who now holds the ancient office of Lord Chancellor) convenes a selection commission. This is chaired by the President of the Supreme Court who chairs the Commission. Under the recent changes introduced by the *Crime and Courts Act 2013*, the Deputy President is no longer a member of a selection commission.⁹¹ Instead the President has to nominate a senior judge from anywhere in the United Kingdom, but that Judge cannot be a Justice of the Supreme Court. In addition, there is a member of the Judicial Appointments Commission for England and Wales, the Judicial Appointments Board in Scotland, and the Judicial Appointment Commission in Northern Ireland. At least one of these representatives must be a lay person. Nominations are made by the Chairman of the relevant Commission/Board.

⁸⁹ See *The Judicial Appointments Regulations 2013*.

⁹⁰ Sections 29 and 30 of the *Constitutional Reform Act 2005*, in respect of the UK Supreme Court; sections 73 and 74 in respect of the Lord Chief Justice and Heads of Division; sections 75E and 75F in respect of the Senior President of Tribunals, and sections 82 and 83 in respect of Court of Appeal appointments.

⁹¹ See *The (Supreme Court) Judicial Appointments Regulations 2013*.

204. Under the changes introduced by the 2013 Act, if a Commission is convened for the selection of a person to be recommended for appointment as President of the Court then the out-going President may not be a member of the commission. In those circumstances the Commission is to be chaired by one of its non-legally qualified members.
205. The Act also includes provisions in relation to diversity where candidates for judicial office are of equal merit. Under section 19 of Schedule 13 of the Act, for appointments to the Supreme Court, where two persons are of equal merit section 159 of the *Equality Act 2010* does not apply, but this does not prevent the commission from preferring one candidate over the other for the purpose of increasing diversity within the group of persons who are judges of the Court.
206. The legislation does not prescribe a process that a selection Commission has to follow, although under section 27(9) of the *Constitutional Reform Act 2005* the Commission must have regard to any guidance given by the Lord Chancellor as to matters to be taken into account (subject to any other provision in the Act) in making a selection. In practice each selection Commission determines its own process. Since 2008/2009, vacancies have been advertised.
207. In coming to their decision, the Commission must consult with the senior judges of the United Kingdom⁹² The Commission must also consult with the Lord Chancellor, the First Minister in Scotland, the First Minister in Wales and the Secretary of State for Northern Ireland even though responsibility for justice and policing is devolved to the Minister of Justice in the Northern Ireland Executive.

⁹² Senior Judges is defined as Judges of the Supreme Court, the Lord Chief Justice of England and Wales, the Master of the Rolls, the Lord President of the Court of Session, the Lord Chief Justice of Northern Ireland, the Lord Justice Clerk, the President of the Queen's Bench Division, the President of the Family Division, the Chancellor of the High Court.

208. Section 27 of the *Constitutional Reform Act 2005* sets out a number of requirements: selection must be on merit, a person may only be selected if s/he meets the qualifications set out at section 25, a person may not be selected if he is a member of the Commission, any selection must be of one person only, and in making selections the Commission must ensure “that between them the Judges will have knowledge of, and experience of practice in, the law of each part of the United Kingdom”. This is designed to ensure continued representation from Scotland and Northern Ireland.
209. Once the decision has been made, the Commission must send a report to the Lord Chancellor stating who has been selected; who was consulted; and any other information required by the Lord Chancellor. The Lord Chancellor is permitted to invite the Commission to reconsider or to reject a candidate. If he does either of those he must give reasons. If, following the consultations made, the Lord Chancellor is content with the recommendations made by the selection commission, he forwards the person’s name to the Prime Minister who, in turn, sends the recommendation to the Queen who makes the formal appointment.⁹³
210. In the United Kingdom, persons eligible to be considered for appointment to the Supreme Court include: those who have held high judicial office for at least two years *i.e.* High Court Judges of England and Wales, and of Northern Ireland; Court of Appeal Judges of England and Wales, and of Northern Ireland; and Judges of the Court of Session. Those who satisfy the judicial-appointment eligibility condition on a 15 year basis, or have been a qualifying practitioner for at least 15 years.
211. Thus, an applicant must have practised as a solicitor of the senior courts of England and Wales, or a barrister in England and Wales, for at least 15 years; and has been gaining experience in law during the post-qualification period; an advocate or a solicitor entitled to appear in the Court of Session

⁹³ See *Procedure for Appointing a Justice of The Supreme Court of the United Kingdom*, available at www.supremecourt.gov.uk.

and the High Court of Justiciary in Scotland; a member of the Bar of Northern Ireland or a solicitor of the Court of Judicature of Northern Ireland.

Lessons from the United Kingdom

212. The judicial appointments process in the United Kingdom has been the subject of recent review and legislative amendment as already discussed. It continues to be a subject of debate. For example, The Rt. Hon Mr. Jack Straw M.P. who served as Home Secretary and subsequently Lord Chancellor in a number of Labour Governments which initiated the reform of judicial appointments has noted that:

“One irony of the creation of the Judicial Appointments Commission and the quite deliberate move away from the ‘tap on the shoulder’ is that lord chancellors who wanted to take bold action to improve diversity, by spotting and appointing particular talented candidates, were no longer able to do so. This was the price we paid for moving to a fairer and more transparent system. But we were so eager to remove all trace of the tap on the shoulder that we went too far the other way.”⁹⁴

213. The U.K. experience illustrates that attempts to improve the perception of fairness in the appointments process can risk deterring candidates from applying who would make excellent judges, but are reluctant to put themselves through the laborious levels of scrutiny throughout the application process. This can apply with particular force in a smaller jurisdiction. For example, Lord Carswell, the former Lord Chief Justice of Northern Ireland, has noted that the new appointments system in Northern Ireland is complex and now takes a considerably long time during which a

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Straw Aspects of Law Reform: An Insider’s Perspective – Judicial Appointments *The Hamlyn Lectures* Cambridge, Cambridge University Press, 2013) at 51.

candidate's practice may suffer.⁹⁵ It illustrates the fact that it is necessary to devise a reformed system with particular care.

214. Such an appointments process may also deter candidates who would not think of applying in the first place but might do so with encouragement from colleagues and judges. The House of Lords Constitution Committee and the Ministry of Justice have now both endorsed discreet soundings of prospective candidates by their colleagues and senior judges as being beneficial in enhancing diversity on the bench, since they would be well informed about the individuals concerned.⁹⁶

⁹⁵ Lord Carswell "*Eheu fugaces: fifty years in the Northern Ireland courts*" in Hogan and Kenny (eds) *Changes in Practice and Law: A selection of essays by members of the legal profession to mark twenty-five years of the Irish Legal History Society*" (Four Courts Press 2013) 3 at 14.

⁹⁶ *House of Lords Constitution Committee Report: Judicial Appointments – 25th Report of Session 2010 – 2012*.

See Report at www.publications.parliament.uk/pa/ld201012/ldselect/ldconst/272/27202.htm and *The Government's response to the Committee's Report* published by the Ministry of Justice May 2012 at www.parliament.uk.

Judicial Appointments in Northern Ireland

215. The Northern Ireland Judicial Appointments Commission (hereafter “NIJAC”) was established in June 2005, under the *Justice (Northern Ireland) Acts 2002 and 2004* which implemented the recommendations of the Northern Ireland Criminal Justice Review.⁹⁷ This flowed from the *Belfast Agreement 1998* which provided for a wide-ranging review of criminal justice in Northern Ireland.
216. Upon the devolution of justice on 12th April 2010, the *Northern Ireland Act 2009* extended the Commission’s statutory duties even further. The four lay Commissioners are appointed through a public appointments process. NIJAC is both a recommending body and an appointing body for certain judicial posts, with a say over the judicial complement and determining certain elements (non-financial) of some terms and conditions. Its sponsoring department is the Office of the First Minister and Deputy First Minister whose role is one of oversight and ensuring accountability for our governance and finance arrangements.
217. The Commission is made up of thirteen Commissioners drawn from each tier of the judiciary, legal professions and professional backgrounds. The Chairman is the Lord Chief Justice of Northern Ireland, The Rt. Hon. Sir Declan Morgan. Judicial members are initially appointed for a five year period, lay members for four years and legal members for three years.

⁹⁷ See www.nijac.gov.uk/

218. Opportunities for judicial appointment are publicly advertised and the Commission engages in education and outreach events to increase awareness of judicial vacancies amongst the legal professions. Upon receipt of an application form, the “Appointments Team” checks if the eligibility requirements for the advertised judicial office are met for progression to the short listing assessment stage. The Commission will only select persons on the basis of merit and good character. Good character will be considered using information drawn from a range of sources including “pre appointment checks”, the character and declaration of interest sections of the application form, and the overall assessment and selection process.
219. An application form containing a self assessment section is submitted for some recruitment schemes. The purpose of the self assessment is to enable applicants to demonstrate how they meet the experience, knowledge, Skills and personal qualities criterion of the personal profile for judicial office.
220. Consultation in confidence is a component of judicial assessment and selection which reflects the standing, level, and good governance requirements for all tiers of judicial office. Consultation is seen as an essential element of the assessment and selection process for all judicial offices. The comments of those consulted can be examined at short listing or in the final assessment as supplementary evidence. They are assessed qualitatively and are not scored or weighted in any way. Depending on the office under recruitment applicants asked to nominate consultees.
221. The Commission typically uses two methods to shortlist. Each member of the Selection Committee will assess and score how an applicant demonstrates the criterion set out in the personal profile against a rating scale. The Selection Committee will then collectively agree a moderated score. Those applicants who achieve the pre determined benchmark are short listed and will progress to the next stage.

222. A short listing assessment test is normally a written assessment carried out on a private basis or in a small or larger group setting. The assessment is usually, but not always, based on the type of work one may expect to come across in the office under recruitment. If short listed the self assessment and consultee comments are usually requested later in the process.
223. The Assessment Centre is intended to elicit evidence that an applicant is suitable for appointment to judicial office. The Assessment Centre may include:
- A Written Exercise;
 - Participation in a Role Play;
 - Questions about a Case Study (applicants will have the opportunity to read Case Study materials in advance of interview);
 - Interview (questions in relation to other areas of the Personal Profile).
 - Prior to appointment, or recommendation for appointment, the following series of pre-appointment checks are conducted:-
 - an examination of the character section of your application form and of information received from any source;
 - an Enhanced Level Criminal Record Check through Access NI to establish if you have ever been the subject of any criminal conviction;
 - checks with relevant professional bodies (e.g. The Law Society, The Bar Council, General Medical Council etc) regarding allegations or findings of misconduct;
 - the Enforcement of Judgments Office and HMRC (Revenue and Customs);
 - an examination of any interests declared;
 - a Conflict of Interest interview; and
 - a medical examination.
224. The Commission conducts an examination of conflicts of interest as part of the pre-appointment checks. Any information obtained is treated in the strictest confidence and may not debar an applicant from appointment unless the Commission considers that it renders you unsuitable for judicial appointment.

225. Applicants are warned that failure to disclose information which subsequently comes to light as a result of the pre-appointment checks may disqualify them from recommendation for judicial appointment.
226. NIJAC can be described as a recommending body, since it makes recommendations in respect of Crown appointments and provides simply one name for each judicial post. There are appointments that are mainly full-time substantive posts in various Courts and Tribunals for example High Court Judge, County Court Judge, District Judge (Magistrates' Courts), Coroners, Social Security Commissioner/Child Support Commissioner etc. Since 2009 it has become an appointing body in respect of judicial posts that are mainly fee-paid posts in various Courts and Tribunals for example Deputy District Judge (Magistrates' Courts), Deputy Statutory Officers, fee-paid members of Tribunals including: the Appeal Tribunals, Care Tribunal, NI Valuation Tribunal, Lands Tribunal, Health & Safety Tribunal, Charity Tribunal for NI, Industrial Tribunals and Fair Employment Tribunal, NI Traffic Penalty Tribunal etc. It should be noted that NIJAC recommends one candidate only.
227. The *Northern Ireland Act 2009* provides that the Lord Chief Justice and Lords Justices of Appeal are appointed by the Queen on the recommendation of the Prime Minister who must consult with the current Lord Chief Justice (or if that office is vacant or the Lord Chief Justice is not available, the Senior Lord Justice of Appeal who is available) and the Northern Ireland Judicial Appointments Commission before making a recommendation.⁹⁸
228. In Northern Ireland, there is also a Judicial Appointments Ombudsman.⁹⁹ It was established on 25th September 2006 under the *Justice (Northern*

⁹⁸ Schedule 2 of the 2009 Act amends the *Judicature (Northern Ireland) Act 2009*.

⁹⁹ See www.nijao.gov.uk. See also Northern Ireland Assembly *Research and Information Briefing Service Paper on the Relationship between the Northern Ireland Judicial Appointments Commission and Northern Ireland Judicial Ombudsman* (1st November 2013) at www.niassembly.gov.uk.

Ireland) Act 2002, as amended by the *Constitutional Reform Act 2005*. It is completely independent of the Government and the judiciary.

229. The Ombudsman investigates complaints from applicants for judicial appointment where maladministration by NIJAC, committees of NIJAC or by the Lord Chancellor in respect of his role in making recommendations for appointment, is alleged. The Ombudsman may also investigate allegations of maladministration by the Northern Ireland Court Service, notwithstanding the abolition of that body; investigate allegations of maladministration by the Lord Chancellor in relation to appointments schemes initiated prior to 12th April 2010; and investigate, determine and make recommendations on matters referred to him by the Lord Chancellor in relation to appointment schemes initiated prior to 12th April 2010. Other responsibilities include: raising awareness and highlighting the strategic direction for the Ombudsman among members of the public, the legal profession and other interested groups; liaising with the Judicial Appointments and Conduct Ombudsman in England and Wales; and producing an annual report to the Department of Justice on the discharge of his functions, which must be laid before the Northern Ireland Assembly.
230. In investigating a complaint the Ombudsman aims to be impartial, accessible and effective within the limits of his authority. In so doing he has a duty of care equally to complainants and those complained about. In the event of maladministration the Ombudsman will seek redress and through recommendation and constructive feedback aim to improve standards and practices in the authorities concerned.

Judicial Appointments in Scotland

231. Under the *Judiciary and Courts (Scotland) Act 2008* the Judicial Appointments Board for Scotland has a number of statutory responsibilities such that:

- (a) the selection of an individual to be recommended for appointment must be solely on merit;
- (b) the Board may select an individual only if it is satisfied that the individual is of good character; and
- (c) in carrying out its functions, the Board must have regard to the need to encourage diversity in the range of individuals available for selection to be recommended for appointment to a judicial office. This is subject to the provisions a) and b) above.

232. The purpose of the Board is to recommend to the Scottish Ministers individuals for appointment to judicial offices within the Board's remit and to provide advice to Scottish Ministers in connection with such appointments.¹⁰⁰ The Scottish Ministers may specify other judicial offices to come within the Board's remit but can only do so by laying a Scottish Statutory Instrument before the Scottish Parliament. Similar to Northern Ireland, the Board recommends just one name for appointment to the Scottish Ministers.

233. The selection of individuals for recommendation must be made solely on merit and an individual may only be selected for recommendation if he or

¹⁰⁰ The judicial offices within the Board's remit are: Judge of the Court of Session, Chair of the Scottish Land Court, Sheriff Principal, Sheriff, Part-Time Sheriff and Temporary Judge except in cases where the individual to be appointed already holds or has held one of the following offices: Judge of the European Court, Judge of the European Court of Human Rights, Chair of the Scottish Land Court, Sheriff Principal and Sheriff.

she is of good character. Only the judicial and legal members of the Board may assess the applicants' knowledge of the law or their skill and competence in the interpretation and application of the law. Decisions about an applicant's suitability to be recommended for appointment are made by the whole Board. Full time appointments are made by the Queen on the First Minister's recommendations.

Judicial Appointments in Australia

234. In Australia, the High Court sits at the apex of the judicial system. When a vacancy on the Court arises, the federal Attorney General's Department does not place notices in the newspapers or place the appointment criteria on its website. Instead, the Attorney General who is a government minister responsible for justice matters, as well as a parliamentarian (M.P. or Senator) and lawyer, consults widely with interested bodies seeking nominations of suitable candidates.¹⁰¹
235. In addition to those bodies, the Attorney General also writes to the Attorneys-General of the six States, the Chief Justice of the High Court, the other Justices of the High Court and the Chief Justices of the 6 States and 2 Territories. The Attorney General then considers the field of highly suitable candidates and writes to the Prime Minister seeking his and/or Cabinet approval.
236. If approved by the Cabinet, the Attorney General makes a recommendation to the Governor-General who considers the appointment through the Federal Executive Council process. Under Chapter III of the Constitution of the Commonwealth of Australia, Justices of the High Court and of other courts created by Parliament can only be appointed by the Governor-General in Executive Council.

¹⁰¹ Section 6 of the *High Court of Australia Act 1979* requires consultation by the federal Attorney General with his State counterparts before appointing the Justices of the High Court. He also takes considerable time in consulting judges, legal professional groups, political parties and others.

237. For Federal Courts appointments such as the Federal Court, Family Court and Federal Magistrates Court, the Attorney General consults widely with interested bodies, the Judiciary and also advertises. Advisory Panels have been established to assist in assessing expressions of interest and nominations, to conduct interviews and report to the Attorney General. These include the Head of the relevant court, a retired judge and a senior office from the Attorney General's Department. The Attorney General considers their report and identifies the person considered to be most suitable. The Attorney General makes the recommends the proposed appointment to the Cabinet and the appointment will be made by the Governor General.
238. Candidates must meet the relevant qualifications set out in section 6(2) of the *Federal Court Act 1976*, section 22 of the *Family Law Act 1975* or Schedule 1, Part 1 of the *Federal Magistrates Act 1999*. Candidates for appointment to the Federal Court and Family Court must also demonstrate the following qualities to the highest degree: legal expertise, conceptual, analytical and organisational skills, decision-making skills, the ability (or the capacity quickly to develop the ability) to deliver clear and concise judgments, the capacity to work effectively under pressure, a commitment to professional development, interpersonal and communication skills, integrity, impartiality, tact and courtesy, and the capacity to inspire respect and confidence. Candidates for appointment to the Federal Magistrates Court must also demonstrate the same qualities to a high degree.¹⁰²
239. In New South Wales, judges are appointed by the Governor, acting upon the advice of the Executive. In practice, the Attorney General makes recommendations to Cabinet, and then advises the Governor. Superior Court appointments are made following consultation with the head of jurisdiction and legal professional bodies. There is a different selection

¹⁰² See Report of the Australian Senate Legal and Constitutional Affairs Committee *Australia's Judicial system and the role of Judges*, December 2009 at www.aph.gov.au/senate/committee/legcon_ctte/judicial_system/report/report.pdf.

process for District Court judges and Local Court magistrates. Vacancies are advertised, with calls for expressions of interest. In addition, selection panels provide advice to the Attorney General. Selection criteria were published in 2008 and are to be considered when selecting candidates for every judicial office.¹⁰³

240. The appointments process in all Australian States is identical to that of New South Wales. However, the Tasmanian Department of Justice published a Protocol for Judicial Appointments.¹⁰⁴ Advertising and assessment panels are also used for the Supreme Court appointments. In Victoria, the Attorney General seeks expression of interest from qualified persons for appointment to the Supreme Court, County and Magistrates Courts. The wide ranging consultation about potential judicial officers is a feature of the Australian system.

¹⁰³ See www.lawlink.nsw.gov.au/lawlink.

¹⁰⁴ See www.justice.tas.gov.au/corporate/policies/protocol_for_judicial_appointments.

Judicial Appointments in Canada

241. In Canada, appointments of federal judges are made by the Government, and the official appointment is made by the Governor General. For appointments to the Supreme Court, the Executive identifies a list of qualified candidates and this is reviewed by a selection panel made up of five Members of Parliament. It provides an unranked list of six candidates to the Executive for its consideration.
242. A different process applies for appointments to other federal courts and to provincial superior courts. The Commissioner for Federal Judicial Affairs administers part of this process on behalf of the Minister of Justice, and a key feature of the process is the role of Judicial Advisory Committees.¹⁰⁵ These Committees are made up of eight representatives from the judiciary, the profession, the public, the government and the law enforcement community, and they provide the Minister with an assessment of candidates (except candidates that are already judges).¹⁰⁶

¹⁰⁵ The Commissioner manages the Judicial Appointments Secretariat, which administers 17 advisory committees which are responsible for evaluating candidates for federal judicial appointment. The Minister of Justice has also mandated the Commissioner to administer the process for the most recent appointments to the Supreme Court. See www.fja.gc.ca/home-accueil/index-eng.html.

¹⁰⁶ See generally Gee “The Politics of Judicial Appointments in Canada” in *Judicial Appointments: Balancing Independence, Accountability and Legitimacy* (2010) at 99 available at <http://jac.judiciary.gov.uk>.

Judicial Appointments in New Zealand

243. Judicial appointments are made by the Governor-General on the recommendation of the Attorney General. For appointments to the Supreme Court, Court of Appeal and High Court, the Governor-General is advised by the Attorney General who, by convention, receives advice from the Chief Justice and the Solicitor-General. For appointments to district courts, the Governor-General is advised by the Attorney General who receives advice from the Chief District Court Judge and the Secretary for Justice.
244. Although judicial appointments are made by the Executive, it is a strong constitutional convention in New Zealand that, in deciding who is to be appointed, the Attorney General acts independently of party political considerations. Judges are appointed according to their qualifications, personal qualities, and relevant experience.
245. Successive Attorneys-General announced new systems designed to widen the search for potential candidates and increase the opportunity for input. Within the past 10 years the systems adopted by Attorneys-General have resulted in a more diversified judiciary. Judges have been appointed whose career paths have not been those of the conventional court advocate.
246. The convention is that the Attorney General mentions appointments at Cabinet after they have been determined. The appointments are not discussed or approved by Cabinet. The appointment process followed by the Attorney-General is not prescribed by any statute or regulation. From

time to time it has been suggested that a more formal method for appointment of judges should be adopted but that course has not been followed. There is no suggestion that the present procedure has not served the country well.

247. All superior court judges (Supreme Court, Court of Appeal and High Court) are High Court judges. Section 6 of the Judicature Act 1908 provides that no person shall be appointed a judge unless he or she has had a practising certificate as a barrister or solicitor for at least seven years. This is the bare minimum for appointment as a High Court judge. Judges also require much more than just experience in practice. They must be of good character, have a sound knowledge of the law and of its practice, and have a real sense of what justice means and requires in present-day New Zealand. They must have the discipline, capacity and insight to act impartially, independently and fairly.¹⁰⁷
248. There have been some studies of the appointments system in New Zealand, however none have as of yet resulted in the establishment of any sort of appointments commission.¹⁰⁸ Indeed, in a consultation paper which dealt with this matter in 2012, the Law Reform Commission did not suggest the establishment of such a commission, rather it emphasised that statute should list the criteria required of persons to be appointed a judge.¹⁰⁹
249. In April 2013, the Attorney General published a Judicial Appointments Protocol applicable to judicial appointments to the High Court, the Court of Appeal and the Supreme Court.¹¹⁰ This is a very interesting document which sets out the process in some detail and has application forms appended to it. Interestingly, expressions of interest are called for by public advertisement. Alternatively, as a result of a consultation process,

¹⁰⁷ See www.courtsofnz.govt.nz/about/judges/appointments.

¹⁰⁸ See "Appointing Judges: A Judicial Appointments Commission for New Zealand? A public consultation paper (April 2004) at www.justice.govt.nz.

¹⁰⁹ See *Review of the Judicature Act 1908: Towards a New Court Act* (2012) at www.lawcom.govt.nz/project/review-judicature-act-1908. The Government has yet to respond to this review.

¹¹⁰ See www.crownlaw.govt.nz/artman/docs/cat_index_6.asp.

prospective candidates may be nominated, or invited to express their interest and to enter the process.

APPENDIX 2: THE ENCJ “DUBLIN DECLARATION 2012”

250. The Declaration and preceding Report makes a number of recommendations worth considering when reviewing the appointments process:¹¹¹

- Judicial appointments should only be based on merit and capability. There is a requirement for a clearly defined and published set of selection competencies against which candidates for judicial appointment should be assessed at all stages of the appointment process.
- Selection competencies should include intellectual and personal skills of a high quality, as well as a proper work ethic and the ability of the candidates to express themselves.
- The intellectual requirement should comprise the adequate cultural and legal knowledge, analytical capacities and the ability to make judgments independently.
- There should be personal skills of a high quality, such as the ability to assume responsibility in the performance of his/her duties as well as qualities of equanimity, independence, persuasiveness, sensibility, sociability, integrity, unflappability and the ability to co-operate.
- Whether the appointment process involved formal examination or examinations of the assessment and interview of candidates, the selection process should be conducted by an independent judicial appointment body.

¹¹¹ See the European Network of Councils for the Judiciary’s “*Dublin Declaration*” available at www.encj.eu/index.php?option=com_content&view=category&layout=blog&id=24&Itemid=98&lang=en.

- Where the appointment process includes assessment based on reports and comments from legal professionals (such as practising judges, Bar Associations, Law Societies *etc*) any such consultation must remain wholly open, fair and transparent, adding that the views of any serving judge or Bar Association should be based on the relevant competencies, should be recorded in writing, available for scrutiny and not based on personal prejudice.
- Whilst the selection of judges must always be based on merit, anyone appointed to judicial office must be of good character and a candidate for judicial office should not have a criminal record, unless it concerns minor misdemeanours committed more than a certain number of years ago.
- Diversity in the range of persons available for selection for appointment should be encouraged, avoiding all kinds of discrimination, although that does not necessarily imply the setting of quotas *per se*, adding that any attempt to achieve diversity in the selection and appointment of judges should not be made at the expense of the basic criterion of merit.
- The entire appointment and selection process must be open to public scrutiny, since the public has a right to know how its judges are selected.
- The procedures for the recruitment, selection or (where relevant) promotion of members of the judiciary ought to be placed in the hands of a body or bodies independent of government in which a relevant number of members of the judiciary are directly involved and that membership of this body should comprise a majority of individuals independent of government influence.
- Decisions made by the body must be free from any influences other than the serious and in-depth examination of the candidate's competencies against which the candidate is to be assessed.
- The body must create a sufficient record in relation to each applicant to ensure that there is a verifiable independent, open, fair and transparent process to

which any unsuccessful applicant is entitled if he or she believes that s/he was unfairly treated in the appointments process.¹¹²

APPENDIX 3: OVERVIEW OF APPOINTMENTS OF IRISH JUDGES TO THE COURT OF JUSTICE OF THE EUROPEAN UNION (GENERAL COURT AND EUROPEAN COURT OF JUSTICE) AND THE EUROPEAN COURT OF HUMAN RIGHTS

251. The requirements for appointments to the European Courts are broadly set out in the following provisions and documents: Article 19 of the *Treaty on European Union* for appointment to the General Court and the European Court of Justice, and Article 21 of the *European Convention on Human Rights* and paragraph 4 of the Council of Europe's Parliamentary Assembly Resolution 1646 (2009) regarding nomination of candidates and election of judges to the European Court of Human Rights.
252. Nominees from Ireland appointed to the Court of Justice of the European Union have previously served as members of the Superior Courts judiciary (the High Court and Supreme Court) or as Attorney General, or as a very experienced barrister prior to their appointment to the EU courts. Therefore, they possess the qualifications required for appointment to the highest judicial offices in Ireland.
253. Irish nominees presented for appointment to the European Court of Human Rights (ECtHR) have in the past included civil servant lawyers, academic lawyers, senior practising barristers and serving judges of the Superior Courts. Candidates seeking a nomination to the Court are provided with

¹¹² The Dublin Declaration is available at www.encj.eu/index.php?option=com_content&view=category&layout=blog&id=24&Itemid=98&lang=en.

an information sheet setting out the criteria which the desired candidate should meet in accordance with Article 21 of the *European Convention on Human Rights*. Candidates must show a high level of achievement and experience. The Irish nominees are native English speakers and are required to have an operational working knowledge of French.

254. The *Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights* adopted by the Ministers on 28th March 2012 and the accompanying Explanatory Report which is partly based on responses to a questionnaire from each Member State is of interest in this regard. It sets out the appropriate methods for selecting candidates for judge of the ECtHR.
255. The Government (*i.e.* the Taoiseach, the Tánaiste, the Minister for Justice and Equality, the Minister for Foreign Affairs and Trade, which incorporates European Union Affairs and the other cabinet Ministers) collectively nominates the Irish candidate for appointment to the Court of Justice of the European Union. In recent times, the nominees for appointment to the EU courts have been serving Judges of the High Court and Senior Counsel. The Government would be advised in this regard by the Attorney General, who is the legal advisor to the Government. The details of the Irish nominee are then transmitted by the Minister for Foreign Affairs and Trade to COREPER, the Committee of Permanent Representatives in the EU.
256. The national selection procedure for appointment to the ECtHR is governed by the requirements of Article 21(1) of the *European Convention on Human Rights* and the relevant recommendations and resolutions of the Parliamentary Assembly of the Council of Europe. The Irish vacancy at the European Court of Human Rights is advertised by the Government through the Department of Foreign Affairs on its website and in national newspapers and the Legal Diary of the Courts. The advertisement is disseminated amongst members of the judiciary, the heads of the professional legal bodies, the heads of national human rights institutions and heads of university law schools.

257. Provision is made for interviews of candidates which are conducted by an independent expert panel appointed by the Attorney General. The panel reviews applications received and advises the Attorney on the three most suitable candidates having regard to the Convention and relevant recommendations and resolutions of the Parliamentary Assembly of the Council of Europe. The three member panel is comprised of the Director General of the Office of the Attorney General who is a lawyer with experience in human rights law, and two Senior Counsel who are independent practicing barristers. Three candidates are chosen by the panel. The Attorney General considers and approves the panel's recommendations, submits the names to the Minister for Foreign Affairs and Trade, and the Government makes the final decision. In turn the names of the candidates and their curriculum vitae are transmitted by the Government to the Council of Europe.
258. The selection/appointment process is confidential. The names and curriculum vitae of the three candidates nominated by Ireland for the ECtHR enter the public domain once the Parliamentary Assembly of the Council of Europe receives the curriculum vitae of the candidates and decides on which candidate to elect.
259. For appointments to the European Union Courts, the seven member Panel set up under Article 255 of the *Lisbon Treaty* to advise on the suitability of candidates nominated for the position of Judge and Advocate General is comprised of serving judges of some Supreme Courts in the EU and retired members of the Court of Justice, the General Court, a national Supreme Court and lawyers of recognized competence one of whom is proposed by the European Parliament. The Committee's work is conducted through communication with the individual Member State governments who propose a candidate for nomination to the Court of Justice of the European Union (which includes the European Court of Justice and the General Court) and involves hearings/interviews with the nominees.

260. The Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights has been established in recent years. It is mandated to advise on the suitability of candidates that the member states intend to put forward for office as judges of the Court so that they meet the criteria set out in Article 21 of the Convention. This is a seven member body and includes Mr. Justice John L. Murray, former Chief Justice of Ireland (2004-2011) and currently the Senior Ordinary Judge of the Supreme Court, who previously served as Attorney General of Ireland and as a Judge of the Court of Justice of the European Communities.
261. The work of the Council of Europe Parliamentary Assembly Sub-Committee and the Advisory Panel of Experts is conducted through communication with the individual Member State governments who propose three candidates to be appointed to the ECtHR and involves hearings/interviews of the candidates by the Sub-Committee and Parliamentary Assembly. Furthermore, the Committee of Ministers has adopted Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights. The Guidelines set out the appropriate methods for selecting candidates for judge of the ECtHR.