



# *Law Society of Ireland*

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## **CONSULTATION ON THE REVIEW OF PROCEDURES FOR APPOINTING JUDGES**

**DEPARTMENT OF JUSTICE & EQUALITY**

**SUBMISSION OF THE LAW SOCIETY OF IRELAND**

**DATED 31 January 2014**

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## INTRODUCTION

The Law Society of Ireland (“the Society”) welcomes the opportunity to make a submission to the Minister for Justice and Equality, Minister Alan Shatter, in respect of the consultation on a review of procedures for appointing judges – ‘the Judicial Appointments Review’ – as published in the Irish Times on 6 December 2013.

As requested in the call for submissions, this submission will address four main issues:

1. Eligibility for appointment;
2. The need to ensure and protect the principle of judicial independence;
3. Promoting equality and diversity;
4. The role of the Judicial Appointments Advisory Board, including its membership and its procedures.

As further requested, these issues are addressed in this submission within the current Constitutional framework.

## **SUMMARY OF RECOMMENDATIONS**

### ***Recommendation 1***

*The Society recommends that there should be no alteration of the existing eligibility requirements for appointment to the bench, and considers that the current legislative framework should be maintained, other than an equalisation of the number of years qualification, which should be standardised at 10 years for all courts.*

### ***Recommendation 2***

*A formal evaluation process should be carried out by the JAAB in respect of each eligible applicant; such evaluation should consist of each candidate being assessed on the basis of published categories of ‘merit criteria’ and involve review of a detailed curriculum vitae, online preliminary testing, an interview process, questionnaire based professional references, and peer review, in order to ensure that the most able and suitable candidates are selected on a meritorious basis. Furthermore, the JAAB should carry out this process with the ultimate aim of providing the Government with a shortlist of 3 candidates for each vacancy or proposed appointment; ranked on the basis of qualifications and suitability.*

### ***Recommendation 3***

*The Society considers that the alteration of the role of the JAAB such that it would conduct an assessment of ‘merit criteria’ and therefore select the most able candidates on this basis would serve to greatly strengthen the protection of judicial independence in the State as it would greatly minimise the discretionary role of the Minister for Justice and Government in the area of judicial appointment whilst still ensuring that candidates of the highest quality are chosen.*

### ***Recommendation 4***

*In order to support the protection of judicial independence and to enable the highest standard of judicial conduct generally, the Society considers that the introduction of judicial training, to be provided under judicial control, should be considered by the Minister of Justice as a matter of priority.*

### ***Recommendation 5***

*The Society considers that all unnecessary barriers which have the effect of excluding any individual or group of society from taking part in the appointment process should be removed; however, this should not be at the expense of evaluating and selecting*

*applicants on the basis of merit; in instances where there are two candidates of equal merit, attention should first be given to filling any lacuna in legal expertise on the bench and then to ensuring diversity on the bench.*

**Recommendation 6**

*The Neuberger Report of the Advisory Panel on Judicial Diversity in England and Wales and the work of its related task force should be considered in detail by the Department of Justice to assess if a similar report is needed in Ireland, and/or to assess what possible courses of action could be adopted from the Neuberger Report and applied to Ireland.*

**Recommendation 7**

*It is strongly urged that the composition of the membership of the JAAB become more open and focused on representing the public interest by both (i) increasing the lay membership from 3 lay members to 6 lay members, and (ii) introducing a requirement that all lay members be selected by a public and open competition rather than by the Minister for Justice. As noted by the Constitutional Committee of the House of Lords, “the appointments process is enhanced by the involvement of lay persons who can bring a different perspective to the assessment of candidates’ abilities. It is therefore important that selection panels include a mixture of judicial and lay representation”.*

**Recommendation 8**

*It is also strongly urged that two nominees of the Law Society of Ireland should be appointed to the JAAB; firstly, this would equitably recognise the far greater numbers of solicitors as compared to barristers, and secondly, it would assist in addressing the continuing emphasis on appointing barristers to the Circuit and Superior Courts .*

**Recommendation 9**

*The broad discretion of the Executive in selecting judicial appointees should be greatly restricted to allow for greater transparency and accountability in the judicial appointment process; the Society considers that provision of a shortlist of names (no more than 3 names) for each vacancy or proposed appointment, ranked on the basis of qualifications and suitability, should be provided by the JAAB to the Executive following the conduct of an extensive and thorough assessment process by the JAAB and that appointments should be made from among those shortlisted.*

## ISSUE 1: ELIGIBILITY FOR APPOINTMENT

### *Eligibility Requirement*

1. The Society does not consider that any changes need to be made to the current framework in existence regarding the eligibility requirement for judicial appointment.
2. Broadly speaking, the statutory requirements for eligibility for judicial appointment are generally set out in the *Courts and Court Officers Act 1995*<sup>1</sup>, as amended ('the Act').
3. In summary, a solicitor or barrister may be appointed to the High or Supreme Courts if they are of "*not less than 12 years' standing*" in addition to having practised "*for a continuous period of not less than 2 years immediately before such appointment*".<sup>2</sup> For the District and Circuit Courts<sup>3</sup>, "*a practising barrister or a practising solicitor of not less than 10 years' standing shall be qualified for appointment*".
4. Furthermore, the Judicial Appointments Advisory Board ('JAAB') can only recommend a candidate for appointment to the High or Supreme Court once it is satisfied (amongst other general requirements) that the candidate "*has displayed in his/her practice as a barrister or solicitor a degree of competence and a degree of probity appropriate to and consistent with the appointment*" and "*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*".<sup>4</sup>
5. Under section 17 of the Act, these requirements do not apply in the situation where the Government proposes to advise the President to promote an existing judge from one bench to another.

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<sup>1</sup> Courts and Court Officers Act 1995. [www.irishstatutebook.ie/1995/en/act/pub/0031/print.html](http://www.irishstatutebook.ie/1995/en/act/pub/0031/print.html) [Accessed on 20 January 2014]

<sup>2</sup>Section 4, Courts and Court Officers Act 2002 inserting new section 5(2)(a) of the Courts (Supplemental Provisions) Act 1961. [www.irishstatutebook.ie/2002/en/act/pub/0015/print.html#sec4](http://www.irishstatutebook.ie/2002/en/act/pub/0015/print.html#sec4) [Accessed on 20 January 2014]

<sup>3</sup> District Court Judges – see section 29(2), Courts (Supplemental Provisions) Act 1961. Circuit Court Judges – see section 30, Courts and Court Officers Act 1995 amending section 17 of the Courts (Supplemental Provisions) Act 1961.

<sup>4</sup> Section 8, Courts and Court Officers Act 2002, amending section 16 of the Courts and Courts Officers Act 1995. [www.irishstatutebook.ie/2002/en/act/pub/0015/print.html#sec8](http://www.irishstatutebook.ie/2002/en/act/pub/0015/print.html#sec8) [Accessed on 10 January 2014]

The other requirements are that the candidate: "(iii) is suitable on the grounds of character and temperament, (iv) complies with the requirements of section 19 of this Act, and (v) is otherwise suitable."

***Recommendation 1***

*The Society recommends that there should be no alteration of the existing eligibility requirements for appointment to the bench, and considers that the current legislative framework should be maintained, other than an equalisation of the number of years qualification, which should be standardised at 10 years for all courts.*

***Qualifications – Merit Criteria and Assessment***

1. On a related point from that of eligibility, the Society is of the view that an equally pressing issue to be considered is that of the assessment of potential candidates for appointment to the bench.

2. As matters stand, there is no substantial assessment process in operation by the JAAB. The legislation requires that the JAAB forward at least seven names to the Minister for Justice.<sup>5</sup> In practice, this has been interpreted as meaning that the names of all eligible candidates are forwarded without any substantive merit-based assessment first taking place. There are no further assessment stages for candidates to complete as a pre-requisite. No interview process is conducted; no detailed questionnaire based reference is completed by referees of the candidates, and no further testing or practical assessment of the applicants takes place. Thus in reality, the eligibility requirements are used as the minimum threshold for consideration for appointment.

3. The Society is strongly of the view that this part of the appointment system needs to be radically changed.

4. Once an applicant is deemed eligible, a comprehensive evaluation process should commence to impartially determine the best available candidate. The evaluation process should be based upon the candidate meeting clear and defined ‘merit criteria’.

5. The Society is strongly of the view that the JAAB should undertake a vital role in this respect in actively assessing candidates, and subsequently selecting and nominating the most able candidates for appointment by ultimately providing a short list of three suitable candidates, ranked in order of qualification and suitability. The Society considers that this is constitutionally permissible as the ultimate selection of appointees would remain within the control of the government; it would merely afford a greater advisory role to the JAAB. As stated by one academic on this issue; “... *preferential ranking of candidates for judicial appointment by the JAAB would not be unconstitutional, unless the practice developed to the point whereby the decision-making power in judicial appointments was actually taken from the government.*”<sup>6</sup>

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<sup>5</sup> Section 16(2) of the *Court and Courts Officers Act 1995* - <http://www.irishstatutebook.ie/1995/en/act/pub/0031/sec0016.html#sec16>

<sup>6</sup> Jennifer Carroll, “You be the Judge Part II”, *The Bar Review* [December 2005, vol 10, issue 6] pg 182 at 185.

6. The ‘merit criteria’ should include a number of different categories such as personal qualities, standing and record as a lawyer, any special legal knowledge or expertise and any other additional qualifications or experience (such as membership of Tribunals, management experience, etc). These ‘merit criteria’ are indicators of likely or potential judicial competence and ability.

7. In greater detail, these categories of ‘merit criteria’ would, at least, include the following qualities and abilities:

- a) Personal qualities, such as:
  - i. Common sense;
  - ii. independence;
  - iii. integrity;
  - iv. intellectual ability;
  - v. balance;
  - vi. even temper;
  - vii. the capacity to listen to both sides before deciding;
  - viii. clarity of thought and expression;
  - ix. flexible mental approach;
  - x. humanity;
  - xi. humility;
  - xii. understanding of the nature and character of people;
  - xiii. patience;
  - xiv. fairness and even-handedness;
  - xv. courtesy;
  - xvi. compassion;
  - xvii. maturity;
  - xviii. social awareness (awareness of issues of gender, sexuality, disability and cultural and linguistic difference);
  - xix. commitment to public service;
  - xx. a commitment to the use of technology and participation in ongoing judicial education.
- b) General standing and record as a lawyer;
- c) Any special legal knowledge or expertise;
- d) Additional qualifications or experience, such as:

- i. Knowledge of human rights principles
- ii. Administrative experience
- iii. Management experience
- iv. Mediation/arbitration experience
- v. Membership of Tribunals, etc.

8. The Society’s view is that the work of the Judicial College of Victoria, Australia,<sup>7</sup> in relation to this type of ‘merit criteria’ should also be closely considered. The Judicial College of Victoria adopted a ‘*Framework of Judicial Abilities and Qualities*’ which “*identifies the knowledge, skills, behaviours and attitudes that the Victorian judiciary are expected to demonstrate in performing their judicial role*”.<sup>8</sup> This framework is available on the website of the Judicial Council and is therefore publicly available. The framework is divided into six key categories which contain corresponding skills and attributes. A summary of the framework is publicly available as follows:<sup>9</sup>

<b>Headline ability</b>	<b>Core abilities and technical skill</b>
Knowledge and technical skills	<ul style="list-style-type: none"> <li>• sound knowledge of law and its application</li> <li>• sound knowledge of procedure and appropriate application</li> </ul>
Communication and Authority	<ul style="list-style-type: none"> <li>• establishes and maintains authority of the court</li> <li>• manages hearings to enable fair and timely disposal</li> <li>• communicates effectively</li> </ul>
Decision-making	<ul style="list-style-type: none"> <li>• sound judgement</li> <li>• appropriate exercise of discretion</li> </ul>

<sup>7</sup> The Judicial College of Victoria provides education for judges, magistrates and Victorian Civil and Administrative Tribunal members. <http://www.judicialcollege.vic.edu.au/> [Accessed on 14 January 2014]

<sup>8</sup> Judicial College of Victoria ‘*Framework of Judicial Abilities and Qualities for Victorian Judicial Officers*’ (September 2008), at page 1. [Accessed on 14 January 2014]  
<http://www.judicialcollege.vic.edu.au/sites/default/files/2009JCVFramework-JCVsite.pdf>

See also - <http://www.judicialcollege.vic.edu.au/judicial-education>

<sup>9</sup> See above, see also Department of Justice, *Reviewing the Judicial Appointments Process in Victoria*, (Discussion Paper, July 2010) at page 12. [Accessed on 14 January 2014]

[https://assets.justice.vic.gov.au/justice/resources/095afced-fbc5-4958-a48d-5e406706a03d/judicial\\_appointments\\_review\\_discussion\\_paper.pdf](https://assets.justice.vic.gov.au/justice/resources/095afced-fbc5-4958-a48d-5e406706a03d/judicial_appointments_review_discussion_paper.pdf)

Professionalism and integrity	<ul style="list-style-type: none"> <li>• maintains independence and authority of the court</li> <li>• maintains personal independence and integrity</li> <li>• personal discipline</li> <li>• promotes highest standards of behaviour in court</li> </ul>
Efficiency	<ul style="list-style-type: none"> <li>• manages hearings to facilitate fair and timely disposal</li> <li>• actively manages cases to promote efficient and just conclusion of business</li> </ul>
Leadership and management	<ul style="list-style-type: none"> <li>• strategically plans and organises</li> <li>• manages change</li> <li>• supports and develops talent</li> <li>• manages quality standards</li> <li>• encourages and facilitates teamwork</li> </ul>

9. Similarly in England and Wales, all potential candidates are assessed against five of six categories of ‘*qualities and abilities*’ (the five categories chosen for assessment depend on the type of position available<sup>10</sup>); these categories are listed on the Judicial Advisory Commission’s website as follows:

(i) Intellectual Capacity

Expertise in your chosen area of profession

Ability to quickly absorb and analyse information

Appropriate knowledge of the law and its underlying principles, or the ability to acquire this knowledge where necessary

(ii) Personal Qualities

Integrity and independence of mind

Sound judgement

Decisiveness

Objectivity

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<sup>10</sup> The JAC website states: “Applicants for each selection exercise will be assessed against five of the six following qualities and abilities. For example, for posts requiring particular leadership skills, the efficiency quality may be replaced by the leadership and management skills quality.”  
<http://jac.judiciary.gov.uk/application-process/qualities-and-abilities.htm> [Accessed on 14 January 2014]

The JAC website also states: “In line with our statutory duty to select ‘solely on merit’ the Commission has developed a set of qualities and abilities against which to measure merit that are used throughout our selection process. These are adjusted as appropriate for different appointments.”  
<http://jac.judiciary.gov.uk/selection-process/selection-process.htm> [Accessed on 145January 2014]

Ability and willingness to learn and develop professionally

(iii) An Ability to Understand and Deal Fairly

An awareness of the diversity of the communities which the courts and tribunals serve and an understanding of differing needs.

Commitment to justice, independence, public service and fair treatment

Willingness to listen with patience and courtesy

(iv) 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

(v) Efficiency

Ability to work at speed and under pressure

Ability to organise time effectively and produce clear reasoned judgments expeditiously

Ability to work constructively with others

(vi) Leadership and Management Skills

Ability to form strategic objectives and to provide leadership to implement them effectively

Ability to motivate, support and encourage the professional development of those for whom you are responsible

Ability to engage constructively with judicial colleagues and the administration, and to manage change effectively

Ability to organise own and others time and manage available resources.<sup>11</sup>

10. Evidently, there are slightly varying forms of categories of criteria which are employed in different jurisdictions but there are common threads apparent throughout which are generally considered to be desirable qualities of a member of the judiciary (e.g., intellectual ability, communication skills, fairness, integrity, etc). The exact categories of ‘qualities and abilities’ (or ‘merit criteria’) which are ultimately chosen to operate as the merit criteria, should then be assessed by the Judicial Appointments Advisory Board through a detailed and comprehensive selection process.

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<sup>11</sup> <http://jac.judiciary.gov.uk/application-process/qualities-and-abilities.htm> [Accessed on 14 January 2014]

11. The assessment and selection process operated by the JAC in England and Wales is extremely thorough, and is well-respected both in its own jurisdiction and abroad; it provides an excellent example of a meticulous system of assessment and indeed in other common law jurisdictions is often viewed as a model judicial appointment system.

12. In summary, the main stages of the assessment and selection process operated by the JAC are as follows:<sup>12</sup>

- a) applications are reviewed to ensure that entry requirements are met and an assessment of good character is made;
- b) applications are then shortlisted usually after preliminary online testing (the online tests are often prepared by judges from the relevant jurisdiction and are designed “*to assess candidates’ ability to perform in a judicial role, by analysing case studies, identifying issues and applying the law*”<sup>13</sup>);
- c) personal and professional references are requested (these references must be provided in a specific questionnaire format);
- d) shortlisted candidates attend a ‘candidate selection day’ which involves a panel interview, role play (simulating a court environment whereby the candidate takes on the role of a judge in response to presented scenarios), and situational questioning (this involves very specific questioning on what a candidate would do in a hypothetical situation);
- e) the members of the interview panel assess all the information they have on each candidate, including their application, the interview and role play performances, their references, etc, and agree which candidates best meet the requirements. A report is completed by the chair of the panel and is forwarded to the JAC;
- f) The JAC usually carries out a statutory consultation with a person who has held the office for which selection is to be made, or, who has other relevant experience, etc;
- g) Commissioners of the JAC then make the final decision on who to recommend for appointment – “*In doing so, they consider those candidates that selection panels have assessed as the most meritorious for the role, having been provided with information gathered on those individuals during the whole process*”.<sup>14</sup>

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<sup>12</sup> This summary is taken in edited form from the description of the selection process set out on the JAC website. <http://jac.judiciary.gov.uk/selection-process/selection-process.htm> [Accessed on 14 January 2014]

<sup>13</sup> <http://jac.judiciary.gov.uk/selection-process/selection-process.htm> [Accessed on 14 January 2014]

<sup>14</sup> <http://jac.judiciary.gov.uk/selection-process/selection-process.htm> [Accessed on 14 January 2014]

13. The Society's view is that a similar model to that of England and Wales would be a preferred means of carrying out assessment of candidates; particular elements of this process could be adapted for use in our smaller jurisdiction. The most essential features of such a selection process would be a combination of the following;

- a) a review of a detailed curriculum vitae (to assess whether the eligibility requirements are met and to generally assess 'good character');
- b) preliminary online testing (to assist in short-listing candidates for interview by requiring the candidate to demonstrate basic judicial abilities such as the analysis of case studies, identifying issues and applying the law);
- c) a panel interview;
- d) submission of two professional references (using a questionnaire based format to elicit specific information from the referees); and
- e) peer review (this should be conducted either through formal soundings within the legal community, or by obtaining the views of the professional body of which the candidate is a member).

14. Furthermore, it would be of benefit to both the JAAB and prospective candidates, if not essential, that the merit criteria and the stages of the selection process be publicly defined. This would also increase the confidence of the public who, undoubtedly, would favour a system which is demonstrably open and accountable in the performance of its functions.

15. The Society considers that increased resources would have to be made available to the JAAB in order to facilitate the introduction of such a thorough selection system or, indeed, to enable the JAAB to adopt any form of more in-depth selection process than currently operates.

### ***Recommendation 2***

*A formal evaluation process should be carried out by the JAAB in respect of each eligible applicant; such evaluation should consist of each candidate being assessed on the basis of published categories of 'merit criteria' and involve review of a detailed curriculum vitae, online preliminary testing, an interview process, questionnaire based professional references, and peer review, in order to ensure that the most able and suitable candidates are selected on a meritorious basis. Furthermore, the JAAB should carry out this process with the ultimate aim of providing the Government with a shortlist of 3 candidates for each vacancy or proposed appointment; ranked on the basis of qualifications and suitability.*

## ISSUE 2: JUDICIAL INDEPENDENCE

1. Judicial independence is a crucial feature of any democratic legal system as it is a core element of the doctrine of the separation of powers. It is one of the cornerstones upon which any functioning democratic state is built and must be protected and safeguarded in every possible respect.

2. An independent judiciary is essential to the rule of law in every democratic state. The former Law Lord, Lord Steyn, described the rule of law as a general principle of constitutional law. He said its “*focus is to constrain the abuse of official power. It protects a citizen's right to legal certainty in respect of interference with his liberties. It guarantees access to justice. It ensures procedural fairness over much of the range of administrative decision-making by officials.*”<sup>15</sup>

3. In similar terms, the American Bar Association described the importance of judicial independence as follows:

“Judicial independence makes a system of impartial justice possible by enabling judges to protect and enforce the rights of the people, and by allowing them without fear of reprisal to strike down actions of the legislative and executive branches of government which run afoul of the Constitution. Independence is not for the personal benefit of the judges but rather for the protection of the people, whose rights only an independent judge can preserve.”<sup>16</sup>

4. The importance of judicial independence is recognised and guaranteed in Article 35.2 of our Constitution which states that judges are to be “*independent in the exercise of their judicial functions and subject only to this Constitution and the law.*”<sup>17</sup>

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<sup>15</sup> The Rt Hon Lord Steyn, ‘The Constitutionalisation of Public Law’, The Constitution Unit School of Public Policy University College London, May 1999, page 4.

<http://www.ucl.ac.uk/spp/publications/unit-publications/38.pdf> [Accessed on 10 January 2014]

<sup>16</sup> American Bar Association, ‘An Independent Judiciary a Report of the Commission on the Separation of Powers and Judicial Independence’, July 1997, page III.

<http://www.americanbar.org/content/dam/aba/migrated/poladv/documents/indepjud.authcheckdam.pdf> [Accessed on 10 January 2014]

<sup>17</sup> Bunreacht na hEireann Article 35.2. Article 35.1 states: “*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.*” The President makes the formal appointment by presenting the seals of office to the appointees; however, the President makes the formal appointment only. (Article 13.9 of Bunreacht na hEireann; “The powers and functions conferred on the President by this Constitution shall be

5. Internationally, the principle of judicial independence is an essential feature of many international rights declarations and charters. For example, the Charter of the United Nations<sup>18</sup> does not explicitly refer to judicial independence but incorporates a respect of human rights which in turn is conditional upon judicial independence and impartiality.<sup>19</sup> Several articles in the Universal Declaration on Human Rights<sup>20</sup> highlight the importance of judicial independence, explicitly or by implication.<sup>21</sup> Thus, it is generally considered that the principle of an independent and impartial judiciary forms part of international customary law and is located in several human rights treaties applicable to Ireland, including the International Covenant on Civil and Political Rights and the European Convention of Human Rights.<sup>22</sup>

6. In terms of ‘soft’ international law (i.e. non legally binding standards), standards relating to the practical elements of judicial independence are outlined in the ‘Basic Principles on the Independence of the Judiciary’.<sup>23</sup> They were adopted by the United Nations in 1985 to “assist Member States in their task of securing and promoting the independence of the judiciary [and] should be taken into account and respected by Governments within the framework of their national legislation and practice”. The Basic Principles consist of; the independence of the judiciary, freedom of expression and association, qualifications, selection and training, conditions of service and tenure, professional secrecy and immunity and discipline, suspension and removal.<sup>24</sup>

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exercisable and performable by him only on the advice of the Government...”) Judicial selection for appointment remains within the power of the government.

<sup>18</sup> <http://www.un.org/en/documents/charter/index.shtml>

<sup>19</sup> See Irish Council for Civil Liberties *Justice Matters: Independence, Accountability and the Irish Judiciary* (Report, July 2007) para 2.4.1. <http://www.iccl.ie/-justice-matters-independence-accountability-and-the-irish-judiciary-parts-1-and-2--%28july-2007%29-.html> [Accessed on 10 January 2014]

<sup>20</sup> <http://www.un.org/en/documents/udhr/index.shtml>

<sup>21</sup> Article 7 guarantees ‘equality before the law’; Article 8, the “right to an effective remedy”; and Article 10 provides a right 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”.

<sup>22</sup> Irish Council for Civil Liberties *Justice Matters: Independence, Accountability and the Irish Judiciary* (Report, July 2007) para 2.4.1. <http://www.iccl.ie/-justice-matters-independence-accountability-and-the-irish-judiciary-parts-1-and-2--%28july-2007%29-.html> [Accessed on 10 January 2014]

<sup>23</sup> Office of the High Commissioner for Human Rights, “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. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx> [Accessed on 28 January 2014]

<sup>24</sup> Basic Principles on the Independence of the Judiciary.

7. Complementary to the Basic Principles are the ‘Bangalore Principles of Judicial Conduct’<sup>25</sup> of 2002 (also non-legally binding). These consist of six general ‘values’, viewed as being crucial to maintaining high standards of judicial conduct, and which are as follows; independence, impartiality, integrity, propriety, equality, competence and diligence. An element of the ‘application’ of the sixth value of ‘competence and diligence’ is that a judge: - *“shall take reasonable steps to maintain and enhance the judge’s knowledge, skills and personal qualities necessary for the proper performance of judicial duties, taking advantage for this purpose of the training and other facilities which should be made available, under judicial control, to judges.”*

8. The Society is of the view that it is certainly arguable that the current system of judicial appointment does not enhance judicial independence or even preserve this principle in the eyes of society as there is little public accountability and transparency in the selection of judicial appointees.

9. The Society considers that changes must be made to the system of judicial appointment to ensure that its framework guarantees and protects the fundamental principle of judicial independence; the most effective way of doing so is by strengthening the role of the JAAB particularly by creating a greater role for JAAB in the assessment process, as outlined in the previous section.

10. Furthermore, the Society considers that this review of the judicial appointment process also provides an opportunity to consider both the introduction of judicial training and the necessary provision of resources and infrastructure in order to facilitate the judiciary in formulating and introducing such a system. The Society is of the view that judicial training forms an important and much neglected aspect of judicial independence.

### ***Recommendation 3***

*The Society considers that the alteration of the role of the JAAB such that it would conduct an assessment of ‘merit criteria’ and therefore select the most able candidates on this basis would serve to greatly strengthen the protection of judicial independence in the State as it would greatly minimise the discretionary role of the Minister for Justice and Government in the area of judicial appointment whilst still ensuring that candidates of the highest quality are chosen.*

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<sup>25</sup>The Bangalore Principles Of Judicial Conduct 2002

[http://www.unodc.org/pdf/crime/corruption/judicial\\_group/Bangalore\\_principles.pdf](http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf)

The Bangalore Principles were subsequently endorsed by the United Nations Commission on Human Rights in 2003 by resolution 2003/43. <http://www.refworld.org/pdfid/43f313390.pdf> [Accessed on 28 January 2014]

***Recommendation 4***

*In order to support the protection of judicial independence and to enable the highest standard of judicial conduct generally, the Society considers that the introduction of judicial training, to be provided under judicial control, should be considered by the Minister of Justice as a matter of priority.*

### ISSUE 3: PROMOTING EQUALITY AND DIVERSITY

1. As stated above in relation to the first issue (eligibility for appointment), allowing for a wider pool of candidates (even if only in relation to appointment to the Supreme Court) will be more representative of society as a whole, and therefore be capable of reflecting as broad a cross-section of society as possible.

2. In addition, instituting an evaluation process which consists of candidates being required to meet certain defined criteria of ‘merit’ would increase public confidence in the transparency, accountability, and most importantly in relation to the issue of promoting equality and diversity, and accessibility of the judicial system of appointment.

3. The Society is of the view that all unnecessary barriers used to exclude or deter sections of society from taking part in the selection process should be removed, and considers that the following statement from the ‘*2011/2012 Report of the European Network of Councils for the Judiciary*’ accurately summarises its position in respect of this issue:

“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.”<sup>26</sup>

4. One practical and immediate attempt which can be undertaken to ensure greater diversity on the bench is the handling of a situation where the selection process results in two candidates of equal merit. In such circumstances, the Society believes that regard should be had to the breadth of experience on the bench at that particular time with the result that the final selection should firstly seek to fill any lacuna in specialist experience, and secondly aim to reflect the demographic of public society, i.e. efforts should be made to reflect the diversity of society within the pool of judges as a whole and a balance should be sought between youth/maturity, men/women, etc; however, the Society does not favour an affirmative action policy, nor does it favour any type of quota system or positive discrimination.

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<sup>26</sup> European Network of Councils for the Judiciary, ‘*Project Team on Development of Minimal Judicial Standards II*’, 2011/2012, at page 12. <http://cdn.thejournal.ie/media/2012/05/20120513judges.pdf> [Accessed on 10 January 2014]

5. In England and Wales, government efforts were recently undertaken in order to understand what could be done ‘to identify the barriers to progress on judicial diversity’<sup>27</sup>. An ‘Advisory Panel on Judicial Diversity’ was established in 2009 by the Lord Chancellor, and its Report was later published in February 2010 (‘the Neuberger Report’).<sup>28</sup> The Neuberger Report made 53 recommendations, most of which were long-term in focus. It emphasised that there was no ‘quick-fix’ solution but rather that significant and lasting change would only be achieved if “*diversity is addressed systemically – not only within the appointments process, but throughout a legal and judicial career, from the first consideration of the possibility of joining the judiciary to promotion at the most senior level*”.<sup>29</sup> A Judicial Diversity Task Force was subsequently established to oversee the implementation of these recommendations.<sup>30</sup>

6. The Society considers that this is an issue of increasing importance which warrants specific examination as has been the case in England and Wales; to begin with, the Society is of the view that a detailed study of the Neuberger Report should be undertaken at government level to assess if a similar report is required in Ireland, or, to at least consider whether any of its recommendations could be directly applied to that of the legal system in Ireland.

#### ***Recommendation 5***

*The Society considers that all unnecessary barriers which have the effect of excluding any individual or group of society from taking part in the appointment process should be removed; however, this should not be at the expense of evaluating and selecting applicants on the basis of merit; in instances where there are two candidates of equal merit, attention should first be given to filling any lacuna in legal expertise on the bench and then to ensuring diversity on the bench.*

#### ***Recommendation 6***

*The Neuberger Report of the Advisory Panel on Judicial Diversity in England and Wales and the work of its related task force should be considered in detail by the Department of Justice to assess if a similar report is needed in Ireland, and/or to*

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<sup>27</sup> Advisory Panel on Judicial Diversity, Annex i ‘Terms of Reference’ at page 55.

<http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/advisory-panel-judicial-diversity-2010.pdf> [Accessed on 13 January 2014]

<sup>28</sup> <http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/advisory-panel-judicial-diversity-2010.pdf> [Accessed on 13 January 2014]

<sup>29</sup> *Ibid* at page 4.

<sup>30</sup> See <http://www.judiciary.gov.uk/publications-and-reports/reports/diversity/advisory-panel-recommendations>. See also Annual Report produced by the Judicial Diversity Taskforce, September 2012, “Improving Judicial Diversity, Progress towards delivery of the ‘Report of the Advisory Panel on Judicial Diversity 2010’”. <https://www.justice.gov.uk/downloads/publications/policy/moj/judicial-diversity-taskforce-annual-report-2012.pdf> [Both accessed on 13 January 2014.]

*assess what possible courses of action could be adopted from the Neuberger Report and applied to Ireland.*

## **ISSUE 4: THE ROLE OF THE JUDICIAL APPOINTMENTS ADVISORY BOARD**

1. Before examining the role of the JAAB in greater detail, some brief comparative analysis of three other common law systems of judicial appointment will be necessary to better illustrate some of the issues within the existing system in Ireland.

2. A very general observation of the practice of judicial appointment in common law jurisdictions is that judges are generally appointed by the Executive branch of Government ('the Executive') following a selection process which varies depending on the particular jurisdiction. In this submission, we will look briefly at the jurisdictions of Australia, England and Wales, and Canada.

### ***Judicial Appointment in selected Common Law Jurisdictions; Australia, England & Wales, Canada.***

#### **A. Australia**

3. Throughout the different states and territories of Australia, two types of process are used and can be generally described as follows:

- a. the Executive makes a selection after conducting a consultation process, which may be formal or informal; or,
- b. the Executive makes a selection after receiving advice from an advisory panel convened by the Executive.<sup>31</sup>

4. No Australian State has statutory provisions in place to govern the selection process of judges; although in Victoria and Tasmania, the Attorneys-General have published an outline of the selection process.<sup>32</sup>

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<sup>31</sup> New South Wales Parliamentary Library, Research Service, *Judicial Appointments Briefing Paper No. 3/2012*, April 2012, page i (summary).

[http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/0/0D7612F3501CB489CA2579DE001B73CC/\\$File/briefing%20paper.judicial%20appointments.pdf](http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/0/0D7612F3501CB489CA2579DE001B73CC/$File/briefing%20paper.judicial%20appointments.pdf) [Accessed on 10 January 2014]

For example, in New South Wales; "Legislation provides for judges to be appointed by the Governor, acting upon the advice of the Executive Council. 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 process for District Court judges and Local Court magistrates (resulting, in part, from reforms in 2008). Vacancies for these positions are advertised, with calls for expressions of interest. In addition, selection panels provide advice to the Attorney-General."

<sup>32</sup> *Ibid* at para 5.2, page 12.

5. In a Discussion Paper published by the Department of Justice in Victoria in 2010, a summary of the selection process for judicial appointment was outlined as follows;<sup>33</sup>

“In Victoria, the Attorney-General discusses with the head of jurisdiction the nature of the judicial vacancy, any particular skills and attributes which may be appropriate, and the present and future needs of the court. The Attorney-General assesses the suitability of candidates who have lodged an expression of interest and other people who have been identified as possible candidates. This assessment includes consideration of the contents of the expression of interest application (if any), feedback arising from consultations undertaken by the Attorney, and the results of probity checks. For appointments of judges and magistrates, the Attorney-General will have a face-to-face meeting with the proposed candidate before forming a concluded view about whether to recommend the person for appointment.

In addition, for appointments to the Magistrates Court and VCAT (Victorian Civil and Administrative Tribunal), an advisory panel is convened to provide advice to the Attorney-General. Advisory panels are established as vacancies arise. They assess the expressions of interest for the position against the selection criteria, interview short-listed candidates, and contact referees nominated by the candidate. The panel then prepares a report for the Attorney-General with its assessment of candidates and a list of suitable candidates for appointment.

The Attorney-General may recommend for appointment any person who meets the statutory requirements. Although the Attorney-General has not appointed people assessed as being unsuitable by an advisory panel, he is not bound by the panel’s assessment.”<sup>34</sup>

6. While the above passage relates specifically to the process of judicial appointment in the State of Victoria, it serves to illustrate a number of general observations which can be made about the process of judicial appointment within Australian States, i.e. at State level only as the process varies somewhat at federal level.

7. Firstly, there are no independent bodies or commissions in place to advertise positions, receive and consider applications and then advise the State Executives accordingly. Secondly, in some States, advisory panels are convened on an ad-hoc basis as vacancies arise but usually only in relation to certain types of judicial appointment. Finally, it is typically the State Attorney-General who is involved in each stage of the judicial appointment process encompassing the initial advertisement

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<sup>33</sup> Department of Justice, *Reviewing the Judicial Appointments Process in Victoria*, (Discussion Paper, July 2010) [https://assets.justice.vic.gov.au/justice/resources/095afced-fbc5-4958-a48d-5e406706a03d/judicial\\_appointments\\_review\\_discussion\\_paper.pdf](https://assets.justice.vic.gov.au/justice/resources/095afced-fbc5-4958-a48d-5e406706a03d/judicial_appointments_review_discussion_paper.pdf) [Accessed on 10 January 2014]

<sup>34</sup> *Ibid* at para 4.2, page 19.

of the vacancy, undertaking consultations with relevant parties to identify suitable candidates (e.g., consulting with members of the judiciary and professional bodies), the review and consideration of applications received, the interview process, and the selection of ‘recommended’ candidates whose names are passed onto the relevant part of the Executive.

8. The approach to appointing judges in Australia has been criticised over the years from all sources of the legal community, by academics, practitioners and judges:

“Criticisms have been made about the lack of transparency in the appointments process, about patronage and political appointments, and regarding the limited gender and cultural diversity on the bench. A number of critics (including eminent judges) have called for the establishment of an independent judicial appointments commission (or commissions) in Australia. On the other hand, some eminent judges have opposed, or expressed doubts about, such a proposal, instead favouring a more formal consultation process.”<sup>35</sup>

9. In particular, concerns have focussed on the lack of transparency and the over-reliance on individual Attorneys-General to undertake almost the entirety of the judicial appointment process.<sup>36</sup> There have been repeated calls for reform of the judicial appointment system over the years in Australia, but, to date, no major reform has been undertaken either federally or at individual State level.

10. Many of the problematic issues surrounding the judicial appointment process in Australia are not applicable to Ireland as there is a separate judicial advisory body in operation in this jurisdiction, in the form of the JAAB; however, the general principles underlying some of the criticisms levelled against the Australian system would be worth bearing in mind as they highlight the weaknesses to which any system of judicial appointment is vulnerable, i.e. a lack of transparency and accountability, political patronage and thus a lack of merit-based appointment, and a lack of diversity or ‘balance’ of views on the bench.

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<sup>35</sup> New South Wales Parliamentary Library, Research Service, *Judicial Appointments Briefing Paper No. 3/2012*, April 2012, page ii (summary).

[http://www.parliament.nsw.gov.au/prod/parliament/publications.nsf/0/0D7612F3501CB489CA2579DE001B73CC/\\$File/briefing%20paper.judicial%20appointments.pdf](http://www.parliament.nsw.gov.au/prod/parliament/publications.nsf/0/0D7612F3501CB489CA2579DE001B73CC/$File/briefing%20paper.judicial%20appointments.pdf) [Accessed on 10 January 2014]

<sup>36</sup> *Ibid* at para 6.1, pages 15-16.

## B. England & Wales

11. In England and Wales, an independent appointments commission has been in operation since 2006.<sup>37</sup>

12. The legislative framework for judicial appointments to the courts and tribunals of England and Wales, as well as for the UK Supreme Court, was established by the Constitutional Reform Act 2005 ('the CRA'). The CRA established an independent Judicial Appointments Commission ('JAC'), which recommends a single candidate for each judicial vacancy. The Lord Chancellor<sup>38</sup> may accept the JAC's selection, require the JAC to reconsider its selection, or reject it. This greatly diminishes the Lord Chancellor's former power of being able to select judges "*substantially in consultation with the serving judiciary and others*"<sup>39</sup>.

13. Therefore, the essential role of the JAC is to "*select candidates for judicial office and recommend them to the Lord Chancellor for appointment*".<sup>40</sup> The JAC consists of 15 members, including a Chairperson. Its members are drawn from the judiciary, the legal profession, non-legally qualified judicial officer holders (e.g. magistrates) and the public.<sup>41</sup>

14. Under the Act, the JAC has specific duties to select candidates solely on merit, to select only people of good character, and to have regard to the need to encourage diversity in the range of people available for judicial selection.<sup>42</sup>

15. The most recent call for reform of the process of judicial appointment in England and Wales has been the review conducted by the Constitutional Committee of the House of Lords, which resulted in a Report being published in March 2012.

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<sup>37</sup> The JAC was set up in April 2006. <http://jac.judiciary.gov.uk/about-jac/about-jac.htm> [Accessed on 10 January 2014]

<sup>38</sup> House of Lords, Select Committee on the Constitution, 25<sup>th</sup> Report of Session 2010-12, *Judicial Appointments*, (Report, 28 March 2012), at para 22, pg 13: "*As well as creating a new appointments process, the CRA removed the role of the Lord Chancellor as head of the judiciary and as Speaker of the House of Lords. The position of Lord Chancellor, which is legally and constitutionally distinct from that of Secretary of State for Justice, is now a more political role than it once was. Although, to date, Lord Chancellors have all been lawyers, there is no longer any requirement for this to be the case.*" <http://www.publications.parliament.uk/pa/ld201012/ldselect/ldconst/272/272.pdf> [Accessed on 10 January 2014]

<sup>39</sup> *Ibid* at para 2, pg 7.

<sup>40</sup> Ministry of Justice 'Framework Document, Ministry of Justice and the Judicial Appointments Commission' (2012) at para 2.2, pg 3. <http://jac.judiciary.gov.uk/about-jac/about-jac.htm> [Accessed on 14 January 2014]

<sup>41</sup> See JAC website for further information. <http://jac.judiciary.gov.uk/about-jac/about-jac.htm> [Accessed on 10 January 2014]

<sup>42</sup> Ministry of Justice 'Framework Document, Ministry of Justice and the Judicial Appointments Commission' (2012) at para 2.4, pg 4. <http://jac.judiciary.gov.uk/about-jac/about-jac.htm> [Accessed on 14 January 2014]

16. Overall, the Constitutional Committee was supportive of the current JAC system and believed that “*no fundamental changes should be made*”. In emphasising its position that the current system should be retained, it set out four conclusions relating to possible reforms which it considered should *never* be adopted. These conclusions are interesting as they provide potential areas of reform in the Irish system of judicial appointment. The conclusions were listed follows:

- “The independent Judicial Appointments Commission (JAC) should continue to be primarily responsible for appointments to the courts and tribunals of England and Wales. The Lord Chancellor should have no power to determine the JAC’s membership or to issue directions as to how it should act; this would be damaging to both its independence and to the perception of its independence.
- The Lord Chancellor should continue to have a limited role in the appointment of senior members of the judiciary; he should be properly consulted and retain his right of veto in relation to the most senior appointments. He must also retain responsibility, and be accountable to Parliament, for the overall appointments process. But he should not be permitted to select candidates from a shortlist, nor should he sit on selection panels. Such changes would risk politicising the appointments process and would undermine the independence of the judiciary.
- Parliamentarians should not hold pre- or post-appointment hearings of judicial candidates, nor should they sit on selection panels. Political considerations would undoubtedly inform both the selection of parliamentarians to sit on the relevant committees or panels and the choice of questions to be asked.
- Merit must continue to remain the sole criterion for appointment. However, we do not consider merit to be a narrow concept based solely on intellectual capacity or high quality advocacy. We refute any notion that those from under-represented groups make less worthy candidates or that a more diverse judiciary would undermine the quality of our judges.”<sup>43</sup>

17. These conclusions will be addressed in more detail in the next section when directly comparing the Irish and English systems.

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<sup>43</sup> House of Lords, Select Committee on the Constitution, 25<sup>th</sup> Report of Session 2010-12, *Judicial Appointments*, (Report, 28 March 2012), pg 6 (Executive Summary).  
<http://www.publications.parliament.uk/pa/ld201012/ldselect/ldconst/272/272.pdf> [Accessed on 14 January 2014]

18. In relation to the issue of the composition of the JAC, the House of Lords Constitutional Committee emphasised that the mixed membership of the JAC encompassing those from both legal and lay backgrounds was of extreme importance, not only in terms of encouraging diversity, but also in terms of public confidence.

19. Whilst recognising the practical need to have judicial members on the JAC as they “*best understand the qualities required to fulfil a particular position and are able to provide an informed assessment of an individual’s skills and abilities*”<sup>44</sup>; it argued that lay membership was also important in providing broader perspectives. It concluded:

“For the judiciary to be solely responsible for the appointments process would risk undermining the promotion of diversity and, ultimately, public confidence in the judiciary. Furthermore, the appointments process is enhanced by the involvement of lay persons who can bring a different perspective to the assessment of candidates’ abilities. It is therefore important that selection panels include a mixture of judicial and lay representation.”<sup>45</sup>

20. The House of Lords Constitutional Committee did make some recommendations in respect of making some limited changes to the JAC system, some of which are again relevant to possible points of reform within Ireland. These recommendations were as follows:

- “UK Supreme Court selection commissions should be increased in size, with greater lay representation.
- The President and Deputy President of the Supreme Court should not sit on the selection commissions formed to choose their successors.
- The Lord Chancellor’s power to reject or request reconsideration of nominations from the JAC for appointments below the level of the High Court should be transferred to the Lord Chief Justice.
- In principle, the JAC should be responsible for the appointment of deputy High Court judges.
- There should be a greater emphasis within the judiciary on judicial careers, making it easier to move between different courts and tribunals and to seek promotions.
- A formal appraisal system for the judiciary should be introduced.
- The retirement age for Court of Appeal and Supreme Court Justices should be raised to 75.”

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<sup>44</sup> *Ibid* at para 65, page 24.

<sup>45</sup> *Ibid* at para 67, page 24.

21. In order to increase judicial diversity, the Constitutional Committee's Report also strongly urged that previous recommendations made by the 'Advisory Panel on Judicial Diversity'<sup>46</sup> (established in 2009 by the Lord Chancellor with a report published in February 2010) should be implemented more rapidly to meet this need.

22. Interestingly, the issue of candidate shortlists was briefly addressed by the Constitutional Committee. Their Report noted the evidence of Professor Cheryl Thomas which was that the JAC system in the UK "*is unique*" in terms of equivalent commissions in other jurisdictions, as more often than not in such other jurisdictions, "*the executive normally has the power to select from a shortlist*".<sup>47</sup>

23. The Constitutional Committee noted that the evidence offered in favour of such shortlists was that of increasing accountability and diversity; however, they did not agree with these arguments. The Constitutional Committee concluded that the Lord Chancellor had the power to reject individual senior appointments which provided for accountability in the process, and that shortlists would more likely have the reverse effect of reducing diversity:- "*The use of shortlists would undermine judicial independence and be contrary to the principle of appointment on merit. The Lord Chancellor should not be offered a shortlist of candidates from which to choose.*"<sup>48</sup>

24. The Constitutional Committee's Report set out its view of what the key principles of a system of judicial appointment should be:

"The conclusions and recommendations which we reach in this report are based on our affirmation of the principles which we believe should continue to underpin the judicial appointments process: judicial independence, appointment on merit, accountability and the promotion of diversity. The achievement of the correct balance between these principles is vital in maintaining public confidence in the judiciary and the legal system as a whole."<sup>49</sup>

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<sup>46</sup> See <http://www.judiciary.gov.uk/publications-and-reports/reports/diversity/advisory-panel-recommendations> [Accessed on 10 January 2014]

The Advisory Panel on Judicial Diversity was chaired by Baroness Neuberger, and its report was published in February 2010. It contained 53 recommendations, one of which was that a Judicial Diversity Taskforce, comprising the Ministry of Justice, senior members of the judiciary, the Judicial Appointments Commission, the Bar Council, the Law Society and Institute of Legal Executives, be constituted. This taskforce is to oversee implementation of the 'Neuberger recommendations'.

<sup>47</sup> House of Lords, Select Committee on the Constitution, 25<sup>th</sup> Report of Session 2010-12, *Judicial Appointments*, (Report, 28 March 2012), para 36, page 16.

<sup>48</sup> *Ibid* at paragraphs 36-37, pgs 16-17.

<sup>49</sup> House of Lords, Select Committee on the Constitution, 25<sup>th</sup> Report of Session 2010-12, *Judicial Appointments*, (Report, 28 March 2012), page ii (summary).

25. As also observed in relation to the criticisms made of the Australian system, the above paragraph also illustrates that the fundamental issues of any system for judicial appointment are those of ensuring complete judicial independence, appointment on merit, accountability and transparency.

### C. Canada

26. Canada employs a somewhat similar method to both that of the England and Wales and Ireland, to varying degrees, in that an appointing commission or body puts forwards nominees to the Executive for consideration; however, a recent change to the appointment process means that ‘post-nomination, introductory’ parliamentary hearings are held in respect of Supreme Court nominees. This unusual process has been summarised as follows:

“... a shortlist of three nominees for each Supreme Court vacancy is selected by an ad hoc appointing commission (comprising members from all the major political parties) and provided to the Prime Minister and the Minister of Justice, who will then select and appoint a single nominee from this list. It is only after the nominee for any vacancy has been selected by the Prime Minister that the Parliamentary hearing will take place. Thus, while the Prime Minister may conceivably choose to take into account what happens at this hearing before confirming the appointment, it is his or her decision that is fully binding. In effect, therefore, the role of the Parliamentary hearing is not to actually alter the nomination itself (there is no formal recommendation or confirmation process) but instead:

‘is intended to bring greater openness and transparency to the appointments process by allowing Canadians to learn more about those individuals who will be appointed to the Supreme Court of Canada.’<sup>50</sup>

27. The introduction of these ‘post-nomination, introductory hearings’ has by and large been considered to be a success.<sup>51</sup> One source states that the result of these hearings is “*that the Canadian public are in a position to have a far greater knowledge of those wielding very significant public power (and how it is they come to hold that power) than their equivalents in the UK*”.<sup>52</sup>

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<sup>50</sup> Professor Alan Paterson OBE and Chris Paterson, CentreForum (UK think-tank), *Guarding the Guardians? Towards an independent, accountable and diverse senior judiciary*, (Report, March 2012), page 56. <http://www.centreforum.org/assets/pubs/guarding-the-guardians.pdf> [Accessed on 10 January 2014]

<sup>51</sup> *Ibid* at page 57.

<sup>52</sup> *Ibid* at page 58.

28. A different process applies to the appointment of judges to other federal courts and to provincial superior courts in Canada. Advisory bodies called Judicial Advisory Committees (JACs) are part of the process in each Province.<sup>53</sup> Applications are made to the Commissioners for Federal Judicial Affairs (who assists the Minister for Justice with this process), if the threshold statutory requirements for appointment are met (e.g., generally 10 years at the bar of the Province),<sup>54</sup> the application is sent to the JAC for consideration. The JAC assess the applications on the basis of two categories, “recommended” or “unable to recommend” and each assessment remains valid for two years.<sup>55</sup> These assessments are provided to the Minister for Justice (through the Commissioner for Federal Judicial Affairs). The Minister for Justice can seek further information from the JAC on a candidate; s/he can also request a reassessment. The Minister makes recommendations to the Cabinet based on the names which have been recommended by the JAC.<sup>56</sup>

29. A Canadian House of Commons Standing Committee on Justice and Human Rights issued a Report in 2007 entitled ‘*Preserving independence in the judicial appointments system*’. This Report highlighted concerns with the process of federal judicial appointment in Canada in light of changes which had been made to the system, and recommended that these changes be reversed.<sup>57</sup> One such change had been the removal of a category of assessment from the JAC; previously the JACs could rate an application as ‘not recommended’, ‘recommended’ and ‘highly recommended’. The latter category was removed, and the majority of the Committee considered that this increased the potential for partisan appointments.<sup>58</sup>

30. The Standing Committee outlined its concern as follows;

“The discussion of categories of assessment for candidates became one of what the role of judicial advisory committees should be. If their role is simply to screen out candidates who are not qualified or should be excluded from consideration for other reasons, then the elimination of the “highly recommended” category should not be particularly troubling. If, however, the committees have been set up to find the best candidates for a particular position on the Bench, then some designation that reflects superior qualities is needed. Some witnesses urged the federal government to follow the lead of provincial governments and have the judicial advisory committees draw up a

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<sup>53</sup> Office of the Commissioner for Federal Judicial Affairs Canada, Federal Judicial Appointments, Process for an Application for Appointment. <http://www.fja.gc.ca/appointments-nominations/process-regime-eng.html> [Accessed on 10 January 2014]

<sup>54</sup> *Ibid.*

<sup>55</sup> *Supra* at no. 29.

<sup>56</sup> *Supra* at no. 29.

<sup>57</sup> House of Commons Canada, Standing Committee on Justice and Human Rights, 39th Parliament 1st Session, ‘*Preserving independence in the judicial appointments system*’, (Report, May 2007). [http://www.parl.gc.ca/content/hoc/Committee/391/JUST/Reports/RP2970953/391\\_JUST\\_Rpt14/391\\_JUST\\_Rpt14-e.pdf](http://www.parl.gc.ca/content/hoc/Committee/391/JUST/Reports/RP2970953/391_JUST_Rpt14/391_JUST_Rpt14-e.pdf) [Accessed on 10 January 2014]

<sup>58</sup> *Ibid* at pages 11-12.

short list of candidates who are the best qualified to fill a particular judicial posting. The Minister of Justice would then be required to select a candidate from this short list, unless exceptional circumstances applied. This would not only improve the quality of the judiciary but also serve to reduce the influence that political considerations may play in the selection of judges.”<sup>59</sup>

31. The Standing Committee simply recommended that the Government reinstate that third category of ‘highly recommended’ in order to allow the judicial advisory committees to resume their assessments along the three categories of ‘not recommended’, ‘recommended’ and ‘highly recommended’.<sup>60</sup>

32. The Standing Committee also made a number of other suggestions which it felt should be considered in greater detail by the Government in consultation with relevant stakeholders. One such suggestion leads on from the above issue of the actual role of an advisory committee and is of relevance to the Irish context as it relates directly to the use of advisory committees either as screening bodies or as nominating bodies:

“The recent changes to the federal judicial nominations process are not solely responsible for the basic problems in the judicial nominations process. One problem is that judicial advisory committees function only as screening committees whose role is to screen out bad candidates. It is not sufficient, however, for advisory committees to perform only the negative task of weeding out those who are not suitable for judicial office. It is essential that they also perform the positive task of assisting the Minister of Justice and the federal government in selecting the very best candidates available for a given position. This is the role played by a nominating committee. A true nominating committee would help to combat the perception that political patronage and favouritism plays an important role in determining who is appointed to the bench.”<sup>61</sup>

33. The latter statement is particularly relevant to the role of the JAAB in this jurisdiction, as its current role could be similarly described in these negative terms (i.e. performing only “*the negative task of weeding out those who are not suitable for judicial office*”).

34. In the context of the Standing Committee making suggestions which it felt should be considered in detail by the Government, it had the following to say in

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<sup>59</sup> *Ibid* at page 11.

<sup>60</sup> *Ibid* at page 11. See ‘recommendation 2’: “*The Committee recommends that the Government of Canada restore the three categories of assessments made by the judicial advisory committees – “highly recommended”, “recommended” and “unable to recommend”.*”

<sup>61</sup> *Ibid* at page 13.

relation to judicial advisory bodies using ranked shortlists in nominating names to the Executive:

“- that consideration be given to having nominating committees propose a short list of 3-5 names for each judicial posting, as it becomes available. Should the federal government appoint a person not named by a committee, it should give a public explanation for doing so.

The functioning of the judicial appointments system as a true merit system will depend upon the length of the list of recommended candidates. If the lists are too long, then the system is vulnerable to improper considerations of a political nature influencing the selection. A merit system is best secured if the government of the day is required to choose from short lists of the most outstanding candidates submitted by nominating committees. This is the best way of preventing truly excellent candidates from being passed over in order to appoint less qualified candidates who happen to have political ties with the government of the day.

The government of the day may still decide to appoint a person not named by a committee. This may be for any number of reasons, such as a language requirement that no one on the short list meets. To ensure the accountability of the appointing process, the government should give a public explanation for not adhering to the short list. There should also be an annual report of all the recommendations that were not accepted by the government.”<sup>62</sup>

### ***The JAAB***

35. As highlighted in the brief comparison of the common law systems of judicial appointment, the main weaknesses within any appointment system are those of a lack of transparency, accountability and accessibility.

36. In summary, in any jurisdiction where there is no independent judicial advisory body in place or, alternatively, where there is but its role is limited to that of carrying out a basic screening process rather than actively undertaking merit-based assessment, the common result is that these flaws are magnified and ultimately greatly undermine the principle of judicial independence and the public’s faith in having a fairly appointed bench.

37. Where such weakness is apparent, the focus naturally comes to rest upon the thorny issues of political patronage and partisanship rather than on the merits of any appointees because there is no publicly defined merit based assessment in operation.

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<sup>62</sup> *Ibid* at page 13-14.

38. These weaknesses are apparent within our own system, through the limited and confining role of the JAAB. Its role is limited to carrying out a basic ‘weeding out’ process, as it is restricted to just filtering out the least suitable or least qualified candidates and passing the numerous other remaining names to the Minister for Justice. This naturally leaves an almost total discretion to the Government in making judicial appointments. Arguably such a system lacks any accountability or transparency in making judicial appointments, and therefore undermines the core principle of judicial independence.

39. The flaws of our judicial appointment system can be easily addressed by firstly re-considering what the role of the JAAB should be; as its name indicates, the JAAB should function in an advisory capacity, in the true sense of the word; it should have the capacity to actively and positively assist the Government in ensuring that the highest calibre candidates are nominated for judicial appointment. Secondly, consideration ought to be afforded to how such a role can be easily facilitated. The Society’s view is that this could be achieved by re-structuring the functions of JAAB, through legislation, thereby allowing for its greater involvement in the appointments process with the introduction of merit based assessment and evaluation.

#### ***Potential areas of reform within the JAAB***

40. It is proposed to outline certain of the recommendations contained earlier in this submission as they relate to the functioning and role of the JAAB.

#### **Merit Criteria and Assessment**

41. As stated above regarding the issue of eligibility of appointment, the Society considers that a far greater role can be afforded to the JAAB to allow it to carry out a merit-based assessment of all eligible applicants.

42. A merit-based assessment would involve considering and evaluating all eligible candidates on the basis of defined and specific categories of ‘merit criteria’. The Society provided an example of four categories of desirable attributes which illustrate the type of criteria which would be appropriate. Two further examples of categories of ‘qualities and abilities’ as used in Victoria and England and Wales were also outlined earlier in this submission. It is imperative that precise categories of clearly defined merit criteria be established in this jurisdiction. It is also crucial that such categories be publicly available.

43. In creating a process of merit based assessment for potential candidates, it is equally vital that the stages of this assessment be clearly defined. The Society would consider that the JAAB could undertake a clearly defined selection process, similar to that used by the JAC in England and Wales – the five key elements being:

- i.) the review of curriculum vitae to ensure eligibility requirements are met and an initial assessment of ‘good character’;
- ii.) online preliminary testing to enable the short-listing of candidates based on demonstration of basic judicial abilities;
- iii.) a panel interview;
- iv.) professional references based on completion a questionnaire format by referees; and,
- v.) peer review within the legal community.

44. The Society notes that rigorous systems of merit-based assessment apply to almost all types of appointment in both the public and private sector. For example, the Public Appointments Service has been successful in both raising the standards in public service recruitment and increasing public confidence in the transparency and accountability of public appointments since 2001. There is no reason why a similar merit-based system of assessment should not be adapted and applied to the process of judicial appointment.

#### Membership of the JAAB

45. Currently, the membership of the JAAB consists of the Chief Justice as Chairperson, the Presidents of the District, Circuit and High Courts, the Attorney General, Chairperson of the Bar Council, nominee of the Law Society of Ireland, three nominees of the Minister for Justice and the Secretary to the JAAB (11 members in total).<sup>63</sup> Its membership consists almost entirely of those from a legal background. There are no lay members representing the public, other than three lay members who are nominated by the Minister for Justice. There is no open and public competition for membership of the JAAB.

46. The current framework for membership of the JAAB, particularly given that the three lay members are nominated by the Minister for Justice, does little to allay fears of political patronage.

47. While the Attorney-General carries out an important function in the process of judicial appointment, it is noted that s/he is the only individual who is involved in both stages of the process – as both a member of JAAB and as advisor to the Cabinet.

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<sup>63</sup>Judicial Appointments Advisory Board, *Annual Report 2012*, at pg 1.  
<http://www.jaab.ie/en/JAAB/Annual%20Report%202012%20Final%20Version.pdf/Files/Annual%20Report%202012%20Final%20Version.pdf>. [Accessed on 14 January 2014]

For this reason, it is suggested that in relation to the matter of judicial appointment, the Attorney-General should be involved at one level only, either as a member of JAAB or as legal advisor to the Cabinet, but not both.

48. The JAAB members representing the judiciary (the Presidents of each of the Jurisdictions of the Courts) play a crucial role as they provide essential input to the process of judicial appointment. The representatives of the practising professions, both solicitors and barristers, are also regarded as essential; however, the Society is strongly of the view that more than one representative of the Society should be appointed to the JAAB to reflect the fact that currently there are 8,895 practising solicitors as at 31<sup>st</sup> December 2013, but just 2,255<sup>64</sup> members of the Law Library. The Society suggests that there be two representatives of the solicitors' profession nominated to the JAAB. In addition, it is apparent from the statistics provided by the JAAB Annual Reports (2002 – 2012) that a far greater number of barristers continue to be appointed to the bench, particularly to the Circuit and Superior Courts. The Society is strongly of the view that having two nominees of the Law Society on the JAAB would help in redressing this imbalance.<sup>65</sup>

49. The Society also recognises the valuable contribution made by the lay members of JAAB (past and present). The importance of their role cannot be underestimated. Their membership provides for a greater mix of perspectives and views in the process of assessment and appointment and brings a greater element of balance to the membership of the JAAB. The Society considers that the lay membership of the JAAB should be increased from 3 to 6, and that such an increase would greatly enhance the independence of the JAAB.

50. In terms of judicial independence and transparency, the Society is of the view that it would be preferable if the Minister for Justice had no input into or control over the lay membership of the JAAB. The Society considers that making the lay membership element of the JAAB subject to public competition would not only increase public confidence in the system of judicial appointment but also strengthen the role of the lay members.

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<sup>64</sup> Dearbhail McDonald, 'Barristers 'struggling to survive' as 180 quit in a year', *Irish Independent*, (11 March 2013) <http://www.independent.ie/irish-news/barristers-struggling-to-survive-as-180-quit-in-a-year-29121339.html> [Accessed on 29 January 2014]

<sup>65</sup> The JAAB Annual Reports 2002 to 2012 are available on its website at <http://www.jaab.ie/en/JAAB/Pages/WP08000099> [Accessed on 29 January 2014]

For example, considering the statistics in these Annual Reports (excluding judges who were promoted and considering only the Circuit, High and Supreme Courts); in 2002, 2 solicitors and 6 barristers were appointed; in 2004, 6 barristers but only 1 solicitor were appointed; in 2007, 8 barristers and 3 solicitors were appointed, and in 2012, 8 barristers and 1 solicitor were appointed.

***Recommendation 7***

*It is strongly urged that the composition of the membership of the JAAB become more open and focused on representing the public interest by both (i) increasing the lay membership from 3 lay members to 6 lay members, and (ii) introducing a requirement that all lay members be selected by a public and open competition rather than by the Minister for Justice. As noted by the Constitutional Committee of the House of Lords, “the appointments process is enhanced by the involvement of lay persons who can bring a different perspective to the assessment of candidates’ abilities. It is therefore important that selection panels include a mixture of judicial and lay representation”.*

***Recommendation 8***

*It is also strongly urged that two nominees of the Law Society of Ireland should be appointed to the JAAB; firstly, this would equitably recognise the far greater numbers of solicitors as compared to barristers, and secondly, it would assist in addressing the continuing emphasis on appointing barristers to the Circuit and Superior Courts .*

Shortlists of ranked candidates

51. The Society considers that the approach of providing the Executive with a shortlist of ranked candidates is preferable to the current ‘filter’ system in operation whereby all eligible names are forwarded.

52. A shortlist system would provide for increased transparency and accountability in the system of judicial appointment due to two main factors;

- i.) it would reduce the influence of political considerations as the discretion afforded to the Executive in making judicial appointments would be greatly diminished;
- ii.) it would assist in improving the quality of the judiciary as the JAAB could act in a truly advisory capacity (provided a merit assessment system was introduced) in thoroughly screening all potential candidates and ultimately nominating only the best candidates to the Executive.

53. The role afforded to the Executive in making judicial appointments should be as restricted as possible. Currently, a great deal of discretion is afforded to the Executive; one means of curtailing this while still recognising the role of the Executive in judicial appointments is by providing a shortlist of candidates after a thorough assessment process is conducted by an independent advisory commission.

54. As noted by the Justice and Human Rights Standing Committee of the House of Commons in Canada; “*A merit system is best secured if the government of the day is required to choose from short lists of the most outstanding candidates submitted by nominating committees.*”<sup>66</sup>

***Recommendation 9***

*The broad discretion of the Executive in selecting judicial appointees should be greatly restricted to allow for greater transparency and accountability in the judicial appointment process; the Society considers that provision of a shortlist of names (no more than 3 names) for each vacancy or proposed appointment, ranked on the basis of qualifications and suitability, should be provided by the JAAB to the Executive following the conduct of an extensive and thorough assessment process by the JAAB and that appointments should be made from among those shortlisted.*

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<sup>66</sup> House of Commons Canada, Standing Committee on Justice and Human Rights, 39th Parliament 1st Session, ‘*Preserving independence in the judicial appointments system*’, (Report, May 2007) at pgs 13-14.

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