

LAW SOCIETY SUBMISSION



**GENERAL SCHEME OF THE JUDICIAL APPOINTMENTS COMMISSION BILL
2020**

SUBMISSION TO THE JOINT OIREACHTAS COMMITTEE ON JUSTICE

6 March 2021

ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

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1. Introduction

- 1.1 The Law Society of Ireland ('the **Society**') is pleased to make a submission to the Joint Oireachtas Committee on Justice ('the **Committee**') on the General Scheme of the Judicial Appointments Commission Bill 2020 ('the **Scheme**').
- 1.2 The Scheme proposes that:
 - i. the Judicial Appointments Advisory Board ('**JAAB**') will be replaced with a new Judicial Appointments Commission ('the **Commission**');
 - ii. any person wishing to be considered for appointment to judicial office, including serving judges, will be required to apply to the Commission;
 - iii. the Commission, which will consist of nine members, will have equal legal and lay representation for voting purposes;
 - iv. the Commission will be chaired by the Chief Justice and the Attorney General is to participate as a non-voting member;
 - v. the Commission will be required to make decisions to recommend persons for appointment to the judiciary on merit; and
 - vi. unlike JAAB, the Commission will operate in respect of all judicial vacancies.
- 1.3 We also note that the Commission will develop upgraded procedures and requirements for appointment to judicial office and its Judicial Appointments Procedures Committee (the '**Procedures Committee**') will prepare and publish statements which set out selection procedures and required skills/attributes having regard to certain criteria.
- 1.4 The Society is committed to supporting policy reforms which reinforce and enhance the Irish judiciary as a core pillar of the democratic governance of this State.
- 1.5 Like other stakeholders, we share the objective of ensuring a strong, independent judiciary and believe that a transparent process of appointment is a crucial safeguard in delivering that foundational tenet of the effective administration of justice in Ireland.
- 1.6 The Scheme presents draft reforms on what has been a long-running and much-debated issue in respect of which the Society has made the following submissions:
 - i. January 2014 - Review of Procedures for Appointing Judges; and
 - ii. March 2017 - Scheme of the Judicial Appointments Commission Bill 2016.

For ease of reference, both documents can be accessed at the above links.

2. Membership of the Commission

Having regard to the provisions of Head 9, the Society makes the below observations:

2.1 Law Society Nominee

The Judicial Appointments Commission Bill 2016 provided that a member of the Commission would be '*a practising solicitor nominated by the President for the time being of the Law Society of Ireland*'.

At that time, the Society queried the inclusion of only one solicitor among the members of the Commission given that the principle of proportionate representation for participation on behalf of the legal profession had already been accepted by the Oireachtas.

We further noted that, while the inclusion of two solicitor members (as against one barrister member) on the Legal Services Regulatory Authority (LSRA) went some way to acknowledging the vastly different numbers of practising lawyers in each profession, significant further work was required in the area to ensure parity. Recent LSRA figures confirm that the current ratio of practising solicitors to barristers in the State is in the region of 7:1.

The area of judicial appointments is one where the Society retains considerable expertise. This is a result of many factors which include:

1. The Society has been represented on JAAB since its establishment;
2. Many member solicitors are subject matter experts across a broad range of areas of law;
3. As the largest branch of the legal profession, solicitors are expert users of the courts system in the State. They operate at every level of seniority, dealing with every conceivable matter before the law; and
4. Solicitors have first-hand experience of the impact of the courts system on the public given their close interaction with court users.

For each of these reasons, solicitors are best positioned to provide necessary perspectives on how the courts might be more responsive to the evolving needs of society and the skills and qualities of the judiciary required to achieve that end.

The Commission would benefit substantially from having a voice from the solicitors' profession at the table and, in the absence of provision for same, the Society cannot agree that the Commission (as proposed) is appropriately constituted.

2.2 Judicial Membership

The judicial membership of the Commission is proposed to be the Chief Justice (or the next most senior judge of that Court), the President of the court in which a vacancy arises (be that the Court of Appeal, the High Court, the Circuit Court or the District Court) and two nominees of the Judicial Council (to have been each of a practising solicitor and a practising barrister for the requisite number of years standing at the time of appointment as a judge).

Reference therefore to ‘equal legal and lay membership for voting purposes’ should more properly be to ‘equal judicial and lay membership for voting purposes’ since, somewhat incredibly, the legal profession is not represented on the Commission as currently proposed.

2.3 Judicial Council Nominees

Balance among the judicial membership of the Commission is crucial and the Society cautioned previously against creating a Commission with too great a concentration of representation from members of the senior judiciary, at the expense of representatives of the courts of local and limited jurisdiction.

Head 18 provides that ‘*the chairperson shall, if present, be the chairperson of the meeting and if not present, one of the Judicial Council nominees shall be the chairperson of the meeting, by nomination of the Chief Justice*’.

Head 19 provides that ‘*the chairperson of the [Procedures C]ommittee shall be the Chief Justice or a Judicial Council nominee member as the Chief Justice shall determine*’ and further that, when the Commission establishes any other committee to assist the Commission itself or the Procedures Committee in the performance of one or more of their statutory functions, ‘*the chairperson of the committee shall be the Chief Justice or a Judicial Council nominee member as the Chief Justice may determine*’.

This raises a question as to whether the Judicial Council nominees are considerably more likely to be senior and long-standing members of the judiciary, given the significant responsibilities outlined above?

As such, their experience of practice, as court users rather than judicial members, would be at a considerable remove from present day experience and would be no substitute for representatives of the current practising profession.

2.4 Attorney General

The Society continues in its view that the membership of the Attorney General on the Commission is not appropriate for the following reasons:

1. If the new Commission is to be genuinely independent in its functions, there is no reason for the Attorney General, who also sits at the Cabinet table, to participate.
2. To the contrary, it becomes more difficult to defend the independence of the process if a significant player has a dual role both prior to, and post, the Commission’s recommendation.
3. We do not believe that this difficulty is overcome, in any real way, by providing that the Attorney will not have a vote at the Commission table.
4. The level of candidate detail which is required to be provided by the Commission to the Minister (in accordance with Head 47) is more than sufficient to enable the Attorney to provide input on the technical aspects of any proposed appointment and Government will always have the benefit of the advice of the Attorney at a political level.

5. As a major purchaser of legal services in the State, there is a risk of a conflict of professional interests, and/or the perception of same, in the Attorney's involvement in both stages of the process.
6. It is not standard in comparable jurisdictions for the Attorney General to participate in the manner being proposed.

2.5 Lay Members

We welcome the participation of non-legal members in the Commission, with four members to be recommended by the Public Appointments Service for appointment by the Minister following a selection process.

We believe that such participation by lay members will be vital in ensuring that society's diverse public interest has a voice in the judicial selection process.

It will also operate to mitigate the risk of self-replication by judicial members. The judiciary serves all of society and that should be reflected in the process of judicial selection.

Recommendations

1. Provide for the appointment of a practising solicitor and a practising barrister, to represent both branches of the profession, as the principal court users with experience of the consumer aspect of the courts service, provided through the judiciary.
2. Consider the inclusion of provision for nominees of Court Presidents to attend in the event of their unavailability to act.
3. The Attorney General should give his/her perspective at Cabinet, following receipt of recommendations from the Commission, and should not be involved in the Commission's deliberations.

3. Procedures Committee

3.1 Formal Evaluation Procedures

Previous submissions advocated for more formal evaluation procedures in the consideration of judicial appointments and, as such, the creation of a Procedures Committee to perform the functions assigned under Heads 55 – 60 is welcome.

Of particular note are the criteria listed at Head 56 (1) to which the Committee must have regard in the preparation of the Statement of Selection Procedures.

These include '*the need for selection criteria to comprise comprehensive procedures, including provision for interviews and other selection tests, approaches and methods in line with the requirements of the vacancy or vacancies proposed to be filled and distinguish between applicants already holding judicial office on the one hand and applicants who do not hold judicial office on the other hand with regard to the requirements for possession of knowledge of certain matters under Head 34*'.

The Society believes that this will assist in stream-lining and aiding transparency in the system of judicial appointments in the State.

3.2 International Developments, Instruments and Conventions

While the requirement at Head 60 (1) that the Procedures Committee would '*monitor and review international developments in the selection and appointment of persons for judicial office, including any international instruments and conventions relevant to such selection and appointment*' is welcome, the Society had previously emphasised the need for the Commission to be given time to research and examine comparable systems which operate in other jurisdictions at the outset.

The credibility of the Commission will be greatly enhanced by a solid start.

Given the importance of its role, we believe that the Commission's work should commence with the benefit of an overview of international best practice in the area of judicial appointments in order to enhance the development of its processes and procedures.

3.3 Eligibility, Skills and Attributes

The Society's 2017 submission emphasised that the purpose of the legislation was to set basic criteria for judicial office which should be as broad as possible in order to allow for consideration of the widest range of candidates possible.

As such, we welcome the provision at Head 55 (4) that '*different statements of requisite skills and attributes may be prepared by reference to different judicial offices or, in the case of judicial offices in the same court, different classes of business in the court that is reasonably anticipated a particular appointee to such office would deal with*'.

It will be important to ensure that sufficient expertise is available to the Procedures Committee to allow it to capture all vital elements of each class of court business and every area of law.

Recommendations

1. That the Commission would be allowed sufficient time at the outset to consider comprehensive research on comparable systems of judicial appointment in other jurisdictions.
2. That sufficient expertise is made available to the Procedures Committee to ensure that comprehensive statements are drafted in respect of each class of court business and every area of law.

4. Merit, Gender and Diversity

While welcoming relevant provisions at Heads 6, 14, 56 and 60, we would make/reiterate the following points:

4.1 Merit

We have previously emphasised the importance of selecting judicial candidates on merit, outlined various international merit standards and how same were used by judicial selection commissions.

We also advocated for the inclusion of a commitment to appoint judges on merit alone (while acknowledging that merit comes in many forms) and, as such, Head 6 is particularly welcome, subject to the application of appropriate criteria.

Merit criteria should be periodically reviewed to reflect the experience of the Commission over time. The criteria must reflect and understand the work of legal professionals, across all areas of law.

In 2014, the Society detailed a range of characteristics which may contribute to judicial merit. They included professionalism, communication, integrity, decision-making, efficiency, leadership and management. In 2017, we further observed that merit is not simply depth of legal knowledge alone and, while technical merit is essential, it must be accompanied by other skills which are necessary to enable a prospective judge to manage a court fairly, efficiently and with appropriate consideration for all court users.

It will be vital that the Commission carefully reflects on the range of skills it wishes to consider as contributing towards merit in recommending judges for appointment.

4.2 Judicial Education and Training

Merit must be maintained over time and, as such, the need for judicial education and training (particularly where legal practices are becoming more specialised) remains a core consideration for the Society.

As such, the Head 41 stipulation that '*the Commission shall not recommend the name of a person to the Minister for appointment to judicial office unless the person gives an undertaking in writing to the Commission, if appointed to judicial office, to take such course or courses of training or education, or both, as may be required by the Chief Justice or the President of the relevant Court*' is welcome.

In respect of EU law, the substantial work of the European Commission in the area (which can be accessed [here](#)) may be of interest to the Committee.

4.3 Gender and Diversity

The Society has conducted extensive work in recent years in the areas of gender equality, diversity and inclusion (which can be accessed [here](#) and) which may also be of interest to the Committee.

Since 2011, concerted political efforts have been made to appoint more females to the courts, particularly the Superior Courts. The initiative was a welcome political intervention, based on a desire to achieve a more reflective judiciary.

A judiciary which is reflective of society is essential to the enduring legitimacy of the judicial branch of government and the Society continues in its commitment to ensure greater gender diversity in the judiciary, in keeping with greater gender diversity across the profession.

4.4 Diversity within the Profession

There is a broad diversity of legal experience in the State which includes solicitors and barristers in private practice, legal academics and a range of in-house lawyers both in the service of the State and in private entities. There is exceptional talent among this pool of practitioners who offer a broad range of legal, personal and professional experience.

Solicitors have broad experience in life and law; as legal practitioners and advisers, as employers, as operators of large and small businesses, and as the branch of the legal profession which deals directly with the public, often at the most challenging of times. In addition to technical legal skills, solicitors bring lived-experience and humanity to the courts.

In the Society's view, the public interest would be better served if more solicitors were appointed to serve in the senior ranks of the judiciary. Solicitors comprise approximately 80% of practising lawyers in the jurisdiction but statistically the number of Superior Court appointments from their ranks remains a small fraction of that.

It may be that there is some residual unconscious bias but, for whatever reason, solicitor appointments to the Superior Courts represents an issue of diversity which the judicial appointments system has yet to fully confront.

The Society believes that a comparable approach to that taken to enhance gender diversity is necessary in order to appoint a greater number of solicitors, who represent the broadest and most societally and geographically diverse portion of the legal profession.

Recommendations

1. That the Commission carefully reflects on the range of skills it wishes to consider as contributing towards merit in recommending judges for appointment.
2. Consider the European Commission's work on judicial training and education in the area of EU law and the Society's work in the areas of gender equality, diversity and inclusion.
3. Consider a comparable approach to that taken to enhance gender diversity in judicial appointments with a view to enhancing the number of solicitor appointments.

5. Legal Academics

The draft provisions at Head 38 will assist in providing greater diversity in the candidates who are eligible for judicial consideration.

Academics have served with great distinction in various courts across the world. For example, Baroness Brenda Hale, who served as President of the Supreme Court of the United Kingdom from 2017 until her retirement in 2020, was a Professor of Law at the University of Manchester prior to embarking on her judicial career. Koen Lenaerts, who was appointed the President of the Court of Justice of the European Union in 2015, was a Professor of European Law at the Katholieke Universiteit (Leuven) immediately prior to his appointment. In the common law world, Mr Justice Russell Brown was an Associate Professor and Associate Dean at the University of Alberta prior to his appointment to the Canadian Supreme Court.

We believe that Head 38 (2) could be widened to increase the pool of academics who are eligible for appointment which could, in turn, assist greatly in achieving greater diversity among the judiciary.

In this regard, we view the requirement that a legal academic has '*practised as a barrister or solicitor for a continuous period of at least 4 years*' as standing at odds with the general thrust of the Scheme which is that appointments are made on merit.

Recommendation

That consideration be given to removing the 4-year threshold and providing that a legal academic shall be appropriately qualified where, at the time of appointment, they are a qualified solicitor or barrister (within the meaning of the LSRA Act of 2015).

6. Other Areas of Particular Interest

6.1 Confidentiality (Heads 30 and 31)

The definition of ‘confidential information’ should be cognisant of the substantial penalties which may attach to breaches by persons to include staff of the Commission.

6.2 Recommendation of names to Minister: principal conditions to be satisfied (Head 40)

The Society previously submitted that the following language replicated a provision in the Courts and Court Officers (Amendment) Act 2002 which was inserted when solicitors could be appointed to the High Court and Supreme Court and, as such, should be deleted:

(b) (i) in the case of an appointment to the office of ordinary judge of the Supreme Court or of ordinary judge of the Court of Appeal or of ordinary judge of the High Court, has an appropriate knowledge of the decisions, and an appropriate knowledge and an appropriate experience of the practice and procedure of the Supreme Court, the Court of Appeal and the High Court

The rationale for the proposed deletion was that:

1. There is no reason to include this as part of the eligibility for the superior courts. It does not form part of the eligibility for the District and Circuit Courts;
2. It is unnecessary as the Commission will be required to set detailed eligibility criteria for each court;
3. It operates as a barrier to diversity; and
4. It is inconsistent with the proposal to allow legal academics to be appointed directly to the courts.

Noting that the requirement remains (at Head 40 (3)) as a ‘principal condition’ to be satisfied in the recommendation of names to the Minister, we continue to believe that the provision should be deleted for the reasons outlined above.

6.3 Recommendation of names to Minister: further conditions to be satisfied (Head 41)

We would again query the rationale for Head 41 (3) which provides that *‘the Commission shall not recommend the name of a person to the Minister for appointment to judicial office unless that person is suitable on grounds of character and temperament and is suitable on grounds of health’*.

While supportive of the practical concerns which have been expressed repeatedly by JAAB relating to scrutiny of candidates on the grounds of health, we continue to believe that careful reflection is needed around how this provision can be included in law.

It is essential that any differential treatment would be handled by reference to modern standards in Irish and European law and should ensure not to in any way infringe on the rights of persons with disabilities.

6.4 Prohibition on Canvassing (Head 65)

There is a view that political party patronage has traditionally played too great a role in the selection of Irish judges.

Any such perception is damaging both to the reputation of the judiciary and to the process of judicial selection. As such, the proposal to introduce a statutory prohibition on all forms of canvassing for judicial office, including the canvassing of any elected person, is welcome.

6.5 Judicial References

The Society reiterates its concern that the practice of seeking and obtaining references from members of the judiciary, as part of an application to JAAB, should cease.

The opportunity presented by the upcoming legislation should be used to create a clear statutory prohibition on the acceptance, by the Commission, of references from sitting, or previous, members of the judiciary.

7. Conclusion

Reform of the judicial selection process in Ireland has been under discussion since 2013 and the necessity to introduce a reformed process becomes more urgent with every passing year.

The Society appreciates the invitation to furnish a written submission to the Committee and hopes that our comments and recommendations will be of assistance in its consideration of the issue.

We will be glad to engage further on any aspect of the Committee's work in the area.

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