

# LAW SOCIETY SUBMISSION

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## **SUBMISSION ON THE SCHEME OF THE JUDICIAL APPOINTMENTS COMMISSION BILL 2016**

Department of Justice and Equality

22 March 2017

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#### 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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## Introduction

The Law Society of Ireland is pleased to make a submission to the Government on the Scheme of the Judicial Appointments Commission Bill 2016. We believe this is an issue of crucial importance for the public interest and the administration of justice, designed to maintain and enhance the quality of the judiciary for the decades to come. Accordingly, the Society has considered the proposals of the Government in great detail. We have engaged in a process of internal discussion and consultation, substantial study of comparable systems in other jurisdictions and careful reflection on the principles and processes that should underpin the judicial selection system in Ireland. We believe that this is an opportunity for a fresh start.

We believe that this is an opportunity to take the best of the Judicial Appointments Advisory Board and to develop it into a new, contemporary, thoroughly professional and properly resourced and managed structure.

With this in mind, the Society takes the view that in order to develop the best system possible, we must both challenge the assumptions behind the status quo and test the logic and the quality of every element of this proposed new system.

## Overarching Principles

- 1.1. Before commenting on the details of the Scheme, the Society wishes to outline some overarching principles about how it believes judicial selection should be managed in Ireland. The judiciary is a central pillar of our constitutional democracy and its function is to act as a check on the will of the law-making majority in order to protect minorities and citizens. The process by which we select judges is important because of the impact that individual judges can have as members of a body of governance that makes decisions about people's lives, the regulation of relationships between bodies corporate and the regulation of the acts and decisions of government and its agencies. Once chosen, judges in Ireland stay in their roles until retirement and within that time may have considerable impact both on individuals and on the body politic. They often do this in ways that are at variance with the expressed will of the elected law-making majority, overturning elements of otherwise validly enacted laws by the freely elected public representatives of the sovereign people.
- 1.2. The judiciary has the authority to do so because of the constitutional structure that enables them to balance the will of the elected majority, while protecting the rights of minorities against overreach by the government. The judiciary has substantial power to overturn legislation that is determined to be unconstitutional, and this acts as a balance against the relative powerlessness of the individual against the overwhelming power of the state. This is the essence of the separation of powers of government that enables the persistence and success of constitutional democracies generally, and ours in particular. But the judiciary has the authority to make decisions of such personal and political impact not just because the constitution says so but because of the enduring legitimacy of the judiciary among the people it governs. Absent the enduring collective respect and acceptance of the role of the judiciary, its decision-making function in the constitutional order could not persist and our democracy based on the rule of law would be threatened.
- 1.3. The public interest demands that we protect this very successful system of constitutional governance in Ireland. The public interest demands that we be concerned about protecting the legitimacy, as well as the independence, of the judiciary. The distinction between independence and legitimacy is quite important. Protecting the independence of the judiciary means protecting a sitting judiciary from attack from external forces, and in particular, protecting the judiciary from attack from the other branches of government. However, protecting the legitimacy of the judiciary involves ensuring that the judiciary has the implicit consent of the body of people it governs because, in part, it is representatives of the people who choose the judges. Consider a scenario in which a multicultural society had judges of only one race or religion and whether their judgments, however well-reasoned, would, over time, be regarded with authority and with legitimacy, by that part of the community that is not reflected in the judiciary and played no part, however indirect, in their selection. Protecting the legitimacy of the judiciary causes us to examine carefully how judges are to be chosen. There needs to be a measure of political or popular participation in the selection of judges. The Society believes that this model is best fulfilled by the involvement of elected politicians. Where the role of elected politicians is to be reduced, it must not be supplanted by an increased role for the legal and judicial community (who are

interested agents in the judicial selection process) but rather must be supplanted or replaced by other public interest representatives that are not themselves agents of the judicial selection process.

- 1.4. In essence, the proposals involve a reduction in the discretion of the elected government in judicial selection and an increase in discretion to an independent arms-length body of delegated governance – the proposed Judicial Appointments Commission. The Society has long called for a reduction in the discretion of government in judicial selection because of persistent fears that judicial selection has been too tightly linked to political party patronage or perceptions of political party patronage. We say such perceptions are damaging to the legitimacy of the judiciary and we welcome measures that will reduce the scope for such patronage.
- 1.5. However, when the influence of one group is decreased and the influence of another group is increased it requires us to examine very closely who will be the people who will gain influence in this new system.
- 1.6. Notwithstanding concerns about the role of political party patronage, the political involvement in the selection of judges performed an important function in our constitutional democracy. It provided the all-important link with the sovereign people that gave the judiciary its legitimacy and, therefore, authority. It is essential that a reduction in the influence of elected politicians is balanced by a proportionate participation in judicial selection by other public interest representatives and not by an increased influence for members of the legal and judicial profession. It is further essential that the new body established to administer the process of judicial selection is appropriately resourced and equipped to perform its duties.

**Law Society of Ireland Submission to ‘Consultation on a Review of Procedures for Appointing Judges’ 2014 and Current and Anticipated Contributions to the Development of the Judicial Appointments Commission**

- 1.7. The Society has already made detailed submissions to the Department of Justice and Equality on possible reforms of the judicial selection system. This 2014 Submission is included as an Appendix to this current Submission. The Society is pleased to note that many of the suggestions made in that submission have been adopted by the government in its approach to the current Scheme. The Society regards such consultation as a productive format for the development of significant new policy. While recognising that it is entirely the prerogative of government to make its own final policy proposals, the Society believes that the opportunity for stakeholders to offer perspectives at an early stage enhances the policy development process generally and provides an excellent opportunity for maximising shared knowledge and information from interested parties. In the case of judicial appointments, we note that this is an area of particular expertise on the part of the Law Society of Ireland; both because there has been a representative of the Law Society of Ireland on the Judicial Appointments Advisory Board for the past 20 years and because of the interest and personal and professional experiences of many of our members as candidates for judicial office and that experience has informed this submission. Our

perspective is also important because solicitors are regular users of the courts at all levels - from the District Court to the Supreme Court, dealing with family, criminal, commercial and other matters on a daily basis. Most importantly, solicitors are the branch of the legal profession with the most immediate day-to-day experience of how the operation of the court system impacts on the public at large (with whom we deal directly on a daily basis). Therefore, solicitors are well placed to provide the perspective on how the Irish courts might be more responsive to the needs of modern Irish society.

- 1.8. Recognising that the government has published its general policy proposals in the form of a Scheme of the Judicial Appointments Commission Bill 2016, the current submission provides a more targeted reflection on the policy and process detail envisaged for a new Judicial Appointments Commission.
- 1.9. We would make two early points before outlining more detailed positions. First, the Society welcomes the Scheme of the Judicial Appointments Commission Bill 2016 as a forward-looking, inclusive and contemporary approach to reform of the judicial selection system. Second, the Society regards this legislation as a necessary, but preliminary, part of a multi-stage process that will lead to a thoroughly professional judicial selection system that uses the very best process to attract and assess the best candidates for judicial office in Ireland. The Society is committed to supporting policy reforms that reinforce and enhance the independence and strength of the Irish judiciary as a core pillar of the democratic governance of this State. The Society takes the view that the proposals in the Scheme of the Judicial Appointments Commission Bill 2016 achieve this objective. In particular we say this is achieved because these proposals protect the role of the public interest in judicial appointments, enhance the professionalism of the judicial selection process and provide the basis for increased diversity of professional experience in our judges of tomorrow. When it comes to administering justice to a complex and contemporary society, one size definitely does not fit all. The Society strongly supports the efforts of the government and the Department of Justice and Equality to enhance the pool of eligible persons for appointment to the judiciary.
- 1.10. The success of this reformed model for judicial selection will be crucially dependent on the institutional strength and capacity of the proposed Judicial Appointments Commission. It is essential that the Commission is capable of recruiting the very best of our broad range of legal practitioners in Ireland. The processes adopted by the Commission will be integral to this success. The Law Society of Ireland will make a further contribution at a later appropriate stage on the processes of such a Judicial Appointments Commission. In keeping with the productive deliberative process adopted by the Department of Justice and Equality on the legislation, the Law Society suggests that the Judicial Appointments Commission should adopt a similarly inclusive and deliberative process when it begins to develop its standards and processes.
- 1.11. In the interim, this submission on the Scheme will specifically address the following issues:
  - I. The composition of the Judicial Appointments Commission
  - II. The processes of the Judicial Appointments Commission

- III.** The interplay of merit and diversity in judicial selection
- IV.** Diversity
- V.** Reducing perceptions of political patronage in judicial selection
- VI.** Eligibility for judicial office and barriers to applicants for judicial office
- VII.** The treatment of judicial promotions and selection of court presidents



## Issue I – The composition of the Judicial Appointments Commission

- 2.1. The Society welcomes the proposal of the government to have a reformed Judicial Appointment Commission with enhanced non-legal representation. The Society notes that the government has adopted an approach that is consistent with the recommendations of the Society's submission in 2014; an increase in the number of lay members from 3 to 6 lay members and that these lay members will be recruited through an open competition. The Society is strongly of the view that such increased representation of lay members is important for two reasons: the first is that it ensures that there is a measure of diverse public interest represented in the judicial selection process. This is especially important in circumstances where the Commission will make a reduced number of recommendations, thereby decreasing the discretion of the government who had previously represented the general public interest in the judicial selection process. The alternative (a reduction in government discretion with no balancing representation of lay members) would result in an overdependence on legal and judicial representatives in judicial selection, which raises two concerns: a threat of self-replication by the existing judicial and legal members and too little involvement by representatives of the public interest. The judiciary serves all of society and it is important to represent this in the profile of those involved at all stages of judicial selection.
- 2.2. In its 2014 submission, the Society set out its detailed examination of the structure and operation of other judicial selection commissions, particularly those in the jurisdictions of the United Kingdom. The Society notes that in Northern Ireland, England and Wales and Scotland there is a near balance between lay members and legal members. Efforts to enhance the proportion of lay members on judicial selection commissions in these jurisdictions stem directly from a concern to have greater public involvement in the selection of judges, which the Society regards as being central to the public interest. In each jurisdiction the inclusion of a large number of lay people was designed as part of a statutory commitment to enhance diversity in judicial selection.
- 2.3. The Society further notes that recruitment of lay members by open competition is the approach taken in the jurisdictions of the United Kingdom. The Society has considered the operation of this practice in the United Kingdom and notes that the persons chosen in this system appear to be of uniformly high calibre and professional background; including senior academics from a range of disciplines, people from the commercial world and people with broad senior public sector experience. The Society notes that the Scheme of the Judicial Appointments Commission Bill 2016 has employed a complicated list system for identifying the skills appropriate for the lay members. It is suggested that, rather than be overly prescriptive in legislation about the skills that are required, the government should adopt an approach which is to ensure that lay members are persons who are not, and never have been, legal practitioners, that they are people of significant experience across a range of activities and that they be persons of good character and standing. This is consistent with the approach taken in the jurisdictions in the United Kingdom and the open competition process has proved capable of selecting high calibre lay members for each judicial selection commission.

- 2.4. The Society notes the proposal of government for the Commission to be chaired by a layperson. The Society welcomes this proposal as one part of a comprehensive package of measures designed to ensure a broad public representation in the selection of judges. The legislation currently provides that the Judicial Appointments Advisory Board is to be chaired by the Chief Justice. The Society recognises that the change proposed by the Government could be regarded as a significant step away from the current model. However, the Society has given this issue very careful consideration and notes, in particular, that the skills required for the management of an executive agency of the kind proposed, as well as the management and recruitment background experience that will be essential for guiding the direction of this new Judicial Appointments Commission, are not necessarily skills that are to be found among the judicial experience.
- 2.5. In this respect, the Society takes comfort in the fact that judicial selection is not a natural or necessary part of the judicial function in the way that responsibility for the administration of justice is part of the judicial function. The Society also takes comfort in knowing that the new system is in every respect transformative of the old system, including in terms of the demands of time that members of the Commission will be required to devote to its work. In addition, the Society is very aware of the many legislative and constitutional duties and responsibilities that are already required of the Chief Justice; for example, running the Supreme Court, the Courts Service, the Superior Courts Rules Committee as well as hearing cases and writing judgments of the Supreme Court. As a result, in taking all of these factors into consideration, the Society is also of the view that the legislation should be structured to give the Chief Justice maximum flexibility either to sit as a member in their own right on the Commission or to nominate a judicial member. Such an arrangement will facilitate the best of both worlds by preserving the invaluable insight, experience, and judgment that the office-holder of Chief Justice can offer, while enabling the appointment of a Chairperson with senior-level recruitment and management experience. Such an individual will have the necessary, advanced, professional competencies and practical resources at their disposal, to focus entirely and solely on the matter of applying best-practice processes to judicial appointment.
- 2.6. The Society notes, and welcomes, that the selection of the Chairperson will be performed through open competition and believes this open competition should have, as its highest priority, the recruitment of a candidate with senior professional recruitment experience, board management and governance experience and experience of identifying and engaging highly skilled professionals.
- 2.7. The Society is concerned about the proposed judicial membership of the Judicial Appointments Commission. The judicial membership of the Commission is set out as being the Chief Justice (or the next most senior judge of that Court) and the President of the Court of Appeal or the President of the High Court as decided between them. The Society is of the view that this is an unworkable formula and would welcome greater certainty on the judicial membership of the Commission in the forthcoming Bill.

- 2.8. In any event, the Society is concerned that this proposed composition consists of too great a representation from members of the senior judiciary at the expense of representatives from the courts of local and limited jurisdiction. The vast bulk of judicial vacancies are in the Circuit and District Court and these are the courts where:
- a. Most citizens will meet the justice system
  - b. There are the most judges (and therefore the most appointments to be made over time)
  - c. There is less political scrutiny of appointments
  - d. There has to be a range of judges with suitable skills and personalities to meet the needs of the court lists and deal with the volume of people competently and sensitively.
- 2.9. For these reasons the Society recommends that the government should reconsider the proposed judicial makeup of the Judicial Appointments Commission either to:
- Include an express reference to the President of the District Court (or nominee) as an alternative to a judge of the superior courts, or
  - Provide that the judicial members may be nominated by the Chief Justice and that such nominees, while at the discretion of the Chief Justice, must reflect the different court levels and different nature of court work. Members appointed in this way would be appointed for a pre-determined period (comparable to the period of the lay members) as continuity in the membership of the Commission is necessary.
- 2.10. The Society notes that the President of the relevant court will attend the relevant deliberations of the Judicial Appointments Commission on vacancies on their court. Notwithstanding this, the government should reconsider the proposal in the Scheme along the lines recommended by the Society to ensure a better balance among the judicial membership of the Commission.
- 2.11. The Society is disappointed that there is only one solicitor on the proposed Judicial Appointments Commission. The principle of proportionate representation for the representatives of the legal profession has already been accepted by the Oireachtas. The Legal Services Regulatory Authority has two solicitors and one barrister in recognition of the very different numbers of practising lawyers in those professions. In fact, this does not go far enough as the actual ratio of practising solicitors to barristers is approximately 4:1.
- 2.12. The Society questions the continued membership of the Attorney General on the proposed Judicial Appointments Commission. If the new Commission is to be genuinely independent in its function there should be no reason for the Attorney General, who also sits at the Cabinet table, to participate in discussions of the Commission. The Attorney General should give his or her perspective at Cabinet or in the course of discussions with relevant Cabinet members following receipt of recommendations made to government by the Commission. Furthermore, as the Attorney General is a major purchaser of legal services in the State, there is a risk of a conflict of professional interests in the Attorney being a central element at each stage of the judicial selection process. There is no good reason why the Attorney must be a member of the Commission. It is not the standard practice in comparable jurisdictions,

it diminishes the independence of the Commission, and the Government will have the benefit of the advice of the Attorney at a political level in any event. The Society has as one of its central functions an ongoing vigilance for the protection of the independence of the legal profession. When an obvious conflict of interest such as this arises, it is the duty of the Society to challenge it. This is a brand new system and, as a result, assumptions about the merit of the status quo must be challenged.

- 2.13. The Society also queries whether the renewal of members of the Commission (see Head 7, subhead (8), pg. 15<sup>1</sup> of the Scheme) is also subject to a resolution of the Oireachtas.

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<sup>1</sup> Head 7, sub-head 8, pg. 15: *“The term of appointment of members appointed to the Commission pursuant to subhead (2), other than judicial members, shall be 3 years renewable for one further term of 3 years.”*

## Issue II – The process of the Judicial Appointments Commission

- 3.1. In its 2014 submission, the Society stated that the assessment part of the appointment system needed to be radically changed to ensure a more substantial assessment process is conducted. Accordingly, the Society made detailed recommendations on proposals to reform and update the processes of the Judicial Appointments Advisory Board. These proposals focused on a more formal evaluation system that included processes such as review of curriculum vitae, online preliminary testing, an interview process and other assessment tools. The Society takes the view that such professional assessment tools are both necessary and appropriate for the assessment of candidates for judicial office. The proposed Judicial Appointments Commission should be specifically empowered to perform such a range of professional assessment procedures.
- 3.2. The Society is of the view that, once established, the Judicial Appointments Commission should be given some time to research and examine comparable professional assessment tools in different jurisdictions as well as best recruitment practice for senior appointments in the public and private sector. It is essential that the Commission start its work having had the benefit of such research and process development. The credibility of the Commission will be enhanced by a strong start that uses the best practice from its first assessment process.
- 3.3. The Society notes with approval that the government has committed to moderate funding for the proposed Judicial Appointments Commission. A policy commitment to ensuring the provision of enhanced professional practices to be adopted and sustained by the Judicial Appointments Commission will necessarily require greater supports than were available to the JAAB. The Society notes that approximately €0.5 million has been allocated for the Commission. The Society would like to see greater detail on how this is to be used, the number of staff that will be available to the Commission and questions whether this figure will be enough to enable the type of robust, contemporary recruitment practices that are essential for the success of the Commission.

## Issue III – The interplay of merit and diversity in judicial selection

- 4.1. In its 2014 submission, the Society emphasised the importance of selecting judicial candidates based on merit. The Society outlined various merit standards used internationally and how they are used by judicial selection commissions, especially those in the United Kingdom. The Society wishes to stress that it believes it is important that the legislation should include a commitment to recruiting judges on merit alone but acknowledges that merit may come in many forms. The Society again wishes to challenge out-dated concepts of merit being coterminous with decades of personal experience of advocacy or settling personal injury claims. Merit is not necessarily the status quo, merit may be achieved on different grounds. The Society wants to ensure that the Judicial Appointments Commission has the authority and flexibility to determine merit criteria that may be adopted on a 'per court' basis. Merit criteria that reflect and understand the complete work of legal professionals on behalf of their clients including the very complex pre-litigation, personal advisory and commercial transactional work that is the bulk of legal services in Ireland today, and that such criteria may be periodically revised to reflect the experience of the Commission over time.
- 4.2. In its 2014 submission, the Society detailed the range of characteristics that contributed to merit including professionalism, communication, integrity, decision-making, efficiency, leadership and management. It is acknowledged that there is a range of characteristics that may contribute to judicial merit. It is submitted that the Commission will need to carefully reflect on the range of skills that it wishes to consider as contributing towards merit in recruiting future judges.
- 4.3. The Society further observes that merit is not simply depth of legal knowledge alone. It is essential to have technical merit but it must be accompanied by personal and professional skills that enable a prospective judge to manage a court fairly, efficiently and with appropriate consideration for litigants and witnesses. There is an important element of judicial education for any prospective judge, especially as legal practices become more specialised. However, the personal and professional skills of efficiency and humanity are core skills that are essential for any judicial applicant and, it is submitted, override technical merit that is not accompanied by such skills. It is submitted that the assessment of such personal skills may be an area where the observations of the lay members of the Commission can add increased tangible value to the assessment processes through lay members observing candidates at interviews or on assessment days.
- 4.4. The Society observes that from time to time the courts require practitioners with particular legal expertise to fill a perceived gap in the courts. It is submitted that this assessment should not be left to the Judicial Appointments Commission alone but that there should be some consultation with the Minister and President of the relevant court. The reason for this is that, while it is essential to enhance public representation in judicial selection, a new Commission with a lay chairperson and increased lay membership needs to be responsive where there is particular need for certain expertise. The legislation should include some flexibility to allow the Minister to periodically consult with the Chairperson of the Commission to give direction where there is a particular need. This point is made as a

balance to the impact of a reduced political and judicial membership of the Commission – communication channels will need to be established in law so that the Commission can be responsive to the actual needs of the day of the different courts.

## Issue IV – Diversity

- 5.1. The Society reaffirms its commitment to securing diversity in the judiciary. The Society considers that greater diversity in the legal profession should be reflected in the judiciary. For example, the Society has been successfully operating a “*Law Society Access Scholarship Programme*” since 2001. Its aim is to financially and practically assist students from socio-economically disadvantaged backgrounds to enter professional legal education. The Society believes that the Access Programme is helping to promote greater diversity within the solicitors’ profession, and that this is vital in building a legal profession that reflects the diversity of the society it serves. Similarly, the Society believes that a judiciary that is reflective of society is absolutely essential for the enduring legitimacy of the judicial branch of government. There is a broad diversity of legal experience in this State, including 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 and experience among this very broad pool of practitioners who offer a broad range of legal and personal and professional experience. The Society is pleased to see that the approach in the Scheme is one of inclusivity, and that it favours opening up judicial appointments to the broadest range of practitioners.
- 5.2. However, the Society notes once again that, while all judicial appointments are currently open both to practising solicitors and barristers, the bulk of judicial appointments continue to be made from the barrister profession. The Law Society represents the vast bulk of lawyers in this State, over 80% of the practising lawyers in Ireland and is comprised of 51% female practitioners. Yet there have only been eight solicitors appointed to the Superior Courts since 2002, no solicitor on the Supreme Court and no female solicitor at all on any of the Superior Courts. This falls short of the commitment to enhance judicial diversity. Diversity must include the appointment of more solicitors and more women. This is necessary as a matter of logic, as a matter of good public policy and as a matter of fairness.
- 5.3. The paucity of appointments of solicitors to the Superior Courts can no longer be explained or sustained. Solicitors have been eligible for appointment to the Superior Courts since 2002. In the fourteen years since then, there have been 90 appointments to the High Court, Court of Appeal and Supreme Court. Of those, only eight have been solicitors. Accordingly, between 2002 and 2016, the branch of the legal profession with approximately 80% of the legal practitioners in the State has produced just 8% of the Superior Court judicial appointments. This cannot be reconciled with the public interest, the intent of the Courts and Courts Officers Act 2002 or the desirability for a broadly experienced judiciary reflective of the community it serves. 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 profession that deals with the public directly, often at the most difficult times in their lives. Solicitors bring an experience and humanity to the courts in addition to their technical legal skills and experience of management. The failure of government to appoint more solicitors to the Superior Courts simply cannot be defended. The Society notes that concerted political efforts have been made since 2011 to appoint more females to the courts and, in particular, to the Superior Courts. This has been a thoroughly appropriate and welcome political intervention that was based on a desire to achieve a



more reflective judiciary. It is submitted that a comparable political approach is necessary in the appointment of a greater number of solicitors, who represent the broadest and most societally and geographically diverse portion of the legal profession.

- 5.4. The Society is aware that diversity in the judiciary is a key concern of policy makers. The Society was pleased to note the concerns raised by Deputies and Senators in the Joint Oireachtas Committee on Justice and Equality in November 2014 in a debate on reforming judicial selection processes<sup>2</sup>. For example, Deputy (now Minister) Finian McGrath raised concerns about ensuring a broad range of people from different socio-economic backgrounds had access to the professions, and therefore the judiciary. Similarly, Deputy Alan Farrell raised concerns about the narrow backgrounds of judges. While both branches of the profession offer access programmes and support for students, the structure of professional training as a solicitor makes the profession greatly more accessible to the broadest range of candidates. Trainees are paid during their training contract, many have their fees paid for them and they are capable of earning money immediately as a solicitor employed in a practice, including the cost of their insurance and practising certificate. By contrast, students wishing to become barristers must fund their training period in the Kings Inns, fund their professional training period as a devil and pay their own fees and insurance at every stage. It is noteworthy that Dr. Jennifer Carroll MacNeill, a recognised subject expert on judicial selection, commented in the course of the Oireachtas debate that the most immediate route to diversity in the judiciary was the appointment of more solicitors<sup>3</sup> - a profession with fewer barriers to entry than the barrister profession because of the financial structure of its training programme<sup>4</sup>.

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<sup>2</sup><http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/committeetakes/JUJ2014112600002?opendocument>

<sup>3</sup> **Deputy Alan Farrell:** I do not wish to give the impression that I was suggesting the higher number of women in the lower courts would naturally trickle up to the higher courts. That was not my point. I was stating this was probably one of the many ways of addressing the issue. On diversity, Dr. Carroll MacNeill's comments prompted me to think about the role of class in representation among the Judiciary, the Law Library and, albeit probably to a lesser extent, solicitors. As has been pointed out, fewer solicitors than barristers are appointed to the Bench. There are fewer solicitors appointed to the bench than there are barristers. We have heard of one witness's experience on getting to the point of a career by starting as a solicitor and then becoming a barrister by getting the BL degree. Given the cost of that education, will there ever be a time when we have proper diversity on the bench in terms of background, social class and so forth. We do not have it in our legal representation in the halls of justice. I do not expect it will happen at the judicial appointments level either. **Chairman (David Stanton):** Is there any hope for change in the future? **Dr. Jennifer Carroll MacNeill:** It depends on the number of solicitors appointed. That is the most immediate solution.'

<sup>4</sup> **Deputy Finian McGrath:** All the witnesses spoke about diversity. I think we have to widen that issue out and not just in terms of gender. My first question concerns public perception of the legal profession, the Law Library and judicial appointments, which is that it is a strong, class-based system from which certain people are excluded.

It is interesting that Dr. Carroll MacNeill mentioned Australia. A friend of mine emigrated there 26 years ago. He is a brilliant educationalist, from a low income family. He tried to get into the Law Library but doors were banged in his face. He then emigrated to Australia with his wife and three children. Within six months he was a practising solicitor and within ten years he was a judge. He always says it is a closed-shop back in Ireland and there is elitism here. I am talking about 26 years ago, but is that still the case here in 2014? Is it still the case that people from working class backgrounds and low income families face major barriers when it comes to getting up the legal profession ladder? **Chairman:** That is a good question. Who wants to take it? **Dr. David Kenny:** It is difficult to say. It would be a fascinating research subject to take a proper look at this question. We know that there are incredible barriers to entry for the Bar. One of them is the fact that it is expensive to train at the King's Inns, which is the only option at the moment. There is a huge up-front cost for that and there is no one else to cover it. One must borrow or find money

- 5.5. A further element of diversity is geographical diversity. A 2004<sup>5</sup> study of the backgrounds of High Court and Supreme Court judges found that the judges were overwhelmingly Dublin based and lived in Dublin immediately prior to their appointment. It is submitted that the increased appointment of solicitors, who practice in every county in the State, would enhance the geographical diversity of the judiciary, especially in the High Court, Court of Appeal and Supreme Court.

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somewhere to pay for that. One then faces two years of devilling as a junior barrister for which one will earn a little money. One then goes out on one's own and tries to find work, but it is unclear what income one can expect in that period. It has been said a lot recently that there is a significant improvement in the number of people going to the Bar, both in terms of gender balance and background. The question is whether or not those people are staying at the Bar. The attrition rate at the Bar is huge. A large number of people do not stay past a few years because it is not financially viable for them to do so. The real question we need to ask therefore is whether or not - even if there is a greater diversity of entry to the King's Inns - people are staying to reach the senior level and then become judges. I do not know the answer but I would suspect - given the barriers are so substantial and given how many people do not stick with the profession - that it is probably still a significant issue. **Dr. Jennifer Carroll MacNeill:** The appointment of solicitors is an important element of that. For example, when I was making the decision to become a legal professional, I simply could not afford to become a barrister so I became a solicitor first. I could not afford the fees for the King's Inns and I certainly could not afford to have no income, in essence, for seven years. To become a solicitor, I got an apprenticeship that paid my Law Society fees and paid me a stipend. Thus, I qualified as a professional without incurring tens of thousands of euro of debt and would have been able to earn as an employed solicitor from the earliest stage. This was the only route open to me. Given the number of solicitors in the country compared to barristers and the number of appointments made from the Law Library compared with the world of solicitors, the possibilities of becoming a judge from that route are much narrower.'

<sup>5</sup> Carroll, J. (2005) "You be the Judge: Parts I and II – A Study of the Backgrounds of Superior Judges in Ireland in 2004" (2005) 10 Bar Review at 153 and (2005) 10 Bar Review at 182.

## Issue V – Reducing perceptions of political patronage in judicial selection

- 6.1. In its 2014 submission, the Society submitted that it is important for the public interest that there be a significant role for public participation in judicial selection. In Ireland, that has historically been provided through the involvement of the government, the political majority of the day. While the Society believes that the current constitutional arrangements should be maintained, i.e. that government should have the final decision on the person to be chosen as a judge, the Society maintains its view that there are compelling public policy reasons for the reduction of the discretion of the government in choosing judges.
- 6.2. These public policy reasons include a public concern that, over time, political party patronage has played too great a part in the selection of Irish judges. Whether or not this is true in general or true for all courts, any such perception is damaging both to the reputation of the judiciary and the process of judicial selection. Accordingly, the Society strongly welcomes the proposal of the Government and the Minister for Justice and Equality<sup>6</sup> to introduce a statutory prohibition on all forms of canvassing for judicial office, including the canvassing of any elected persons. This is a targeted and proportionate response to concerns about the role of political patronage in judicial selection but it will be important to observe how it works once enacted.

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<sup>6</sup> 'Before I turn to other matters, I would mention to the committee that I intend to include in the legislation a prohibition on canvassing, which would make it unlawful for any person, candidate, applicant or otherwise, to seek to interfere with or compromise in any way the selection procedures. This issue has been mentioned by the Judiciary as well and subject to Government approval, a relevant provision should form part of the reforms. We see this, for example, when the new police authority is appointing people to promotions within the ranks of An Garda Síochána. There will now be a specific clause saying that it is an offence to canvas for a promotion. It will be a disqualifying offence. That has to be drafted.' Minister for Justice and Equality, Frances Fitzgerald TD, January 25, 2017, Joint Oireachtas Committee on Justice and Equality, Debate on General Scheme of the Judicial Appointments Commission Bill 2016

## Issue VI – Eligibility for judicial office and barriers to applicants for judicial office

7.1. The Society recommends that eligibility for judicial office be harmonised across all courts. The purpose of legislation is to set the basic criteria for judicial office. The Society takes the view that this should be set at a high level but that it should be as broad as possible, thereby allowing the broadest range of senior legal professionals access to consideration for judicial office. It is for the Judicial Appointments Commission to consider the candidacy of eligible applicants. It is important that the legislation should not exclude groups of otherwise suitable senior legal professionals from all judicial offices.

7.2. Specifically this means:

- Harmonising the number of years of qualification that makes a candidate eligible for judicial office at 10 years,
- Ending the anomaly whereby District Court judges are not eligible for appointment to the High Court,
- Removing the current requirement for two years continuous practice immediately prior to appointment,
- Removing the anomaly that superior courts vacancies are qualified in law by a requirement for ‘appropriate knowledge and experience of superior court practice and procedure’ - superior court vacancies should be handled within the same structure as other court vacancies, and
- Including the broadest range of legal professionals as eligible for judicial office including qualified lawyers with extensive senior legal academic experience.

7.3. As part of measures to harmonise the eligibility for all courts it is submitted that the following language in Head 21 (b) of the Scheme should be omitted:

*(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*

7.4. This language replicates the provision in the Courts and Courts Officers (Amendment) Act 2002 that was inserted when solicitors were allowed to be appointed to the High Court and Supreme Court. It should be removed for the following reasons:

- 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,
- It is unnecessary in any event as the Judicial Appointments Commission will be required to set detailed eligibility criteria for each court,
- The current requirement operates as a barrier to diversity, and
- It is inconsistent with the proposal to allow legal academics be appointed directly to the courts.

- 7.5. The Society supports the government's proposal to make legal academics eligible for judicial appointment. It is important for the independence and quality of the judiciary to make the widest pool of legal practitioners and experts eligible for judicial appointment. The Society observes that, in drafting this provision in the Bill, the government should make sure to allow for practitioners who have spent time both as practising lawyers and as academics. It should also be possible to amalgamate periods of practice as a solicitor/barrister and legal academic for the purpose of eligibility, and clarity may be needed on this in the forthcoming Bill.
- 7.6. The Society observes that a particular barrier to judicial office arises in the form of the new pension arrangements for prospective judges. The Society is aware that this measure is part of a broader 'public pensions' reform, and makes no comment on that broader policy. However, this broader policy has produced an anomaly that the Society wishes to highlight to Government. It is submitted that the changed pension arrangements, and specifically any need to make a large upfront payment upon accepting judicial office, will serve to restrict, in practice, the pool of applicants for judicial office to those that are at that specific time financially capable of accepting such an offer. The Society does not believe it was the intention of government to restrict access to judicial office in this way and notes that such restriction is inconsistent with the government's stated preference of ensuring enhanced diversity in the pool of judicial candidates.
- 7.7. The Society wishes to query the grounds for Head 22 (c), which provides that an applicant be suitable on the grounds of health. The Society is highly attuned to the concerns repeatedly expressed in the Annual Reports of the Judicial Appointments Advisory Board relating to some scrutiny of candidates on the grounds of health. While the Society supports the practical concerns raised by the JAAB, it believes the government needs to reflect carefully on how this provision can be included in law. It is essential that any differential treatment be handled with reference to modern standards in Irish and European law and to be very conscious that an exclusion on the ground of health may come close to an exclusion of people with disabilities.
- 7.8. A further barrier to entry is the permitted practice of submitting, as part of an application to the Judicial Appointments Advisory Board, references written by sitting members of the judiciary. The Society wishes to point out that as a general principle it is entirely inappropriate for legal professionals to seek, and for members of the judiciary to give, professional references in this way. It is compromising of the independence of the judicial profession that sitting judges should influence the appointment of their successors through the provision of references in support of particular candidates. As a practice, the Judicial Appointments Advisory Board should immediately prohibit the submission of references from sitting judges. As a matter of law and as part of its responsibility to protect the independence of the legal profession, the Government should ensure that the seeking of references from or giving of references by a sitting member of the judiciary will be prohibited in the forthcoming Bill.

## Issue VII – The treatment of judicial promotions and selection of court presidents

- 8.1. The Society notes with approval that the promotion or elevation of judges from one court to another court will now be included in the Judicial Appointments Commission structure rather than being exclusively at the discretion of the government. However, the Society wishes to make some cautionary observations for the drafting of the Bill.
- 8.2. As a matter of practical concern, the Society is of the view that the procedures outlined in Head 32 (*Appointment as Chief Justice, President of the Court of Appeal and President of the High Court*) should also be applied to the judicial offices of the Presidents of the District and Circuit Courts. There is no practical reason why these specific procedures should be limited to the Superior Courts. The remit of Head 32 should perhaps be clarified and be extended to include the District and Circuit Courts.
- 8.3. One of the concerns about the ‘elevation’ of a sitting judge is that it is potentially compromising for judicial independence if a judge is perceived to act in a way that finds favour with the government of the day in the hope of a promotion to another court. The Society notes that, historically, nearly every vacancy on the Supreme Court was filled by the elevation of a High Court judge and that very few concerns about judicial independence were expressed about this practice..
- 8.4. The Society is of the view that judicial promotions have a place in the filling of judicial vacancies but that they must be treated very carefully. On the one hand, the Society agrees that all judicial vacancies should be treated equally and that all applicants, including sitting judges, should be required to participate in a transparent assessment process. On the other hand, sitting judges must be protected from any process of judicial selection that may compromise their individual or institutional independence. Additionally, including judicial promotions in the Judicial Appointments Commission structure also ensures that there can be no perception of sitting judges attempting to act in ways perceived as being favourable to government in the hope of promotion. The Law Society wants to make clear it does not believe that this occurs, and that judicial independence in Ireland is very robust.
- 8.5. However, in designing any new system we need to be clear about its potential weaknesses. It is submitted that the Judicial Appointments Commission will have to exercise particular caution in the treatment of sitting judges as applicants for judicial office. In particular this means that the role of the legal professional representatives and any sitting judges on the Judicial Appointments Commission will have to be carefully considered in the assessment process applied to sitting judges. This is important both for the independence of the legal profession and the protection of judicial independence. Some of the practical difficulties that may arise in the assessment of sitting judges include:
  - How judges give an account of their experience and suitability for another judicial office – are they to provide an account of their judgments?
  - How judges submit themselves for assessment to a body comprising members of the legal profession.

- How judges apply for a promotion to a body where the President of their court may be a member or adviser.

8.6. This will be part of a major area of work for the new Judicial Appointments Commission as it designs its processes and standards. The Society anticipates that the Commission will have a significant body of work in researching and creating these systems as an initial part of its work and prior to beginning its selection exercises. The Society wishes to flag the necessity for some transitional arrangements to be built into the legislation in anticipation of this period of research and design and the continued need to recruit judges to fill vacancies that may arise in that interregnum.

## Conclusion

- 9.1. The Law Society of Ireland is pleased to have had the opportunity to contribute to the development of the new judicial appointments policy and the forthcoming Judicial Appointments Commission Bill 2017. The Society calls on the government to now urgently progress this legislation. Reform of the judicial selection process in Ireland has been under discussion since 2013. The necessity for introducing a reformed process increases with every year and reform is long overdue. It is integral to the administration of justice that the judicial selection system is perceived as being robust and transparent. The Society will make further contributions as appropriate and, particularly in relation to the processes to be adopted by the Judicial Appointments Commission. The Society welcomes this enhanced system for judicial selection and believes that it will contribute significantly to protecting judicial independence, recruiting a high quality judiciary and attracting a broad range of candidates for the judiciary of tomorrow.



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