

Judicial Appointments Commission Bill 2020

Meeting of Joint Oireachtas Committee on Justice

Tuesday, 18th May 2021

Opening Statement of Dr Patrick O'Brien

This statement draws on my written submission to the Committee of 3rd March. In my view the core objectives and approach of the draft Bill are broadly appropriate for the Irish court system. That the judicial appointments process is to be made more structured, formal and transparent is welcome, especially in light of political controversies arising out of appointments in recent years.

It is important to note, however, that international empirical studies suggest very firmly that the primary determinant of judicial independence is legal and political culture rather than formal legal rules. Notwithstanding that the appointment process has sometimes been politicised in Ireland, it has historically produced a high-quality judiciary with a robust culture of independence after appointment. I would not expect the technical details of the new Bill to have any effect on this, but I would caution that there is a possibility that formalisation could have an adverse effect on the diversity of appointments.

1. Diversity (Head 6)

- The formulation of the diversity objectives in Head 6 of the Bill are, in my view, so weak that they will be overshadowed by the merit criterion.
- The role of the Irish language as currently drafted in Head 6 is also potentially a matter of concern as it may pull against the diversity mandate.
- In England and Wales, formalisation of the appointments process did not lead to any significant improvement in diversity in appointments for three key reasons.
 - Firstly, there was a strict focus on merit which had the effect of privileging the qualifications and experience of traditional candidates.
 - Secondly, formalisation removed the Lord Chancellor's capacity to "tap on the shoulder" high quality candidates from underrepresented groups.
 - Thirdly, political involvement is an important driver to greater diversity in appointments.
- I recommend a "balanced slate" approach, in which the Commission is required to put forward an unranked list of 3-5 names that meet the merit requirements for judicial appointment and include candidates that would satisfy the goals of enhancing the diversity and Irish language capacity of the judiciary.

2. Membership of the Commission (Head 9)

- The proposed 50-50 split between judicial and lay members of the Commission seems appropriate given concerns expressed by the judiciary in relation to the 2017 Bill.
- The omission of representatives of the legal professional bodies is, however, relatively unusual by international standards.

3. Recommendations to the Minister/Government (Heads 40, 45 & 51)

- In circumstances where the Commission has been unable to recommend anyone for a judicial post, it is anomalous that the Minister could then proceed to an appointment using the same applications that the Commission has considered. In these circumstances the Commission should be required seek further instructions from the Minister and commence a new recruitment exercise.
- More robust forms of political accountability (eg a statement to the Oireachtas) should be provided for in circumstances where a judge is appointed who has not been recommended by the Commission.

4. Criminal offences (Heads 30, 31 & 65)

- I am unaware of any international equivalent of the offences included in Heads 30, 31 & 65 and the inclusion of these offences requires explanation. The prohibitions on disclosure of confidential material (Heads 30 & 31) seem – in their indictable forms – particularly disproportionate.
- There is a potential for these offences to create a chilling effect on beneficial behaviour, such as JAC members informally encouraging candidates from underrepresented groups to apply for judicial positions.

5. Legal academics (Head 38)

- This head is unduly convoluted. It may be better to allow the Commission to set out the detailed standards required of academic applicants in its recruitment exercises.
- Given the modern career structure of academia, very few legal academics will satisfy the professional practice requirements imposed by Head 38.

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