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**OPENING STATEMENT TO THE OIREACHTAS
JOINT COMMITTEE ON JUSTICE ON THE
GENERAL SCHEME OF THE JUDICIAL
APPOINTMENTS COMMISSION BILL 2020**



**THE BAR
OF IRELAND**
The Law Library

Chairman,

I would like to thank you and the members of the Committee for your invitation to us, as members of the Bar of Ireland, to participate in this public session of the Oireachtas Joint Committee on Justice to set out our views on the General Scheme of the Judicial Appointments Commission Bill 2020.

As you know, the Council made a written submission to the Committee in March 2021 and I would like to highlight some of the key points made in that submission during this opening statement.

It is crucial that the judiciary maintains the highest of standards of competency, impartiality and fairness, and that the public retains the utmost confidence in the judiciary. The judicial appointments process is a vital mechanism for ensuring that these objectives are achieved. There are many aspects of the 2020 Bill that take on board the previous suggestions made by the Council in earlier submissions, including the balance of lay to legal members of the Commission, the preference to have the Commission chaired by the Chief Justice, and the reduction of the number of people on the Commission. There are, however, a number of concerns about the current draft, which remain from 2017 and some new provisions which require some further observations.

ADMINISTRATION OF THE COMMISSION

The Council submits that the establishment of a new separate body such as the Judicial Appointments Commission is costly and unnecessary when the current Judicial Appointments Advisory Board could be reorganised so as to perform the same functions as the proposed new Commission. Alternatively, administrative support functions could be shared with the Judicial Council. It is the Council's view that scarce resources are better used in underpinning and supporting the judiciary in its functions.

MEMBERSHIP OF THE COMMISSION

The Council welcomes the reduction in the number of members of the Commission from 17 to 9 and agrees that a reduced number encourages consensus and aids decision making. However, it is of concern that neither the Chair of the Council of The Bar of Ireland nor the President of the Law Society are included as members of the Commission, resulting in no

member of the Commission representing either of the professions from which candidates may be selected. This is in contrast to the Legal Services Regulation Act, 2015 which includes both the Chair of the Council and the President of the Law Society on the Advisory Committee for the grant of Patents of Precedents. The inclusion of both the Chair and President on that Committee arises from the fact that they are in a position to provide a more complete picture of attributes of applicants that come before that Committee. Appointment as a judge is a unique occupation and the skills required may not always be obvious on paper or indeed at interview.

COMPOSITION OF THE COMMISSION

While the 2020 Bill provides for an alternate to the Chief Justice sitting on the Senior Judicial Appointments Advisory Committee when appointing a new Chief Justice, no provision is made in the Bill for an alternate to the Attorney General when the Attorney General is in fact the applicant for a judicial position. The Bar of Ireland is of the view that where the Attorney General has recused her/himself as s/he is an applicant for such judicial office, an alternate should sit on the Committee. In such situations the expertise, advice, knowledge and skills of the Chair of the Council of The Bar of Ireland would be of particular benefit to the Commission.

SELECTION AND RECOMMENDATION

The Council submits that where there are sufficient suitably qualified candidates, the maximum number of persons recommended to the Minister should be 3 as opposed to 5 as is recommended in the 2020 Bill. There is no rationale for recommending 5 people for one available role, particularly where the recommended candidates are not ranked.

As is evidenced by the long list of recommendations forwarded to the Minister in connection with previous judicial vacancies, many (if not all) applicants will have the requisite experience, competence and good character to satisfy the necessary conditions. The Bar of Ireland recommends that the Commission then undertakes an exercise of ranking such applicants on the basis of merit. This is particularly important if the proposed legislation does not reduce the long list from 5. We recognise that many of the candidates will rank almost equally in terms of merit and does not think it is necessary to rank each candidate from 1 to 5, rather where candidates are of equal merit they may be ranked equally.

The Bar of Ireland recognises that, under the Constitution, the executive retains the power to nominate judges for appointment by the President. We believe that only candidates recommended by the Commission should be eligible for appointment.

However, the Bill provides that where the Commission cannot recommend any of the candidates or can only recommend a lesser number of candidates, then it may provide to the

Minister a statement of the name of each eligible person who made a relevant application. It is not clear why the Minister would receive such a list of names from the Commission, in circumstances where the Commission concluded, having conducted the selection process, that none or a lesser number of candidates were suitable for recommendation.

This suggests that the 2020 Bill envisages that the Minister would appoint a person not recommended by the Commission despite it having conducted, at great expense, the selection process it was tasked with doing. We do not believe that such a provision is necessary and would go so far as to state that it flies in the face of the rationale behind the establishment of the Commission. We would suggest that in such circumstance the position should be re-advertised if no applicant is deemed suitable by the Commission.

The Bar of Ireland welcomes the introduction of a process where judges seeking appointment to a higher court would participate in the same selection process as other candidates thus allowing for a level playing field. With that scenario in mind, the Council notes that appointment to international Courts is not covered by the 2020 Bill and submits that the Bill should include any nomination by the State to international judicial positions, including the EU, Strasbourg and international criminal courts. There is no rationale for treating such category of judge any differently to national appointments.

The Bar of Ireland welcomes the inclusion of objectives relating to equality and diversity in the general scheme of the 2020 Bill. However, the wording in the general scheme of the 2020 Bill suggests that the equality objective, for example, will be viewed through the prism of the judiciary as a whole, rather than in individual jurisdictional Courts. To do so could allow for an over-representation of either men or women on Courts of local and limited jurisdiction with a corresponding under-representation on the Superior Courts or *vice versa*. Such a situation would show that the judiciary as a whole is balanced but could nonetheless leave significant imbalances in particular Courts.

We would also stress that care should also be taken in the drafting of the equality provisions to ensure that a practice does not arise where an outgoing male judge can only be replaced by a man, or where an outgoing female judge can only be replaced by a woman.

The Council welcomes the provision in Head 40 that, in making recommendations for appointment to the Superior Courts, the Commission must be satisfied that each applicant being recommended has appropriate knowledge of the decisions of the Superior Courts and has appropriate knowledge and experience of court practice and procedure.

Curiously there is no similar requirement that applicants being recommended by the Commission for appointment to either the Circuit Court or the District Court should have appropriate knowledge and experience of the practices and procedures of those Courts. The Council submits that such a stipulation should be included.

The Bar of Ireland does not believe that any case has been made out for the extension of eligibility for appointment to legal academics and that what constitutes a legal academic has been poorly defined. It is submitted that the inclusion of such a category is inconsistent with requirements for candidates to demonstrate experience and competence. In the case that provision is made for the inclusion of legal academics as a category of persons eligible for appointment, it is submitted that practice as a barrister or solicitor for a period of four years is an insufficient period within which to acquire and/or be able to demonstrate the necessary competence, probity, knowledge of decisions and knowledge of practice and procedure that will be required of applicants. It is submitted that the period of four years should be increased to equate with the period of practice required of barrister or solicitor applicants.

CONCLUSION

The Bar of Ireland believes that if the foregoing matters were addressed, the 2020 Bill would be significantly strengthened. This, in turn, would ensure the judicial appointments process would continue to select judges with the highest standards of competency, impartiality and fairness which would ensure the continued public trust and confidence in the judiciary.

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Member of the Inner Bar - Barrister

Chair, Council of The Bar of Ireland