DÁIL ÉIREANN

AN COMHCHOISTE UM DHLÍ AGUS CEART

JOINT COMMITTEE ON JUSTICE

Dé Máirt, 18 Bealtaine 2021

Tuesday, 18 May 2021

Tháinig an Comhchoiste le chéile ag 3.30 p.m.

The Joint Committee met at 3.30 p.m.

Comhaltaí a bhí i láthair / Members present:

Teachtaí Dála / Deputies	Seanadóirí / Senators
Michael Creed,	Gerry Horkan,*
Pa Daly,	Vincent P. Martin,
Martin Kenny,	Michael McDowell,
Thomas Pringle,	Lynn Ruane,
Niamh Smyth.	Barry Ward.

* In éagmais / In the absence of Senator Robbie Gallagher.

Teachta / Deputy Jennifer Carroll MacNeill sa Chathaoir / in the Chair.

General Scheme of the Judicial Appointments Commission Bill 2020: Discussion

Vice Chairman: Apologies have been received from Senator Gallagher. Senator Horkan is attending in substitution for him. The Senator is very welcome. The purpose of the meeting is to have an engagement with a number of stakeholders who have made written submissions on the general scheme of the Judicial Appointments Commission Bill 2020. All witnesses are appearing virtually before the committee this afternoon from a location outside the Leinster House precincts. I welcome the witnesses to our meeting.

We are joined from the Law Society of Ireland by Mr. James Cahill, president, and Ms Mary Keane, director general; from the Council of the Bar of Ireland, Ms Maura McNally, chair, and Ms Mema Byrne, member; Dr. Patrick O'Brien, from Oxford Brookes University; Dr. Laura Cahillane, University of Limerick; Dr. Tom Hickey, Dublin City University; and Dr. David Kenny, Trinity College Dublin. I congratulate Ms Keane on her recent appointment.

I ask members and witnesses to mute their devices while not contributing to avoid picking up background noise or feedback. I also ask that they use the "raise hand" function when they wish to contribute. As usual, I remind all those in attendance to ensure their mobile phones are on silent mode.

Before I invite the witnesses to deliver their opening statements, I advise them of the following regarding parliamentary privilege. All witnesses are reminded of the long-standing parliamentary practice that they should not criticise or make charges against any person or entity by name or in such a way as to make him, her or it identifiable or otherwise engage in speech that might be regarded as damaging to the good name of a person or entity. Therefore, if statements are potentially defamatory in relation to an identifiable person or entity, they will be directed to discontinue their remarks. It is imperative that they comply with any such direction.

For witnesses attending remotely outside of the Leinster House campus, there are some limitations to parliamentary privilege and, as such, they may not benefit from the same level of immunity from legal proceedings as a witness who is physically present does. Witnesses participating in this committee session from a jurisdiction outside of the State are advised that they should also be mindful of their domestic law and how it may apply to any evidence they may give.

Members are reminded of the long-standing parliamentary practice to the effect that they should not comment on, criticise or make charges against a person outside of the House or an official either by name or in such a way as to make him or her identifiable. For members who are participating remotely, I ask them to keep their devices on mute until they are invited to speak. When speaking, where possible I ask that they should have their camera switched on and be mindful that we are in public session.

In addition, I remind members of the constitutional requirements that they must be physically present within the confines of the place in which the Parliament has chosen to sit, namely, Leinster House, in order to participate in public meetings. I will not permit a member to participate where he or she is not adhering to this constitutional requirement. Therefore, any member who attempts to participate in the meeting from outside of the precinct will be refused.

I remind members and witnesses that they are expected to strictly adhere to the subject matter scheduled for discussion today. Any deviation from these matters will be addressed through the Chair.

I will invite each organisation in turn to make an opening statement for a maximum of five minutes. Once all the opening statements have been delivered, I will call on members of the committee in the order that they indicate to me, to put their questions. In the remaining time there will be an opportunity for supplementary questions. The duration of the meeting is limited. Therefore, we must strictly adhere to the time allocated. All speakers should focus on that in their contributions. I invite Mr. Cahill to make his opening statement.

Mr. James Cahill: The director general and I are very pleased to attend this event. The necessity to introduce a reformed process for judicial selection becomes more urgent with each passing year. Our recent submission is the third we have made. The others were made in 2014 and 2017. I wish to highlight five areas which require further careful consideration during the drafting process. They are: membership of the commission; the procedures committee; merit, gender and diversity; legal academics; and miscellaneous matters.

We make a number of points regarding membership of the commission. The 2016 Bill provided that "a practising solicitor nominated by the President for the time being of the Law Society of Ireland" would be a member of the commission. The provision has not been retained in the general scheme. It is critically important that a representative from each branch of the profession is appointed to the commission. The general scheme provides that the Attorney General will participate in the commission as a non-voting member. The society's long-held view is that it is not appropriate that the Attorney General would have a dual function in the process, both at the commission and the Cabinet table. The reasons for this are listed in our submission.

The society cautioned against creating a commission which was top-heavy in terms of senior members of the Judiciary, at the expense of judicial representatives of the courts of local and limited jurisdiction. We continue to believe that balance among the judicial membership of the commission is crucial. However, the scheme provides that a Judicial Council nominee will chair the commission in the absence of the Chief Justice. The chair of the procedures committee will be the Chief Justice or his or her nominee. In any other committee which is formed to assist the commission or the procedures committee, the chair will be the Chief Justice or a nominee determined by the Chief Justice. These substantial responsibilities raise a question as to whether the Judicial Council nominees are more likely to be senior, long-standing members of the Judiciary. If so, their experience of legal practice - as court users rather than as members of the Judiciary - will be at a considerable remove from their present-day experience. I reiterate that the Law Society welcomes the participation of lay members on the commission in the manner proposed by the general scheme.

The procedures committee will be the engine room of the process. Our previous submissions advocated for more formal evaluation procedures in the consideration of judicial appointments. We believe that is necessary to streamline and aid transparency in the process and, as such, the creation of a procedures committee to perform prescribed functions is welcome. The question has been raised whether sufficient detail has been provided under heads 55 to 60 to deliver that transparency. Transparency has been the subject of debate.

The credibility of the commission will be greatly enhanced by a solid start. At the outset, we suggested that the commission conduct a detailed analysis of international best practice in judicial appointments so that the best elements of other systems can be considered in an Irish

context. It will also be critically important to ensure that sufficient expertise is available to the procedures committee to enable it to draft and deliver to the commission comprehensive "Statements of Procedures" and "Statements of Relevant Skills and Attributes" for each class of court business and every area of law. The expanse of that task cannot be underestimated.

We believe the commission should carefully reflect on the range of skills it wishes to consider as contributing to the concept of "merit" in recommending persons for appointment. It should also consider the European Commission's extensive work on judicial training and education in EU law as well as the Law Society's work on gender equality, diversity and inclusion in the Irish legal system.

As regards diversity between the branches of the profession, we have proposed that a comparable approach should be taken in order to increase the number of solicitors being appointed to judicial office. There is the potential to provide greater diversity in eligible candidates for judicial appointment. However, head 38 could be widened to increase the pool of legal academics who are eligible, which, in itself, has potential to achieve greater diversity among the members of the Judiciary. We consider that the requirement for legal academics to have 12 years' standing and to have practised for at least four years is at odds with the general thrust of the scheme, which is to make judicial appointments on merit. We propose removing the four-year threshold and propose that an academic will be deemed to be appropriately qualified where, at the time of such appointment, they are a legal academic of 12 years standing, or then just a solicitor or barrister within the meaning of the Legal Services Regulation Act 2015.

A further point relates to confidentiality and the conditions to be satisfied in recommending names to the Minister. I wish to also highlight the issue of judicial references. On that, I would simply say that the practice of submitting references from sitting or previous members of the Judiciary as part of the application process should cease.

We welcome the legislation. Judicial appointments are, of course, a vital component of the proper administration of justice in the State and we look forward to today's debate. I thank the members for their time and attention.

Vice Chairman: Thank you for your contribution, Mr. Cahill. I totally agree with you on the point about judicial references. It has been a bizarre oversight, both for legal professional independence and judicial independence. It has been very curious over time. On the procedural point, although, arguably, it could always have been done under the current arrangements, the Law Society has been totally consistent on the need for representation of solicitors, and they have been an important counterpoint to the "being known" phenomenon that has operated for many years within the Judicial Appointments Advisory Board for lack of other procedures to identify whether people were appropriate.

We move to the Bar of Ireland. I call Ms McNally.

Ms Maura McNally: I thank the committee for inviting us today. This opening statement is premised upon our earlier submission of 2021 but we also made submissions in January 2017. I do not intend to open those submissions but they should both be on the committee's files.

We are of the opinion that it is crucial the Judiciary maintains the highest standards of competency, impartiality and fairness, and it is essential that the public retains confidence in its Judiciary in order to ensure appropriate rule of law. The judicial appointments process is a vital mechanism for ensuring that those aims and objectives are achieved.

There are many aspects of the general scheme of the Bill which take on board our previous suggestions, including the balance of lay members on the commission, and the number of members of the Judiciary and of the Bar and of the Law Society. However, there are a number of concerns in respect of the new judicial appointments commission as proposed. There is no automatic inclusion of the chair of the Bar of Ireland, nor automatic inclusion of the president of the Law Society. It is our submission that those two persons, whoever they may be in the future, are best positioned to advise as to the suitability of either a practising barrister or practising solicitor. For example, in my role as chair of the Bar of Ireland, I am conversant with the reputations, standing, competency and areas of speciality of the members of the Bar of Ireland, and I am in a position to advise the Government, which is basically the role of the commission when it comes to appointing new members of the Judiciary. I submit that, in those circumstances and premised upon that unique knowledge, the chair of the Bar of Ireland and, in the case of solicitors, the president of the Law Society, should be included on the commission.

There is logic to reducing the number of those on the commission, such as, for example, that smaller numbers can lead to greater consensus, but I would also submit that judges, whether they be of the superior courts or, for example, of the Circuit Court or District Court, should also be included in the following circumstances. For example, if it is an appointment to a position of the Circuit Court, the president of the Circuit Court should be invited to that commission to make a submission as to precisely what it is he or she is looking for in a candidate, and, in addition, that president will be aware of the reputation of the person applying. I say that in circumstances where one of the criteria for application is that one must have experience in the practice and procedure of the courts when applying.

There is a limit in the wording of the new Bill. For example, when applying for an appointment to the role of judge of the superior courts, one must show experience of practice and procedure in that court and one must show knowledge of the case law and determinations of that court. However, that is not carried backwards, for example, to the Circuit Court or the District Court, where, we would submit on behalf of the Bar of Ireland, persons who are conversant with the practice and procedure in those courts must show that competency. For example, they must show they are aware of the practice and procedure in the Circuit Court, if that is the position they are applying for, and of the judicial decisions and determinations of that court, and it is similar in respect of the District Court.

As to selection and recommendation, again, I am not going to reiterate the point about experience and having knowledge of the practice and procedure. However, there is an anomaly whereby barristers and solicitors who are in practice are required to show their experience and not only their knowledge of the case law, knowledge of determinations and knowledge of statute, but more particularly knowledge of the practice and procedure. Yet, academics are only required to show four years experience. If anything has taught us since March 2020, it is that we have had some 18 months during which there has been very little learning in the area of practice and procedure for younger barristers and younger solicitors. For example, 18 months of that four years could well be considered written off because they have not seen in practice what happens in the very court to which the person is applying as an applicant to be appointed. There is a very big difference between academic knowledge or knowledge of practice, and experience of practice and procedure in those courts. I submit that the practice and procedure and the experience should be equal for all across the board, whether they be barristers, solicitors or academics. There is no point, for example, having four years of knowledge of practice and procedure from 2000 to 2004, and then applying 17 years later, in 2021, to be appointed to a court that they have not set foot in for almost two decades because they are not knowledgeable

in the area of practice and procedure in that court.

Another issue I would like to raise is in respect of the appointment or the replacement of individuals on the commission. For example, if the Attorney General is an applicant for a position, we think it is very obvious that he or she should recuse himself or herself and that she or he should be replaced by an alternate when an application is being made. It is similar when it comes to judges who have already, shall we say, passed the test at the Judicial Appointments Advisory Board as exists at present. Therefore, where a person was deemed suitable for the Circuit Court but, for example, might now be applying for a position on the High Court, the Court of Appeal or the Supreme Court, we would submit that that person should go through the same rigours as any barrister or solicitor applying, in that he or she may very well have been suitable to the District Court or Circuit Court but that does not automatically mean she or he is suitable for the higher courts.

I think I have taken up my five minutes. I will answer any questions members may have. I refer also to our two previous submissions, particularly the most recent one of this year. I thank members for listening.

Vice Chairman: Thank you, Ms McNally. On a technical point, the 2017 submission is not on file as such, the reason being that it was submitted to a previous committee, which has essentially died. However, we are aware of the submission, it is available and I have read it.

I ask Dr. Patrick O'Brien from Oxford Brookes University to make his opening statement.

Dr. Patrick O'Brien: I thank the committee for inviting me. In this opening statement I will focus primarily on the treatment of diversity in the Bill. Broadly speaking, I think the Bill is a step forward and a good thing but I am concerned about the way in which diversity is treated under head 6. Head 6 introduces three different issues: the idea of merit; diversity, first in terms of gender and then in terms of the make-up of the general population; and linguistic competence criteria, that is, competence in the Irish language. I am concerned that, as drafted, the Bill's focus will be primarily on merit and that this is likely to crowd out concerns about diversity. This is based on the experience of the various UK judicial appointments bodies, of which there are four. UK processes have been formalised steadily over the past 20 years. Part of the reason for doing this was to increase the diversity of appointments made. The practical experience of this, however, has been that it has not happened because there has been a fairly resolute focus on merit in very traditional terms. Diversity is therefore increasing but only very gradually.

Looking at the statistics, the Irish Judiciary under the current system outperforms all the various UK jurisdictions. For example, in England and Wales 32% of judges are female whereas for Ireland as a whole the figure is 38%. If the two supreme courts are compared, it is two out of 12 on the UK Supreme Court and three out of nine on the Irish Supreme Court, although granted that is with some vacancies.

Why has this happened? Particularly in England and Wales we can point to two or three things. First is this strict focus on merit, which privileges traditional qualifications and traditional candidates rather than the potential of candidates. Second is the removal of the capacity to tap eligible candidates on the shoulder. One important thing that has been shown internationally is that if people who might not be traditionally represented are approached directly, often they have not really thought about applying or have not thought of themselves in those terms. That is good at bringing people in. Third is the involvement of politicians. Again, international comparisons show that politics is important as a driver to diversity because if politics accepts

diversity as a goal, it can introduce that element into selection.

Given the way in which the Bill is currently structured, I recommend that head 6 be amended to require the commission to present the Government or the Minister, as appropriate, with a balanced slate of three to five names of which some - at least one - should be someone whose appointment would advance the diversity of the Judiciary as a whole. This could be a way of avoiding what appears to be the slowing down that has occurred under the various UK appointment bodies.

The other submissions I have made are a little smaller. First, regarding the membership of the commission, again the experience in the UK in particular suggests that not a great deal turns on this. Judges tend to have a great deal of influence by virtue of their status and expertise. The omission of representatives from the professional bodies is anomalous and should be looked at in some capacity.

Second, regarding recommendations to the Minister, another anomaly of the Bill is the potential, in circumstances in which the commission has felt unable to appoint anyone, that the Minister could then still proceed to an appointment based on the same names. Given that the new processes are supposed to be more closely focused on merit and modern selection processes, it seems anomalous that someone whom the commission has decided should not merit appointment should then be appointed by the Minister. I think there should be more political accountability for this, possibly in the form of a requirement that the Oireachtas be notified if the Minister appoints off the list, as it were.

Third, I understand and I can see the reasoning behind the criminal offences introduced under heads 30, 31 and 65. They do seem a little disproportionate to me, particularly the confidentiality offences, which have indictable versions. There is maybe more to discuss here, but they have at least a potential for a chilling effect, possibly from a merit perspective, in terms of getting people to approach potential candidates informally.

Finally, legal academics have been mentioned already. I suggest, given the Bill's current form, that no legal academic is likely to be appointed because the modern structure of academic careers is such that professional experience of the kind suggested is simply not an option. It is very unusual. Therefore, if it is considered that the appointment of legal academics is a good thing, this will need to be looked at again. Certainly, the structure of head 38 seems to me to be extremely convoluted and needs some further thought and clarification.

I will stop there. I think that is roughly five minutes. I am happy to take any questions as required.

Vice Chairman: Thank you, Dr. O'Brien. There has always been provision for the Minister to notify the public through *Iris Oifigiúil* of any appointments off the list, as it were. I am delighted Dr. O'Brien could contribute because the research he did with Robert Hazell and Kate Malleson on the UK system provides a really important political counterpoint whereby politics was taken entirely out of that system. The narrative here has been one of reducing political influence, but I think Dr. O'Brien found that diversity had actually been better achieved through the political system. I think he pointed to the Supreme Court profile. It might be interesting to come back to some of that because the narratives are going in opposite directions, which is quite interesting in jurisdictions so similar.

We will move on to the next group: Dr. Laura Cahillane, Dr. Tom Hickey and Dr. David

Kenny from the University of Limerick, Dublin City University and Trinity College Dublin, respectively. They have five minutes. I am not sure who is going to present.

Dr. Laura Cahillane: I will present on behalf of the group. I thank the committee for the opportunity to speak. I should note that this statement represents the views of three legal academics from three different institutions. We have all researched the area of judicial appointments and wish to highlight the most important points from our longer written submission. We are very enthusiastic about this proposed legislation. This reform is long overdue and we are delighted to see progress on so many areas in the general scheme. We are concerned, however, that unless certain changes and improvements are made, this opportunity will be potentially wasted and the commission may be no more effective in improving our judicial appointments process than the Judicial Appointments Advisory Board, JAAB, has been.

The first matter we wish to highlight is the absolute necessity for more specificity in the recommendations from the commission. It is widely acknowledged that JAAB had little effect in influencing the Government's decisions on appointments because it sent forward too many candidates and did so with no ranking or order of preference and in fact very little evaluation. A smaller number of names is proposed in this Bill. We feel it is still not small enough. The commission should recommend no more than three candidates per vacancy. It is crucial, in our view, that the commission be required to rank these candidates in order of preference.

We expect that the commission will carry out detailed assessment procedures. It may be very obvious that certain candidates are more suitable for appointment. It would be appropriate that this be conveyed to the Government. If candidates are unranked, governmental discretion will once again be largely unguided and any assessment procedures carried out will become somewhat nugatory. To be clear, the Government will still be entirely free under the Constitution to pick whomever it wishes for any judicial vacancy either from the list of recommendations or outside of it. The only consequence would be, as under the current system, a statement to that effect in *Iris Oifigiúil*. It is certainly not unconstitutional to provide for a three-name list or a ranking of candidates because legally the Government's discretion is not fettered.

The second matter we wish to address is the criteria and process used by the commission to recommend candidates. Compared with international best practice, the proposals in the general scheme are very scant. In fact, they do not add any additional detail to the existing criteria for appointment, which have long been criticised as being too vague. The commitment to a merit-based process is welcome but further detail is needed to elaborate on what merit actually means. The detail is crucial here because merit on its own is not a very useful guide to judicial appointments, unless it is elaborated on, in guiding the commission on what types of candidates are desirable and meritorious. England and Wales might be consulted as jurisdictions where this has been done, for example. Further detail on suitability on grounds of character and temperament would be desirable, as well as a direction on how the committee would actually establish this.

A crucial omission is that the scheme does not detail the process that the commission should undertake in assessing candidates. It allows for various procedures such as interviews but does not specifically require them.

Currently, JAAB also has the power but has chosen not to exercise it. We believe the legislation should be stronger and should specify the procedures, such as interviews, for example, or perhaps case studies or role-plays, as is very common in other jurisdictions because if these decisions are left to the discretion of the committee afterwards, then procedures may simply be dispensed with.

We also welcome the introduction of a commitment to diversity and equality in appointments. It would be useful to include a requirement for a diversity strategy and for diversity data management, or at least a requirement for the commission to report on diversity in its annual reports.

We are also of the firm belief that the central role of the Attorney General in the commission should be reconsidered. If the Attorney General is removed from the membership of the commission, it would then have equal lay and legal representation, which reflects international best practice. Also, the Attorney General, as legal adviser to the Government, will have an intimate role in the discussions of the Government's final choice. Having the Attorney General also sitting on the commission gives the Government an outsized influence on the process. In fact, it is the only figure involved in both parts of the decision-making process. The commission is being set up as an independent assistant in the Government's selection of candidates. It should not, therefore, have this overlap with the Government's process and its chief legal adviser. We see no merit in the inclusion of the Attorney General on the commission and this should be reconsidered.

It might also be considered appropriate to exclude the Attorney General from eligibility for recommendation by the commission for a period of time after leaving office to avoid any potential conflict of interest in the Attorney General's advice to Government on appointments.

Finally, this legislation is a very critical opportunity to provide for fairness and transparency in a process that is flawed at present. It is crucial that this opportunity is taken to ensure real reform and to guarantee that the existing process is not going to be replicated under the guise of reform. I thank the committee again for this opportunity to present our views and we will be happy to discuss any questions its members may have.

Vice Chairman: I am curious about Dr. Cahillane's point on the conflict of interest. We will start with members' contributions.

Deputy Thomas Pringle: I thank all of the contributors for their submissions. It is remarkable how similar they all are in respect of the need for a proper system of appointment. Have they any thoughts as to why the system is so vague at present and as to why the opportunity has not been taken to strengthen it? That is probably a rhetorical question and may not require an answer.

Dr. O'Brien's contribution on the UK system pointed out that the political representatives have been taken out of the system and that this has affected its diversity. Are those two things similar? I would have thought that taking politicians out of the system might ensure diversity, rather than restricting it, as might be the case on an Irish basis. Is the cause and effect there, in that the removal of the political representatives in the UK has led directly to a less diverse range of appointments?

In all the contributions, the point has been made that the process of selecting candidates has not been specified clearly enough in the legislation. Obviously, all of our witnesses would like to see this specified and laid out clearly in legislation. That is vitally important. The proposal to remove the Attorney General from the selection process is also a valid point and makes perfect sense.

In our witnesses' view, if all of those things were achieved, would this lead to a more open and transparent system, rather than what we have at the moment?

Vice Chairman: To whom does Deputy Pringle wish to address his questions? Will we start with Dr. O'Brien?

Deputy Thomas Pringle: Perhaps we might start with Dr. O'Brien, as the rest of my questions may be rhetorical in nature.

Dr. Patrick O'Brien: The key question I will address is whether the removal of politicians has led to a reduction of diversity in the system for England and Wales. It is important not to be too definitive because, as with anything to do with people, social science and culture, there is a lot of stuff going on. Under the pre-existing system, where one had political commitment to diversity, that encouraged diversity. One issue to consider is that if one has politicians who are committed to this goal, the fact that they are more involved in decision-making and choice will have a knock-on impact on who gets chosen. The second aspect of this is an indirect one, which is that if one takes politicians out, in the sense of taking outsiders out, there is a possibility that judges will engage in something more like self-replication. I need to be very careful here because there is a very strong culture of appointment on merit in the UK system and I do not quite mean that as a positive thing.

By contrast with the Vice Chairman's excellent book on appointments, which I have consulted extensively, most female judges in England and Wales to whom I have spoken are adamant that they have been appointed exclusively on merit and not by reference to any kind of broader consideration of the make-up of the Judiciary. The Vice Chairman's book suggests that the opposite may be true to an extent for Irish judges. One has to bear in mind that that background characteristic or cultural norm is there.

That said, in any system where one gets a greater involvement of existing incumbents in choosing who succeeds or joins them, one ends up with a degree of self-replication. Everyone wants the people who come after them to have done it the same way in which they did it. There are broader political and cultural reasons why that might be the case and I do not think that we can see it as baldly and as simply as saying that if one has more politicians, one gets more diversity. There are, however, more complex and nuanced reasons why that might be a beneficial side-effect of it, if not a direct consequence. I will pause there as many others may want to contribute.

Vice Chairman: The point was that in 2011, the then Minister for Justice and Equality, Alan Shatter, and the then Attorney General, Máire Whelan, decided that a proportion of the appointments were going to be women and that was all there was to it. That was a political decision and it did not matter what names arose, women were going to be appointed and that was the end of that. Would Deputy Pringle like to address his questions to anyone else?

Deputy Thomas Pringle: My apologies. If any other witnesses wish to respond to my other questions they may do so although these may not merit a response and perhaps some other members should be given the opportunity to contribute.

Vice Chairman: The Deputy is very welcome to come back if there are other issues he wishes to raise.

Deputy Niamh Smyth: I thank our guests, Mr. Cahill, Dr. Cahillane, Dr. O'Brien and Ms McNally for their presentations, which I found fascinating. I have a number of observations to make on the points they made and I would ask that they might extrapolate and tease them out a little bit further. On the point made by Mr. Cahill on a wider pool of legal academics, could he

extend those thoughts and ideas for me? On practice and procedure, I fully get what Ms McNally is saying there. Could she perhaps expand on the point about judges serving currently on the District and Circuit Courts? I believe she is saying they do not go through the same robust interview process or anything like that in their application process, as opposed to an application made for the superior courts. Will she expand on that? I like the point about their suitability for a different court. As was said, they may have sat on the Bench of a Circuit or District Court from a number of years and are going into an area that is vastly different. What is the difference in their applications for that higher court?

Dr. O'Brien spoke very eloquently about diversity and equality. I think no one would disagree with that. The point he made about the positive aspects politics has played in achieving that was interesting. He might make a further comment on that. His comment on the Attorney General serving as a member of the commission while serving the Government is a valid and obvious point, which was made very well. I commend and agree with him on that.

Mr. James Cahill: The director general may want to add to what I have to say. Our view with regard to legal academics is geared towards the higher courts such as the Supreme Court, for example, where very precise legal issues are dealt with at a much more detailed and in-depth level than would occur in local courts day to day. The issue of practice by an academic for four years in the general scheme of things could include a need to demonstrate an appropriate knowledge and experience of the decisions and practices before being considered for appointment. The notion of academics having to cease work in a university, take out a practising certificate and then develop a business for four years in the Bar or the solicitors' profession would damage their capacity as academics to move then to one of the higher courts. Ms Keane may want to add to what I have said.

Ms Mary Keane: On the issue of academics, we see the four-year requirement as a barrier to entry. It is hoped that what is being put together here is a system of eligibility to apply. The procedures commission will set out all kinds of merit, criteria, professional skills, and other qualifications. Our view is that the broadest range of legal professionals should be able to access consideration for appointment. Therefore, we believe the four-year requirement should be removed. As the president, Mr. Cahill, has said, there is a particularly compelling argument for the appointment of academics to multi-judge courts, such as the Court of Appeal or the Supreme Court, where there could be a mix of academic and trial lawyers. They would bring different perspectives and enrich the decision-making process. That is our view on the point of academics.

There would have to be a definition of a legal academic and of an understanding of experience in law as opposed to experience in a court. England and Wales, very helpfully, introduced a provision, especially section 52, in the 2007 tribunals and enforcement Act. It provides for the eligibility of a broader number of academics compared with what is proposed here with, effectively, a four-year bar or barrier to their becoming eligible.

Vice Chairman: It is a difficult issue. Deputy Smyth, is there anyone else you would like to answer?

Deputy Niamh Smyth: I would like if Ms McNally would comment.

Ms Maura McNally: I have two comments to make. The first one is about diversity on the Bench. It would be incorrect for anyone to look at the Judiciary as a whole and say that the percentage of women satisfies a reflection of society, because it certainly does not in this

country. When we talk about diversity, in the opinion of the Bar of Ireland, we must ensure there is diversity in each branch of the Judiciary. There is no point in putting all the Judiciary together - Supreme Court, Court of Appeal, High Court, Circuit Court and District Court - and saying that we have done a great job because thirty-something per cent are women if the majority of them are in the lower courts. To ensure there is a reflection of faith in the system and a reflection that the system of the administration of justice mirrors what is going on in society, we submit that diversity should apply with specificity to each level, not just as a prism but on each separate level.

Looking at head 40 and how it looks for difference experience, at present under the system, a person who is a judge of the Circuit Court, High Court or District Court has already gone through the JAAB process, if I can call it that, and has passed that particular hurdle. However, when that person made the application, he or she made it, if was to the District Court, to be a judge of the District Court. If it was to the Circuit Court, it was to be a judge of the Circuit Court. Under the new mechanism, and-or as present, a person does not have to apply separately. For example, if I want to apply to be a judge of the Court of Appeal, I have to show my experience in practice and procedure in that Court of Appeal. How can a Circuit or District Court judge do that? It is creating an imbalance in diversity and a dichotomy in respect of applicants.

Vice Chairman: That is a very good point.

Deputy Niamh Smyth: My comments on Dr. O'Brien's presentation were more of an observation, but perhaps he has something else to add to it.

Dr. Patrick O'Brien: Obviously, I was not suggesting that 38% was an adequate representation, but it is better than the comparators in the UK. Ethnic diversity is something we would to have a completely different conversation about as well. It is going to become increasingly an issue we will all need to grasp.

In terms of politics being a driver, the Chair gave a great example, better than any I have on file, which was that if politicians are committed to this as a whole, they can push it through. Couple that with the capacity to approach people directly, which I fear may be lost under a much more formal process, there is the potential for things to slow down. This is hemmed in by all sorts of caveats. That is my concern about moving to a more formal process.

Senator Lynn Ruane: I am sorry that I missed the first few statements. I was attending a public session of the children's committee. I have read the statements, however, and prepared questions. My first question is for either Dr. Cahillane or Dr. Kenny or anyone else who was part of that submission. Instead of introducing new a offence regarding canvassing for judicial appointments and disclosing information, in particular confidential information, to people connected to the commission, would the previous practice and provision of the duty of confidentiality be sufficient?

Dr. David Kenny: I agree with Dr. O'Brien's characterisation of it, that it is perhaps disproportionate to frame the offence in the way it has been in the heads of the Bill. It is very important that confidentiality, data protection and various other desiderata in these processes are taken seriously. The heads of the Bill probably go too far, both in terms of the scope and scale of criminal offences and perhaps the need for a criminal offence in general. What was done previously would have been acceptable. I do not know that it needs to go that far.

If I could weigh in briefly on the previous conversation as well, without taking up the

Senator's time, I echo what was in the submission of the Law Society in respect of academic appointments. We often see in various jurisdictions around the world effective academic appointments in particular to appellate courts. We need to be mindful of procedural knowledge not being something that even every practitioner picks up in respect of the practice in individual courts. Ultimately, if we insist on decades of practice in a particular court being required, we will only appoint litigators and that will, *per se*, massively reduces the pool of appointments that we have. We need judicial education in practice and procedure for all judges because we cannot guarantee that people's professional experience has prepared them, nor should we. We should train people in the art of practice and procedure, so I might add that as well if I could.

Senator Lynn Ruane: That is brilliant. I thank Dr. Kenny. I agree with what he said about training.

I understand the importance of the Irish language in the function of the courts system and being able to provide a space for people to have hearings in Irish. I accept that we need to protect it, but I also wonder about the knock-on effect it has on increasing diversity in and of itself. We talk about having it as a criterion, but we also talk about increasing diversity in other key areas such as gender, ethnic and social diversity, and I wonder how we reconcile those two issues. Do the witnesses think we should create a quota of how many members of the Judiciary have proficiency in Irish rather than ending up in a space where we say that everybody must have proficiency in Irish? We see from other sectors where we are fighting to have diversity, such as the teaching profession and the Garda, that even in order to be able to study in the area, having a proficiency in Irish could reduce diversity before anyone even has the opportunity to apply to the Bar, for example. Sometimes the situation has already been determined much earlier. Could Dr. Cahillane comment on that?

Dr. Laura Cahillane: A requirement to consider a particular competency in the Irish language would not necessarily be a bar to diversity in general. In one way, it could be a way of encouraging diversity in terms of representing geographical areas where Irish might be a primary language. We must be very careful because the Irish language is given primacy in the Constitution and we must protect that. People have a right to have their cases heard through the Irish language. We would have to maintain that criterion in the legislation, but we could make the other criteria around diversity stronger in the Bill itself if we want to broaden it out along the lines of what Dr. O'Brien set out. As we heard from previous speakers, for a long time in Ireland diversity is an area we have not really considered to be necessary and taking action, for example, such as broadening the pool and allowing legal academics apply for judicial eligibility, but making that a reality rather than having restricted barriers to entry is going to be a major benefit in terms of increasing the potential pool. The same is true of trying to encourage solicitors as well as barristers. We know that judges are predominantly taken from the pool of barristers rather than solicitors. Perhaps having specific references to that in the legislation would enable the procedures committee to then build its processes around having diversity as a goal.

Senator Lynn Ruane: I thank Dr. Cahillane. My next question is for Ms McNally of the Bar Council. When it comes to the selection process and procedure, what are the issues that could arise due to the absence of a formal interview and application process?

Ms Maura McNally: The present system does allow for interview but at present the JAAB does not hold interviews. Personally, I do not see any difficulty with interviews in circumstances where it would be the equivalent of a test of that person's knowledge of the case law, in particular the leading cases in the court to which that person is applying to be a sitting judge. It would also have to question the practice and procedure which would include rules of evidence,

the rules of public law and administrative law. All of that would have to be part and parcel of the application and possibly part of the interview.

To recap on the issue of Irish, given that it is our primary language, it is currently one of the questions on the application form under the current JAAB system when people apply to be judges. The number of judges with a proficiency in Irish is diminishing, rather than the opposite. The difficulty boils down to two if not three separate issues. One is entirely to do with the educational system where we all seem to stop speaking Irish as soon as we leave school or college. Second, under the Judicial Council, to my understanding, there is no funding at present in order to support training in the Irish language in order to re-ignite or awaken one's memory of knowledge of Irish because a few weeks or months of speaking Irish would lead to greater capacity to hear a case in Irish and give a determination as Gaeilge. Here at the Bar of Ireland, for example, we recognise that, and we have now established Cumann na Barra, which is a specialised Bar group comprising Irish speakers. Irish is the primary language of the group. They practise primarily in Irish and not only do they do so, but they are trying to involve the rest of us, including me as a dinosaur who has not spoken Irish in 30 years to try to re-ignite my knowledge of the language. Similarly, we are trying to encourage young people coming into the Bar to continue speaking Irish. We are encouraging it across the board, not only from the perspective of judicial appointments or progress at the Bar but as a recognition of it being part of our heritage and culture.

Senator Lynn Ruane: I thank Ms McNally. I have lots more questions, but I will let other speakers come in first and if there is more time at the end I can get to them.

Vice Chairman: Absolutely. That is no difficulty. Given that Ms McNally has raised it a couple of times, I wish to follow up with a question about interviews. Who does she think is the appropriate person to interview a legal practitioner who is applying to be a judge of the High Court?

Ms Maura McNally: At present, it would be the JAAB. I must hold my hand up and say that I sit on the JAAB, but I do so purely from my position as chair of the Bar of Ireland. That is similarly the case with Mr. Cahill who sits on the JAAB. We are on the advisory council. It would be up to the chair of the JAAB, who at present is the Chief Justice, to appoint a committee, either the entire committee to hold an interview or persons in that committee. Personally, if it was down to me, if there was to be an interview I would recommend that if a person was applying for the Circuit Court then the president of the Circuit Court should be one of the persons on the interviewing committee because that person knows exactly what it is that he or she is looking for in a candidate, the kind of experience required, the practice and procedure and whether the person has the correct temperament or answers the questions that would indicate correct temperament, etc. It is down to the Chief Justice.

Vice Chairman: It seems obvious, but to what extent does it cross over legal professional independence to put oneself in a position where one is being questioned like that? It might be something we could talk to Ms McNally about later because I am conscious that Senator McDowell is next on the list. We might come back to that and let Senator McDowell come in.

Senator Michael McDowell: I thank the witnesses for their presentations, which I found very interesting. One problem that I have with the scheme of the Bill that is now before us is, curiously, one which caused a problem with the previous Bill, that is the membership of the commission. It seems to be a body corporate consisting of nine people, but one of those nine people is a kind of rotational person. I cannot follow exactly how this is supposed to work.

Perhaps I am missing something and somebody else understands this better than I do. I refer to the second item, which is a court president, if it depends on what appointment is being made as to whether one is on the commission, does the commission have any continuing existence if it is appointing a procedures committee and preparing its annual general report? There seems to be a lacuna there which I cannot quite follow. The committee should signal that to the Department. It is a strange corporate body that has a rotational person depending on one aspect of the commission's business, which is simply the appointment to a particular court on a particular day.

I am concerned about the whole notion of the Judiciary selecting a tame barrister and a tame solicitor for a three-year term. The legal professions deserve some standing in this. This is not a trade union point of view. It is simply that the members of the professions have representative bodies and a chairperson or president of that body.

It seems odd that this can be completely sidelined and the Judiciary can select a solicitor for three years, say that is it and it does not want any further input from the Law Society of Ireland. It has selected Joe or Josephine Bloggs from McCann Fitzgerald and that is the input from the solicitors' profession. Likewise, it selects some barrister who it favours, or thinks is wise or unwise or house-trained or whatever, and that is the entire input or insight from the profession that one of its members has been selected by the Judiciary.

Perhaps Dr. Cahillane, Dr. Kenny and others will come in on this. Is that normal or is this something new that is being brought in? If one wants the professions to have faith in the whole system, I cannot see why it is the case that the Judiciary chooses which member of each body has a function. The first question I pose is about this rotational issue, which I believe is a bit strange, and then the appointment of a barrister and solicitor by the Judiciary for three years, which is strange.

I then come to the question of interviews. One of the things during - we will not call it a filibuster - the detailed investigation of the previous Bill was this whole question of interviewing sitting judges. What questions will the commission put to them? Will it ask how judges decide cases? Will it ask if they are even-tempered and what their general attitude is, or whether they are liberal or conservative?

What questions can be put to a High Court judge by an interview process that are of any real assistance to a committee? Is it purely to find out if the person is pleasant or unpleasant or is it to find out how he or she has functioned as a judge? Is it to ask that person about the decisions they have made, or might be able to make, or his or her capacity to work with other people? I find the whole interview process at the higher level a little bit problematic.

I will make a point that is missed by some people. Once a person is appointed as a High Court judge, however he or she got there, be that person a barrister or a solicitor, he or she is entitled to serve on the Supreme Court when asked by the Chief Justice. That person is entitled to serve on the Court of Appeal. He or she is eligible to act up and to serve on those bodies.

What is the purpose of an interview in this context? What kinds of questions could be asked? The independence of the Judiciary is lurking in the back of my mind. Are the laypeople on the commission going to ask whether Michael McDowell is a conservative on the pro-life issue and ask me questions to bring this out before I get onto the Court of Appeal? Is that what they are going to do? There is a real problem here. I will leave it at that.

Obviously, the two professional body witnesses have an interest in this selection of a tame

barrister or tame solicitor. There is, however, this wider systemic issue of the composition of the commission and having a rotating person, and whether the commission is really a body corporate if its composition changes depending on the afternoon's business.

Supposing there are three vacancies in the District Court, four in the Circuit Court and one in the High Court, who is the commission at any given time? Head 9 seems to me to be very strange in the way it approaches that. I will start off by asking the two professional body witnesses what their attitude is to having one of their members selected.

Ms Mary Keane: I thank Senator McDowell. On that point, we are obviously concerned about the exclusion, after 25 years of faithful service to the Judicial Appointments Advisory Board, JAAB, to get sent outside the door on the proposed Judicial Appointments Commission. We hope that will not stay as part of the new Bill.

On the Deputy's question about the tame solicitor and tame barrister, my reading of Head 9 is that because of subsection (3), it is actually a judge who was previously a solicitor or a judge who was previously a barrister. It is, therefore, two members of the Judicial Council, one of whom in a previous life was a solicitor and one of whom was a barrister.

To our reading, that is even worse because it could well have been a long time since they practised in either branch of the legal profession. If they are going to be elected as Judicial Council members who can substitute for the Chief Justice, for example, if the Chief Justice is not available, they are likely to be very senior Judicial Council members and, therefore, even more at a distance in terms of years from the practising professions. We do not like it either but we do not like it for a different reason.

We do not embrace the reduction in numbers to nine if it means the representatives of the practising professions are excluded. We also believe if it is to stay at four judicial members, that maybe the four judicial nominees should come from courts of local or limited jurisdiction. We also do not like the suggestion that there are equal legal and lay numbers because there are not. There are equal judicial and lay numbers on the proposed commission as it stands.

Senator Michael McDowell: That comes as a surprise to me. I thought Head 9(3) was to say that the barrister or solicitor it chose had to be qualified to have been a judge at the time of appointment, in other words, to have ten years' practice. I agree with Ms Keane that it is loosely worded. It could carry the meaning that she is supposing-----

Ms Mary Keane: That is the meaning we took from it. We have addressed it in our submission. If it is referring to standing as a judge at the time of appointment then that person is a judge. There is nobody on the Judicial Council except judges.

Senator Michael McDowell: It is the requisite number of years standing at the time of appointment.

Ms Mary Keane: They have to be a judge at the time of appointment.

Senator Michael McDowell: I do not know which they are driving at. It would be very frightening if it was all former judges, I must say.

Ms Mary Keane: As I said, we found it quite extraordinary. We thought perhaps it was an attempted standard operating procedure, SOP, to our removal that at least one of the judges would have once been a solicitor in a previous life. We do not like it one bit, however.

Ms Maura McNally: I will come in if I may, Chairman. I agree entirely with that. As stated in our previous submissions and as I said at the start, there is no inclusion of the Chair of the Bar of Ireland or the President of the Law Society of Ireland. Our reading is that it is not a tame barrister and a tame solicitor but a tame judge who was a barrister and a tame judge who was a solicitor. That is what is meant by subsection (3) as to the two appointments by the Judicial Council. The equality of arms the commission seeks means there will be X number of judges and X number of laypersons without any input whatsoever from the two professions that have to appear in front of judges and that are aware of practice and procedure and so on. We do not even get a tame barrister or solicitor, if there is such a thing.

Senator Michael McDowell: The former Minister, Alan Shatter, extended the period of service required for a pension from 15 to 20 years. I will not be too unfair but the process was strange because this provision was not referred to in the explanatory memorandum to the pensions Bill in question. This effectively means that, if someone has not been appointed by the age of 50, he or she cannot get a full pension. It must dampen people's willingness to become judges if they have effectively have to begin mobilising at the age of 48 to put themselves forward. There is an big issue there in respect of experience.

Ms Mary Keane: I agree.

Vice Chairman: It also means that by the time the judicial barrister or solicitor representative has been selected, he or she will potentially be so far removed from practice that this qualification will have become meaningless as it relates to his or her knowledge of the profession. I recall a president of the District Court telling me that, when he was on the Judicial Appointments Advisory Board, JAAB, he would always listen very carefully to the Law Society representative because he or she would know whether the applicants had blotted their copybooks in any way. What he was really saying was that this representative knew exactly what was going on in the profession at any given time and that he or she had a contemporary insight into practitioners and the conduct of practices, which is extremely important and telling in respect of judicial experience.

Senator Michael McDowell: Was any of this the subject of consultation with the Law Society or with the Bar? Was any of the thinking behind this bounced off them at any stage?

Ms Maura McNally: As stated in our opening contribution, we made submissions. As the Chair pointed out to me, our first submissions, made in 2017, are not on the record but we can arrange to have them sent over. We made other submissions earlier this year. We made submissions but we were not consulted.

Ms Mary Keane: We received a copy of the scheme, which perhaps forms part of the consultation. Schemes are, however, very general. The Law Society made a submission on that draft scheme, as did the Bar.

Senator Michael McDowell: Was the thinking behind the scheme explained to the groups? I refer to the issue of retired judges, if that is how it is to be read. Was that ever explained?

Ms Mary Keane: No. We were astonished by it.

Senator Michael McDowell: Will Dr. Kenny and Dr. Cahillane deal with the other point?

Dr. David Kenny: I thank the Senator very much. I will address the points he has raised. On the matter of pensions, there is an additional problem in respect of the taxation burden on

past pension provision because of the accelerated accumulation under the scheme that was drawn up. I do not know if that issue has been resolved but it should be examined as a matter of urgency if it has not because I have heard of it causing problems.

I agree with his point on the rotation of membership. When the final text is revealed, careful consideration should be given to whether there would be any problem with the group acting as a unit because of that rotating member. That is absolutely worth looking at.

The second point, on the comparative question, has been addressed but it would be unusual not to have some sort of representation from the professions. This sort of indirect representation by way of a judicial member is unusual in the context of the schemes of which I am aware. It is a question of ensuring that any representation of the professions is used appropriately. There is a risk that members of some eminence such as our colleagues here, who are chairs of their respective professional bodies, might bring such a degree of extra process knowledge to the table that transparency issues could be created. While the very detailed knowledge the head of a particular body might have about people's backgrounds is very valuable, we have to make sure that does not turn the process into something else. It should be a matter of an application being made and a process being followed in which all members can participate rather than some members bringing to the table knowledge that is entirely extraneous to that process, which was not gathered through the process and which is not transparent in the process. Professional representation is important but perhaps it should be a member chosen by the head of the respective professional body rather than the head himself or herself. That could be a good compromise.

On the Senator's final point, which had regard to questions in interviews, this is a challenge. It is a challenge to decide what one can ask a judicial candidate to determine merit, temperament and so on. There are questions that can be asked that are common in general interview practice. For example, candidates can be asked to tell the board about a time they encountered a given situation. From their answers, one can try to draw out the various *desiderata* of merit. This is seen in the appointments process in England and Wales, for example. The reason it is important to try to include candidates for judicial promotion within the same process is that we have seen the problems that arise when there is a parallel process for people who have applied, formally or informally, for promotion. If one ends up with a parallel process in which applicants are treated differently, it can result in either set of candidates being treated unfairly or not being given the same fair and equal consideration based on the same factors. There is a challenge to be faced in determining what can be asked in a judicial interview without getting into questions of judicial ideology, which none of us wishes to see being central in the process. General emotional intelligence interview-style questioning provides some questions that could be asked which would be relevant to all candidates.

Ms Maura McNally: I would like to come in on one point. From the perspective of the profession, when a practitioner, either a solicitor or a barrister, applies to Government for patents of precedence to become a senior counsel solicitor or senior counsel barrister, the latter additionally being a member of the inner Bar, he or she seeks a recommendation from the legal services regulatory advisory committee. Both the Bar Council and the Law Society are represented on this committee. They are on this committee precisely because they are able to explain the applicants' experience, temperament and so on. The corollary is not applied in this particular Bill, which we find illogical in the circumstances. I just wanted to add that.

Vice Chairman: Is that okay for Senator McDowell?

Senator Michael McDowell: That is it. I am happy.

Deputy Michael Creed: I thank our distinguished attendees. Fools rush in where angels fear to tread. I am conscious that, as a non-legal person, I am substantially outnumbered. The uninitiated dropping in on today's meeting would be forgiven for believing we were in the midst of a judicial crisis. I acknowledge that, since the foundation of the State, the Judiciary has served us extraordinarily well.

Vice Chairman: I totally agree with Deputy Creed. May I ask him to turn on his camera if possible?

Deputy Michael Creed: I apologise. As I was saying, the Judiciary in this State has served us well. This may be a philosophical question or observation but, if the Judiciary has served us well, then the manner in which judges are appointed, which has evolved substantially and which will evolve further, cannot be all bad. It appears to me that an attempt is being made to reduce the influence of elected representatives and Government in the appointment of the Judiciary and, in so doing, to cede to others including, in many respects, vested interests greater influence over the appointment of the Judiciary. It is a point worth making. It is also worth asking whether our guests accept that we have been served well by our Judiciary.

There is much talk about the requirement for diversity. The legal profession is not exactly a bastion of diversity. I do not want to go down the road of saying it is male, pale and stale, but it certainly might be pale and stale. While we have moved far beyond the requirement for diversity in terms of gender balance, there is a far greater challenge in reflecting the diversity of the modern Ireland of today, a challenge we need to embrace. Is the legal service fit for purpose to lecture us on diversity given that the professional is not exactly a bastion of diversity? I acknowledge the Vice Chairman's expertise and academic publications in this area.

Dr. Tom Hickey: I speak along with Dr. Kenny and Dr. Cahillane. What the Deputy said is interesting. Head 44, relating to the discretion that the Government of the day will have, is at the heart of this legislative reform. Dr. Cahillane made this point at the outset. The commission recommends five names and Government then has discretion - one might say absolute discretion. We do not want the committee to have the impression - it is interesting that Deputy Creed may have this impression - that we favour an absolutely technocratic model. We do not. Dr. O'Brien, another academic, certainly does not favour an absolutely rigidly technocratic model and neither do we.

This is the critical point. Along with some other members of this committee, Deputy Creed is not a lawyer and he may sometimes feel he can get bamboozled and so on. This is really simple. Under the old system, the JAAB recommended seven names and Government had absolute discretion. Under the new system, the Judicial Appointments Commission recommends five names and the Government has absolute discretion. I am confident my colleagues will agree with me when I say that the Constitution requires political discretion, Government discretion. Even as a matter of public policy, for reasons relating to what Dr. O'Brien said, political discretion is valuable.

As Deputy Creed stated, this approach has served us reasonably well over the years. Patronage or even the perception of patronage is important. What also matters is merit over time. Ultimately, we are saying that instead of recommending five names, three should be recommended. In addition, we are saying that the names should be ranked 3, 2, 1 or if necessary 5, 4, 3, 2, 1. We are also saying, I think this is the key point, that the Government of the day should have unrestrained discretion to appoint anyone from among the top three names. We feel there are good public policy reasons for that, never mind the Constitution.

The Judiciary should reflect whoever is in government for 25 of the next 40 years. If there is an absolutely rigidly technocratic model in place for the next 25 or 30 years, it will not reflect that. We are saying that it should be three names, with absolute discretion. If the Government wants to choose a person who is not on the list, which may happen, that is fine but it should make a statement in *Iris Oifigiúil* to that effect. We appreciate that this is a practical constraint; it is not a legal or constitutional constraint. We acknowledge that it is a political constraint but there are good reasons for having that constraint. We believe there ought to be absolute discretion with respect to the best three candidates.

Obviously, I heartily agree with what Dr. Cahillane and others have said about having an interview process. As outlined in my first statement, I acknowledge Senator McDowell's concerns about that. Of course, this needs to be thought through. We need to remember that head 44 is the key provision. It would be an insignificant shift if we end up with the Government choosing from five as opposed to choosing from the seven. If that is what we get, it will represent a failure.

Vice Chairman: I will now take my opportunity to contribute. I have consistently disagreed with Dr. Hickey on that point, as he knows. I have also consistently disagreed on the issue of ranking. It is interesting that a tension between who decides and the level of political discretion is emerging in this conversation. Also in this conversation, there is a leaning towards pulling it away from politics because politics is bad, it does not have a role and it could not be trusted to perform that role if it had it. The proposal seems to be to hand responsibility over almost entirely to a judicially dominated model, which we know from international experience can contribute to judicial self-replication.

Michael Kirby, the great High Court judge and the first openly gay judge in Australia, said he would never have been appointed by his peers because they were too conservative. It took bravery, forward thinking or just being ahead of politics to enable his appointment.

This tension flares up every few years in different jurisdictions in the context of what the right balance is and proposals to take politics out of it. However, the discretion in politics has engendered diversity and a measure of accountability. As Dr. Hickey knows, they were not recommending seven names. They were recommending considerably more names than that until about 2014 or 2015 when it was reduced to seven, as the legislation had prescribed and, indeed, they had the power to reduce fewer or more than that. It is very interesting to hear this tension.

It is not a reduction from seven to five. Typically, there would be approximately 150 applications for the District Court. The reduction in discretion is from 150 to five, which is a very considerable reduction in discretion. Therefore, it is not from seven to five; it is from 150 to five in real terms. Dr. Hickey has made the point about the unconstitutionality of ranking. Many people from various universities have disagreed with him on that point. I do not take it as a given in any sense. It has been disagreed with for many years that it is an unconstitutional restriction. The reason for all that is that the indirect involvement of politics provides a cover of legitimacy for the appointment of judges who have no other connection with the electorate and no other connection with the people, whom their decisions directly affect in the very core of their lives.

Dr. Kenny, Dr. Cahillane and I had this conversation in 2016 and we will have it again. It would always be about this tension between politics and judicial self-replication. It is interesting to note the very strong comments of those from the professions who know the practitioners who are likely to become judges.

Ms Maura McNally: I wish to comment on diversity. In answer to Deputy Creed's question, as the first woman in 41 years to lead the Bar of Ireland, I am more than conscious of how the bar is perceived. I apologise to Senator McDowell and anybody else here who is from the Bar of Ireland. It is perceived as old, stale, grey, cigar smoking and claret drinking. I have drunk a few glasses of claret in my time. However, we are endeavouring to change not just the perception of the bar but what the bar is.

I have no connection with the law. I come from Leitrim. I have had to fight for everything I have here at the Bar and I encourage everyone, male and female, to do that. Do I believe that Ruth Bader Ginsburg was correct when she was asked how many women she wanted on the Supreme Court? Her answer was that all of them should be women. Do I believe that? Yes, I do. I would say that would be diversity and progress. However, if we can get 50% of our membership to reflect what society looks like, that would be an achievement. The same applies for solicitors. We need to do it across every profession - doctors, nurses, teachers and politicians. It must reflect society. We are aiming for that and we are doing so through educational processes.

We have the Denham fellowship, scholarships for people from DEIS schools. We have our transition year programme, where this year instead of 100 pupils looking at what the bar might offer as a career, when it went online we had over 10,000 pupils, many from my own county and other areas in the west of Ireland. I was delighted with the number of people who viewed what we have to offer. Therefore, we are aiming for diversity and there is a change. This is the first year at the Bar of Ireland that 50% of our intake were women and 50% men. We are getting there, but it takes time. It will not change overnight, but we are getting there. We are progressive in our thinking and we are aiming for diversity across all sections. Race, colour, creed or religion should not matter. One of the other contributions to diversity is made by solicitors, who represent a very broad geographic spread, which is most important. In respect of the concerns about judicial self-replication, by favouring judges on this board and then allowing them to appoint three ranked candidates, we are almost certainly going to contribute to judicial self-replication.

I believe Senator Martin is next.

Senator Vincent P. Martin: Ms McNally made a good point. It is good to see her today. We soldiered together for many years on the northern circuit. We were called to the inner Bar on the same day. She has described one of the big challenges facing us, namely, the extent to which the area that we are trying to diversify is itself diverse. It is not diversified in the first instance. Not everyone can be a judge. Judges are chosen from the ranks of solicitors, barristers or perhaps academics. We must ask how diversified that group is in the first instance, apart from the obvious categories of diversity.

I am glad to hear that Ms McNally is making strides with her work, but what about the representation among barristers and solicitors of those who attended non-private schools, or state schools, as they are called in England? A short generation ago, the vast majority of those in the High Court came from a few schools in Ireland. Until we address the issue at a more fundamental level, we are just tinkering with it. The actual raw material is not there to achieve the diversification that Ms McNally is trying to achieve. However, I commend her on the work she is doing.

Ms McNally stated that she would like a candidate to have experience in a court of limited or local jurisdiction, and to paraphrase her, if such a candidate has not worked as a barrister in those courts for 20 years, he or she will be out of touch with practice and procedure. However,

that may close the door on senior lawyers- for example, senior counsels - coming down to enrich the Circuit Court, because they have not put a foot in the door for a number of years but did their time a while ago. Indeed, it has been a long time since we had a senior counsel appointed to the District Court. I believe the last appointment might have been that of Judge Desmond Zaidan, which is perhaps over 20 years ago. Those appointments are for prestigious positions that should be sought after. However, the appointment of senior lawyers to courts of limited or local jurisdiction does not happen at the moment.

I would like to hear the views of the academics on having a greater level of attrition. Apart from some noted exceptions, a judge does not normally move from the District Court to the Circuit Court to the High Court. Is that a good thing? Should it not be an incentivised attraction of appointment or is it a distraction for the judge in how he or she performs his or her duties? Has any work been done on levels of attrition? Would the academic witnesses be in favour of increased levels of attrition?

In respect of the superior courts, I am not saying there should be positive discrimination, but a candidate who has jury trial advocacy experience is very well positioned to hit the ground running and go into the Central Criminal Court for a trial on day 1. I believe a candidate who has never addressed a jury is at a disadvantage unless intensive training is provided although I am not saying it cannot be done. I take Ms Keane's point about academics. I believe they can enrich the court. Indeed, solicitors have enriched the court. The appointments of Mr. Justice Michael Peart and Mr Justice O'Donnell were fantastic. I believe they were the first solicitors to be appointed. I would be more in favour of academics in the divisional courts, be it in the Court of Appeal or the Supreme Court, where perhaps they will not be found wanting in the experience of the cross-examination of witnesses of advocacy because that does not normally happen in those courts. I would like to hear the academics on that.

Finally, I do not support the decision made by the former Minister, Deputy Shatter, in respect of the pension. It is not a reality for some solicitors and barristers to take the plunge at the age of 50 to get the most out of that pension, which was a very attractive pension. It meant that we had great quality on the bench. If solicitors and barristers do not go at 50, they are not incentivised to go at 55 since the pension years were increased. Perhaps the learned chair of the Bar Association would know if there is any talk or speculation about increasing the age of retirement. We have lost some good judges. I am thinking about the last month. Mr. Justice McKechnie was in his prime and he has retired. The late Mr. Justice Kearney was a super judge and was a reluctant retiree. He was still in the full fettle of his mental and physical health at the time of his retirement. We lost him a few years early because judges had to retire for that reason. Is there talk or speculation of the retirement age in all the jursidictions increasing to 72 or 73 years of age?

Vice Chairman: Perhaps Dr. Kenny can respond to the questions addressed to the academics.

Dr. David Kenny: I will quickly address a few of the points the Senator made. In terms of the promotion up the ranks, we have had a number of judges who have been promoted, including, notably, Mrs. Justice Catherine McGuinness who began at the Circuit Court and ended up at the Supreme Court. It raises a broader question of whether there should be something of a professional track, without going into the idea of professionalised judging as we see in civil law systems on the Continent. There might be something to be said for trying to have more movement within the different ranks of the Judiciary and to try and encourage that with ongoing judicial education perhaps. This goes to the broader point about training. While I agree

with the Senator's point that the greatest role perhaps for academic appointments exists at the appellate level, that is proven to be the case across common law jurisdictions of our peers in this respect. There is also something to be said for having an intensive programme of training to get people ready to walk into a trial court and to oversee it. If we do not have that, we will forever and perpetually only appoint litigators to be judges in those courts. If we recognise, as has been said several times, that the solicitors' profession may hold a great opportunity for finding some more diverse candidates because it is larger and has more routes to entry, then that is something that have to look at. Not all solicitors will have engaged extensively in advocacy at the particular level or done a lot of courtroom work themselves. That may change, but it also may not. We may actually benefit from people having different backgrounds in regulatory law and other bodies of law in various judicial roles who do not yet have experience running a courtroom. That is something that we can provide. It would be an intensive training exercise, but it can be done and we should look into it as a matter of urgency in respect of the judicial council and its education programme that it will be setting up shortly.

Ms Mary Keane: I wonder if I could speak on behalf of the Law Society. There seems to be a theme developing on a point with which we do not agree. That is the suggestion that is made that in order to be eligible for appointment to a particular court, there should be some statutory nexus between the candidate's experience before that court and eligibility for for appointment.

It is a multi-step process. The first hurdle is eligibility. After that comes the criteria that must be met on a basis of merit for appointment to any and every court in the land. In actual fact, in our submission we have called for the removal of the anomaly that is in Head 21 B(1), which applies to the superior courts rather than its extension to the courts of local and limited jurisdiction, as suggested by the Bar. We would like eligibility to be harmonised across all courts, but not by extending a restriction, rather by removing it. Once people are eligible and get across the line and the more solicitors, academics and barristers that are eligible, then there is a much broader and more diverse pool from which they can be drawn. By its nature it will be more diverse if more people are eligible. That will increase diversity in respect of geography, gender, sexual orientation and everything that exists across all walks of life, whether it is the Bar, solicitors or the academic world.

Another point I would make is that it is all very well talking about diversity - and diversity in eligibility - but there must also be diversity in appointment. Solicitors have been eligible for appointment to the superior courts since 2002 but the percentages are appalling. We have not crunched the recent numbers but we crunched numbers for the last scheme. Between 2002 and 2016, solicitors were eligible for appointment to all of the courts. There were 90 appointments to the High Court, Court of Appeal and Supreme Court, that is, the superior courts, eight of whom were solicitors. We can have all the diversity we want in eligibility but people are not actually being appointed. There is a phrase which I love, which is that diversity is being invited to the party but inclusion is being asked to dance. We would like diversity and inclusion, please. We would like to see more solicitors being asked to dance, and we would like to see more people of different backgrounds being asked to dance, and it being reflective of society. That is how we feel on diversity and inclusion because, nowadays, one is no good without the other.

Vice Chairman: Thank you. Is that okay for Senator Martin?

Senator Vincent P. Martin: Are there many with diversified backgrounds among the members of the Law Library? Ms McNally has addressed that. I am sure there are, with the passing of time.

Ms Mary Keane: In the Law Society, most certainly. We have more women than men practising at the moment, and we also have our scholarships. We have everything-----

Senator Vincent P. Martin: Are the less well-off represented in increasing numbers?

Ms Mary Keane: Yes, they are. We have an access programme and we have bursaries. We go out there and we have a transition year programme across the country. Yes, we are moving with the times.

Senator Vincent P. Martin: Like the Bar Council, I want to congratulate the Law Society for its efforts.

Ms Mary Keane: Thank you.

Vice Chairman: That is certainly why I chose the Law Society at an early career stage as I could not afford to train as a barrister and the Law Society was a different model. There is a broader range at that stage. I call Senator Barry Ward.

Senator Barry Ward: I am sorry that I was late. I was actually in court and it took a little bit of time to get across the city. I was listening in the car on the way over and I have been following what is being discussed.

I want to raise a couple of issues. I will start with the last point in respect of diversity. I was delighted to hear what Ms McNally said on behalf of the Bar because I was a little bit involved when I was in the council of King's Inns and we set up the Denham fellowship. There are two things about that. First, both the Law Society and the Bar Council would cut off their left arm to have more diversity, and they are doing everything they can to achieve it. The reality is that, if we compare the legal professions to others like medicine or engineering, the skills or qualifications are not as transferable internationally, so it is much more difficult to attract people in from internationally than it is in other professions. If someone is building a bridge in Galway or in Santiago de Chile, it is the same skill set and the only thing different is the language. It is much harder to introduce diversity into the legal professions because they are very national-specific. That diversity is coming as Ireland itself becomes more diverse, and the populations of the two professions are reflecting that, but it takes time for those people to come up through the system. We cannot have somebody who is a newly qualified solicitor or newly qualified barrister occupying a judicial position. We all know that is not going to work as there is formation and experience involved. It is important to recognise that both professions are working very hard to increase diversity and, in the lower ranks of the professions, the results are clear to see.

The other group that is very strong on diversity is governments. I agree with what the Vice Chairman said earlier about the importance of, if not political input into judicial appointments, democratic input into judicial appointments. As other speakers have said, the reality is we are appointing a person for his or her working life, often for 20 or more years, although probably not often enough, and I agree with what Senator McDowell said about the changes in the benching regimes having locked many people out of judicial office in real terms. Nonetheless, governments are the will of the people in terms of judicial appointments. When appointing a person into a branch of government for a long time, where they are largely unimpeachable - or if not quite unimpeachable, we know they are largely untouchable by the other branches of government - it is very important we have some democratic influence in that decision-making process. The way that happens is through the political process and through appointment by the Government as another branch of government.

I absolutely understand what the academics in particular have said about this and the misgivings they might have. However, I would be concerned about the narrative that is abroad that, in some respects, all judges are political cronies. I know academics are not suggesting this but some politicians are suggesting it. There is a concern that people only get appointed to judicial office if they are involved in a political party. Of course, as the academics or anybody who has looked at this will know, there is a raft of very senior judicial figures who have never been involved. Mr. Justice Peter Kelly is the obvious example of a man who always eschewed any kind of politics and became one of the highest judicial officers in the State in recent years. It is important to challenge that narrative and to remind people just how many people are appointed to judicial office by party-political Governments but who have no involvement either in party politics or in the parties who are in power. It is a very important thing to say.

On that point, I want to agree with the Vice Chairman in respect of the proposals in this Bill. I do not agree with the academic position that we should again reduce the discretion with which the Government should operate, that is very important.

There is a point I would like to put to the professions. I accept the solicitors' profession is more diverse and I believe the reason for that is that it is a more stable profession. To become a solicitor is to become an employee, in the first instance, and to have one's way through the Law Society paid for by the employer and to enter into employment, ideally, after qualifying as a solicitor. The role of a barrister is akin to a person who is self-employed from the word go.

I do not come from a legal background. I always joke that the last lawyer in my family was Daniel O'Connell, and I can assure people he had no influence on any work I ever got but he is there somewhere in the background. I am the first person in my family to go to university and I became a barrister. I worked full-time when I was in King's Inns for three years. I put myself through and then I went down to the Bar, having worked for two years and having built up, I suppose, a fund to help me through my first years. However, one is a self-employed person. In the same way that it is difficult to set up a business and there is risk associated with it, that is true of the Bar. For that reason, there is necessarily greater diversity in the solicitors' profession.

However, when it comes to the judicial role, and Senator Martin touched on this, it is important to acknowledge the reality that not all lawyers are courtroom lawyers. I have many friends in big commercial firms who have never been inside a courtroom, except when they were in the Law Society or whatever it was. This is what I want to ask the professional bodies. I do not agree with the notion that a person who is a highly qualified, highly specialised, highly expert lawyer would necessarily be a good judge if that person does not have the litigation experience that is necessary. Some of the most expert lawyers in the State do not go to court because they are experts in their field and maybe there is not a litigation side to it, or maybe it does not pay them to go to court, or whatever it might be. I wonder if account is to be taken of the fact judges are an extension of that litigation role and they must have experience of that litigation role to function properly. We have seen, in all courts, judges who may have less experience in that regard struggling, certainly in the initial years, when they are appointed to judicial office. I wonder if the professions have a view on whether that, therefore, reflects what Ms Keane was saying on the disparity between the number of barristers and the number of solicitors appointed as judges. Does it account for that? Is it reasonable? Is it something they think needs to change or do they think that where we are at the moment is the right balance? What should we be doing to change it?

Vice Chairman: I agree with much of what Senator Ward has said. I will ask the professions for their response and I will then call Senator Ruane.

Ms Mary Keane: I am happy to deal with that. I suppose it is back to what I was saying earlier. We believe this is a multi-step process and, for eligibility purposes, we do not believe that people should be able to display a certain number of years of experience. We particularly do not agree that it should be before the court to which they are applying. It is because there is no good reason for that. The skills and the qualifications needed in a good judge are not just about the capacity to be able to research case law and argue in court. Of course, it is fine to have more experience and skills but much of it is to do with personal qualities, such as being a good listener. As for this thing of advocacy or nothing, most judges say very little. Why is having years of experience of saying an awful lot of some great benefit when sitting on a bench from which he or she is supposed to listen, neutrally, about both sides of an argument and look at the cases put before him or her?

Nobody likes some judges who are too interventionist and forget they have left the Bar or the solicitor's profession behind and are now in a different role. There are many characteristics society should want in a good judge which have nothing to do with standing on one's hind legs in a court. That is our view.

Ms Maura McNally: In answer to that, I disagree. When one is sitting on a bench listening to arguments being made, one has to understand the parameters of what is allowed. Is it hear-say? Are the questions leading? Is it within the rules of evidence? Is it allowed on a regulatory basis? Is it defamatory? Various questions must be understood by the person who is listening to an argument.

It is similar to managing a football team. One can have as many selectors as one wants but the person who makes the decision about who the best players are, is the manager. I would rather have the manager making the decisions than all of the selectors coming together trying to make a singular decision, when it comes to a determination in court.

Head 40 provides for knowledge of the practice and procedures in the Supreme Court, the Court of Appeal and the High Court. That is a necessity. If one will have a brain surgery, one wants the surgeon who has experience in brain surgery carrying out the surgery. It is as simple as that.

To go back to other points raised earlier, about the access to the professions, I wanted to mention the Legal Services Regulatory Authority, LSRA, is doing a study and has invited sub-missions from both the Law Society-----

Vice Chairman: I apologise to Ms McNally. We have covered some of those points and I am keen to get Senator Ruane in.

Ms Maura McNally: Thank you..

Senator Lynn Ruane: It is something to watch legal people converse with each other. It is quite interesting. Senator McDowell spoke about interview questions and entitlement. One of the first questions should be on whether he or she feels entitled to this position. Does he or she know what clarion is? Does he or she know what a smoking jacket is? Then he or she should be automatically excluded from the rest of the process.

On diversity, I think it is interesting. My question is on the conversation which was just happening between Ms Keane and Ms McNally. I have been working closely with the Bar Council and its equality and diversity committee on looking at the blockages at every point. It goes back to what Senator Martin was saying on whether we had the diversity material to meet

the eligibility. We have been looking at that right through and have carried out a large amount of research.

There are so many blocks and barriers to people progressing, right down to being able to attend dinners, social events and everything that comes with that on a cultural level and how one is excluded if one cannot participate at that level, such as if one is a single mother. All these different things are coming up. The solicitor one is interesting because it automatically increases the pool and will have a knock-on effect on diversity.

How would Ms Keane address that in this legislation, if it were to be addressed? Has she thought about how this Bill could reflect that?

Ms Mary Keane: By the removal of a couple of the restrictions which are in there which I have mentioned them earlier on, such as the four-year requirement for a legal academic. I also referred to the one in head 21(b) whereby if one has not stood in a particular court and shown one's wares over a considerable period of time, one should be automatically not allowed to apply for appointment.

The real detail on this will be done by the procedures committee. We are only talking here to a general scheme, which is high level, but in that it is indicated there will be a procedures committee. We would like to see a bit more diversity in who would sit on the procedures committee. If one does not have representatives of the practising professions on the commission, does that mean they will not be on the procedures committee?

I am chair of another board and we have external members on our committees. I know the procedures committee of this new commission will have some lay members, but it may be a good idea for it to have external members for the purposes of drawing up its procedures and criteria and identifying where the balance should be between the legal qualifications and the personal attributes or skills, or maybe there should be some sort of diversity requirement. It would be great to see that more people being involved in the procedures committee, besides the judicial and lay members who are appointed to the overall commission.

Vice Chairman: I would like to give the opportunity to anyone who would like to briefly come in before we conclude.

Dr. Laura Cahillane: I wanted to clarify one point. I wanted to make it clear our submission is not recommending political discretion be reduced. I am sure the proposals we have made do not reduce political discretion in any way. We see the value of that democratic input. What we are trying to say is the Government's choice in terms of the candidates should be guided by professional selection procedures, which are carried on at the JAC level. The importance of interview, role plays and everything else which happens beforehand would culminate in a recommendation to Government with three names ranked, in order to demonstrate one candidate has demonstrated a particular competence or has shown himself or herself to be a better candidate than another.

At that stage, the Government should have full discretion to choose from that list or from outside of it, if that is its choice. Certainly, it is not reducing governmental discretion. We want to be clear this whole point is about fairness for judicial candidates and, for example, the judges' submission made in 2014 made the point that our great reputation in terms of Irish judges is in spite of, not because of, the appointments process we have. There are a great many potential candidates who were never appointed, because of our current system.

Vice Chairman: I thank Dr. Cahillane. The 2014 submission never reflected their own role in having deviated from the legislative process and substantially increased the political discretion, so I will set that one aside. Reducing the number of names and ranking them necessarily reduces political discretion. We need is more qualitative information coming from the JAAB or the JAC. That is absolutely true. The processes by which that is garnered are important.

What Senator Ruane is saying about diversity is so important. Ms Keane has identified a couple of things in terms of removing restrictions. We have seen concern about it becoming too judicial at every stage. I dare say the role of politics has an influence on diversity. In terms of the procedures committee, it goes back to what Senator Ruane says about being available to go to dinners, conferences or whatever it happens to be. It is the being known phenomenon, that is, "Do you know Jennifer? Yes, I know Jennifer, she is grand." It is a phenomenon of self-replicating networks which contribute to being visible and known to decision makers and which not offset by the procedures of the JAAB or the JAC. How does one deal with that? How does that prejudice somebody practising in County Kerry over County Dublin, for example?

I am conscious Dr. O'Brien has not had an opportunity to contribute.

Dr. Patrick O'Brien: I have one small point based on how the conversation has gone in the last 15 or 20 minutes, which is I want to push back against the idea diversity in the Judiciary has to wait on diversity in the profession. That is not to disparage anything the representatives of the professions have said. These are different issues and it is possible to have a more diverse Judiciary without waiting, as a former judge of the Supreme Court of the United Kingdom called Jonathan Sumption said, when he indicated it would take 50 years to wait for gender diversity. We do not have to do that. We can have separate conversations and judicial diversity. Without wishing to disparage what anyone else has said, these do not all have to be part of the same conversation.

Vice Chairman: We have come to the end of our time. I tried to get the different groups back in at the end. I thank our Chair, Deputy James Lawless, who, knowing my long-standing interest in this issue, generously suggested that I chair this meeting and invited me to do so. I thank him for his thoughtfulness in doing so. That concludes our engagement with the witnesses. I propose that we publish all of the opening statements on the committee's website. Is that agreed? Agreed. On behalf of the committee, I thank all of the witnesses for their preparation, attendance, commitment and interest in the issues. It is helpful for our committee and our deliberations. Is there any business which members would like to raise? There is not.

The joint committee adjourned at 5.30 p.m. until 3.30 p.m. on Tuesday, 25 May 2021.