An analysis of the Judicial Council Act

Introduction

The Judicial Council Act was finally published in July 2019, almost 20 years after it was first proposed. The origins of the proposal go back further still. In 1996, the Constitution Review Group had recommended amending Article 35 of the Constitution in order to provide for a Judicial Council which would regulate judicial conduct.[1] The Fourth Progress Report of the All-Party Oireachtas Committee on the Constitution, published in 1999, also recommended the establishment of a council to regulate the conduct of judges, which would comprise judges, retired judges and also a lay element.[2] Similar recommendations were made in further reports such as the Sixth Report of the Working Group on a Courts Commission (the Denham Report)[3] and the Report of the Committee on Judicial Conduct and Ethics (the Keane Report).[4] These two latter reports form the original basis of the Act. The Keane Report was a detailed response to the Denham Report and as a result, the Government brought forward a proposal which sought to amend the Constitution in order to establish a judicial council.[5] That particular Bill was not well-drafted and consequently, the proposal was dropped.[6] In 2007, the Irish Council for Civil Liberties produced a further report making similar recommendations[7] and subsequently, draft legislation was prepared and a scheme of a bill was published to give effect to the Keane Report in August 2010. From 2011 to 2015 the Bill featured in successive iterations of the Government's Legislative Programme and while it appeared to drop off the radar in 2016,[8] the Bill was finally initiated in 2017. Today's Act is the final product of that journey.

Two major scandals (along with a number of less serious incidents)[9] involving judicial misconduct occurred in the period between the first proposals for a judicial council and the

[1] *Report of the Constitution Review Group* (Dublin Stationary Office, 1996).
[2] *Fourth Progress Report: The Courts and the Judiciary*, The All-Party Oireachtas Committee on the Constitution (Dublin Stationery Office, 1999).
[3] This Group was established by the Minister for Justice Nora Owen in 1996 and was published in 1998, see *Working Group on a Courts Commission Conclusion* 1998, available at http://www.courts.ie/Courts.ie/Library3.nsf/(WebFiles)/96E384ACEAED7F4F80256DA60039A0B8/$FILE/court6.pdf . Last accessed 12th November 2019. Unlike the Fourth Progress Report, this Report (which was published first) has no mention of lay involvement, and suggested the body be set up on a non-statutory basis.
[4] *Report of the Committee on Judicial Conduct and Ethics*. (Dublin Stationery Office, 2000).
[5] Twenty-Second Amendment to the Constitution Bill.
[6] For more on this, see L Cahillane, 'Ireland's System for Disciplining and Removing Judges' 2015 DULJ 55.
[7] Irish Council for Civil Liberties (2007) Justice Matters: Independence, Accountability and the Irish Judiciary available here: http://www.iccl.ie/-justicematters-independence-accountability-andthe-irish-judiciary-parts-1-and-2--(july-2007)- .html last accessed 12th November 2019.
[8] The Programme for a Partnership Government published in May 2016 did not contain provision for a Judicial Council Bill, although it had been included in an earlier discussion draft. In June 2016, when the Office of the Government Chief Whip published its 'Legislation programme Current Session', the Bill was listed under 'All Other Legislation', a list described as 'long-term' plans.
[9] Arguably the Heather Perrin case from 2012 was also a significant scandal although the fact that the conduct occurred before her appointment to the bench and the fact that the judge resigned once the detail emerged meant the story did not have much time to gather momentum. For details, see Fiona Gartland, 'Former judge Heather Perrin found guilty of misconduct' Irish Times 17 Oct 2013. There are other examples of less serious incidents although most are not known publicly. For one case of potential judicial interference which was publicised, see Ruadhán MacCormaic, 'Judge should not have raised family law case, inquiry finds' Irish Times, 5 November 2013.

publication of the Act. The Sheedy Affair[10] and the Curtin Case[11] both rocked public confidence in the administration of justice and it is to be welcomed that the proposals have finally come to fruition before a further scandal causes untold damage. Indeed in 2016, in calling for urgent action on the establishment of the council, the now former Chief Justice Susan Denham cited a fear for Ireland's reputation as a major concern.[12] The Council of Europe's 2014 GRECO Report on 'Corruption prevention in respect of members of parliament, judges and prosecutors' had criticised Ireland for its failure to establish a council and its 2017 compliance report also criticised Ireland for its low levels of compliance with the recommendations.[13] Given that there was such support and detailed reform proposals already in place, it is incredible that it has taken so long to get to this point.

In this context, this article proposes to examine the detail of the Act and to consider the success and suitability of the final provisions. The general provisions will be considered before a more detailed examination of the provisions relating to the four principal committees on Judicial Studies, Sentencing Guidelines and Information, Personal Injuries Guidelines, and Conduct. Some potential problems and questions that remain unanswered, particularly in the area of judicial conduct will then be considered. Finally, although it is unrelated to the rest of the Act, the section on sentence policy review will be examined.

The Council – general provisions

The Act provides for the establishment of the Judicial Council, which is intended to be the over-arching body comprising all of the judges in Ireland. It will be a body corporate with perpetual succession and an official seal.[14] The functions of the Council include promoting and maintaining high standards of conduct among judges, the effective and efficient use of resources made available to judges, continuing education of judges, respect for and public confidence in the judiciary and the administration of justice.[15] Under the Act, the Council has the power to: develop schemes for education and training of judges; adopt and publish guidelines on judicial conduct, personal injuries, sentencing guidelines; make decisions on reports or recommendations sent to it by the Board;[16] liaise with international judicial bodies; establish committees; delegate its functions to committees; engage consultants with the consent of the Minister for Justice and Equality.[17]

[10] For details see J O'Dowd, 'The Sheedy Affair' (2000) 3 Contemporary Issues in Irish Law & Politics, 103.
[11] For details see L Cahillane, 'Judicial Discipline: Where do we Stand? A Consideration of the Curtin Case', (2009) 27 Irish Law Times 26.
[12] See for example the statement by the Chief Justice marking the beginning of the new legal year, September 2016 available at https://scoirl.files.wordpress.com/2016/09/a-vacum_-statement-by-chief-justice-denham.pdf Last accessed 12th November 2019.

[13] See 'Corruption prevention in respect of members of parliament, judges and prosecutors' Evaluation Report – Ireland, available at:
http://www.justice.ie/en/JELR/Greco%20Eval%20IV%20Rep%20_2014_%203E%20Final%20Ireland.pdf/Files/Greco%20Eval%20IV%20Rep%20_2014_%203E%20Final%20Ireland.pdf (Last accessed 12th November 2019
And Compliance Report available at:
http://justice.ie/en/JELR/GRECO_Compliance_Report_Corruption_Prevention_in_Respect_of_Members_of_Parliament,_Judges_and_Prosecutors.pdf/Files/GRECO_Compliance_Report_Corruption_Prevention_in_Respect_of_Members_of_Parliament,_Judges_and_Prosecutors.pdf Last accessed 12th November 2019.
[14] Judicial Council Act S6.
[15] S7.
[16] See below.
[17] S7.

The Council will meet at least once a year and any decisions will be determined by a majority of the votes present.[18] A Secretary to the Council appointed by the Board is provided for to manage the staff and administration of the Council.[19] The Secretary is not a member of the Council but may attend meetings, speak, and give advice.

The Council is required to submit an annual report of its activities to the Minister at the end of each financial year.[20] The report will include details on the activities of the Council during that period, including detail from the Judicial Conduct Committee on the number of complaints received, determined admissible, resolved by informal means, investigations conducted, determinations made, number of judges consenting to reprimands, and complaints withdrawn.[21] The report will not contain any information that would identify the judge or complainants concerned except in the case of reprimands issued, in which case the name of the judge and the reprimand will be published, or in the case of a judge who has failed to comply with the recommendations of the Judicial Conduct Committee,[22] in which case the name of the judge will be published. This is a welcome step and one that is necessary for transparency and in order to ensure public confidence in the process.[23] The report will be published after copies are first laid before the Houses of the Oireachtas by the Minister. In a similar way, the accounts of the Council will be presented to the Comptroller and Auditor General each year.[24]

Further sections in this part of the Act require the Secretary to appear before the Public Accounts Committee if requested[25]or to appear before other Oireachtas Committees.[26] The Act makes clear that the Secretary may not discuss matters related to the exercise of judicial function, or any matter before the courts or the Judicial Conduct Committee or a matter which could become the subject of such in the future. In outlining what the Secretary may discuss in relation to an appearance before the Public Accounts Committee, the Act also specifies that the Secretary shall not express an opinion on the merits of any Government policy.[27]

The Act provides that judicial members of the Board and members of committees shall be paid allowances for expenses and these will be determined by the Minister for Public Expenditure and Reform. Similarly, lay committee members shall be paid remuneration and allowances for expenses, as determined by the Minister.[28]

<u>The Board</u>

While the Council is at the apex of the organisation, the de facto decision-making body will be the Board. The Board of the Council is intended to be an executive-type body with the power to determine policy and to review any guidelines made by the committees on conduct, sentencing or personal injuries. The Act specifies that the Board shall have 'all such powers as are necessary

[18] S9(4).
[19] S32.
[20] S 37.
[21] S 87 (4).
[22] S79(13).
[23] This is discussed further below.
[24] S 38.
[25] S 39.
[26]S 40.
[27] S 39(2). This is in line with restrictions on Civil Servants giving evidence as per Section 15 of the Compellability, Privileges and Immunities of Witnesses Act, 1997.
[28] S31. S85 provides same for members of the JCC and panels of inquiry. S 86 also provides that reasonable expenses may be provided for witnesses as determined by the JCC and paid by the Council.

or expedient for the performance of its functions'.[29] The Board will comprise 11 members; the five court presidents, one judge from each court elected by that court and 1 further judge co-opted from one of the courts. The co-opted member will be from a different court in rotation beginning with the Supreme Court and working down through the hierarchy.[30] Membership is for four years and members may serve two consecutive terms. The Board must hold at least four meetings a year with intervals of not more than four months in between. All decisions will be determined by a majority of the votes present.[31]

The Act provides that the Council may establish such committees as it thinks fit to advise and assist it in the performance of its functions but certain other committees are specified, in particular it is provided that the Council shall establish a Judicial Studies Committee, a Personal Injuries Guidelines Committee, a Sentencing Guidelines and Information Committee, Judicial Support Committees, and a Judicial Conduct Committee.

Having considered the general structure and roles of the Council and the Board, we now turn our attention to specific strands of the Council's work undertaken by the designated committees.

The Judicial Studies Committee

The new Judicial Studies Committee will replace the current more informal Committee for Judicial Studies (formerly the Judicial Studies Institute). The purpose of the Judicial Studies Committee will be to 'facilitate the continuing education and training of judges with regard to their functions.'[32] While initial introductory training or induction courses are not mentioned here, presumably they would come within the remit of this Committee also. Section 17(3) outlines some of the areas of competency of the Committee, which will include preparing, distributing, and publishing material relevant to its functions and some training areas are proposed which include: dealing with accused persons, jury trials, EU and international law, human rights and equality law, IT, and personal injuries assessment. The composition of this Committee is not set out in the Act.

This area will require a huge amount of thought, planning, and funding. Currently in Ireland there is no formal system of judicial education and training. From an international perspective, this is very unusual. In a survey from 2016, it was noted that in all of the 10 European jurisdictions surveyed, there existed mandatory initial or induction training for all new judicial appointees. This included England and Wales.[33] However, no such system exists in Ireland.[34] Training is supposedly mandatory since 1996, as per Section 16 of the Court and Court Officers Act 1995, but beyond the provision of bench books, some ad hoc shadowing and funding for judges to attend courses abroad, a formal system has never materialised.[35] According to the

[29] S11.
[30] S 12.
[31] S 15.
[32] S 17(2).
[33] Diana Richards, 'Current models of judicial training: an updated review of initial and continuous training models across Western democratic jurisdictions' (2016) *5 Journal of the International Organization for Judicial Training* 41 at p 43.
[34] Apart from some rudimentary induction in the District Court, and some shadowing practices, those appointed to the Bench are generally expected to learn on the job and while funds exist to allow for judges to attend conferences or courses abroad, no such courses exist here. See also a Council of Europe Report on efficiency of justice in European Judicial Systems from 2018, which notes that Ireland is one of only three States that do not provide continuous training. See report at p 99. Available here: https://rm.coe.int/rapport-avec-couv-18-09-2018-en/16808def9c Last accessed 12th November 2019.
[35] A review into the judicial studies institute was commissioned by the Chief Justice in 2004. It was critical of the existing set up, or lack thereof, as well as the lack of funding. It examined a number of other jurisdictions and made

website of the Association of Judges in Ireland, on the system in place before the introduction of the Judicial Council Act:[36]

> 'The Judicial Studies Committee has extremely limited financial resources and is accordingly unable to provide the type of continuing training and education that is common in other jurisdictions. In the circumstances its activities are confined to the organisation of annual one-day conferences for the Judges of the District Court, the Circuit Court, and the combined High and Supreme Courts, respectively. In addition there is a one day annual National Judges' Conference at which topics relevant to judges of all jurisdictions are discussed.'

The fact that there is no existing structure might be an advantage in that the new Committee will have to begin from scratch and will hopefully provide a modern needs-based system. The approaches used across various jurisdictions to determine what type of training is necessary vary but usually include one or more of the following: training committees, questionnaires or surveys of judges, court users and community assessment exercises, large-scale reviews of the judiciary, research.[37] All jurisdictions involve judges in the assessment of their training needs. The types of training offered to judges in other jurisdictions also varies considerably with some jurisdictions offering much wider programmes than others but the main curriculum areas include:

- Substantive law
- Social context
- Legal skills (judge craft)
- Judicial ethics
- Judicial skills (management, media, technology, languages)
- Personal welfare[38]

The social context area is key and is becoming more and more important. This includes issues such as gender, race, age and disability discrimination in the legal process. The National Judicial Institute in Canada is particularly well-known for its social context education which covers the impact of diversity and equality jurisprudence in the day-to-day work of judges and issues related to judicial independence, impartiality, discretion, decision-making and the judicial process.[39] Matthew Weatherson has emphasised the importance of social context area by describing it as one of the 'three dimensions of learning' for judicial education along with substantive law and skills development.[40] For Richard Reaves, the most important topics for judicial education focus upon the 'tone, demeanor, and engagement styles that judges bring to resolution of disputes.' He

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recommendations in relation to establishing a formal training system. The various recommendations made in the report were not acted upon due to lack of funding. The report has recently been updated in light of the Act and it is expected that this will be relied upon in setting up a system for education and training under the new body. Neither report has been published.

[36] An informal representative group for judges established in the absence of any statutorily-sanctioned body.

[37] For information generally on judicial education and training, see the website of the International Organisation of Judicial Training and its associated journal, http://www.iojt.org/

[38] Cheryl Thomas, 'Review of Judicial Training and Education in Other Jurisdictions Report', May 2006 at p 57 et sec. Available at https://www.ucl.ac.uk/judicial-institute/sites/judicial-institute/files/judicial_training_and_education_in_other_jurisdictions.pdf Last accessed 12th November 2019

[39] Ibid at p 58.

[40] Matthew Weatherson, 'Forging collaborative partnerships: judges, judicial educators & the academy' (2016) 5 *Journal of the International Organization for Judicial Training* 19 at p 19.

explains as follows: 'The parties and their lawyers, if any, already bring law, opinions about case resolution, and plenty of conflict, so diffusing its presence by the manner in which the court treats these individuals is key. Professional competence with these skills is at least equal to, yet probably more important than, legal correctness of result or dispositional efficiency.'[41]

Presumably, the Committee will look to establish both initial induction-type training (even though this is not specified in the Act) as well as up-skilling and CPD training. A formal training and education system is something judges themselves are very interested in[42] and this would further strengthen public confidence in the administration of justice in the jurisdiction. Irish judges are familiar with the Scottish system which is lauded as an international example of good practice and many Irish judges have attended courses there.[43] The informal soundings from the judiciary indicate that this system is the preferred model for Ireland but no decisions have yet been made. It will be a huge undertaking but it is to be hoped that the new Committee will take the opportunity to create the essential supports that respect judicial independence while also providing confidence in the administration of justice. As with most things however, many of the decisions to be made here will come down to how much funding is made available.

The Personal Injuries Guidelines Committee

This was a relatively late addition to the Bill. It is envisaged that this Committee will be established no later than three months following the first meeting of the Council. The function of this Committee will be to prepare draft personal injuries guidelines and submit them to the Board for review.[44] The Committee will have six months to prepare its first draft. It is also envisaged that the Committee will review the guidelines at least once every three years. In order to carry out its functions, the Committee is authorised to acquire documents and records, consult relevant persons, conduct research and organise conferences or seminars. The Committee will comprise seven judges nominated by the Chief Justice, one from each court with an additional High Court and either a District or Circuit Court Judge, who will serve on the Committee for a four-year term, renewable for one further term.[45] This Committee will not have lay representation.

This section resulted from the report of the Personal Injuries Commission (PIC) which was published in September 2018.[46] The Report of the PIC, which was chaired by former High Court President Mr Justice Nicholas Kearns, recommended that:

> 'the Judicial Council should, when established, be requested by the Minister for Justice and Equality to compile guidelines for appropriate general damages for various types of personal injury. The PIC believes that the Judicial Council will, in compiling the guidelines, take account of the jurisprudence of the Court of Appeal,

[41] Richard Reaves, 'Continuing education for judges' (2016) 5 *Journal of the International Organization for Judicial Training* 29 at p 29.
[42] Surveys conducted with judges in unpublished Review of Judicial Studies Institute (2004).
[43] See Shane Phelan, 'Cuts mean judges having 'to go abroad to access training', Irish Independent, 18th January 2018.
[44] S 18(2).
[45] Ss 19 & 20.
[46] See Final Report of the Personal Injuries Commission, available at https://dbei.gov.ie/en/Publications/Publication-files/Second-and-Final-Report-of-the-Personal-Injuries-Commission.pdf Last accessed 12th November 2019.

the results of the PIC benchmarking exercise, the WAD (Whiplash Associated Disorder scale as established by the Quebec Task Force) scale and any other factors it considers relevant.'[47]

The PIC conducted benchmarking exercises domestically and internationally and found that that soft tissue injury claim costs in Ireland are approximately 4.4 times that of the UK costs.[48] The Report decided to follow the example in the UK where guidelines are provided by the judiciary and it stated that the establishment of the Judicial Council provided the perfect opportunity to provide a legislative basis for this proposal.[49]

The frustration behind the lack of progress on reform of the personal injuries area and the fact that businesses around the country are being forced to close as a result of rising insurance costs meant that this section was added to the Bill and efforts were made to speed up the progress of the Bill through its final stages. Before the Council was even established, questions were being asked in the Oireachtas[50] and in the media[51] about when the new guidelines would be published.[52] The original timelines for this Committee were also shortened during the final stages of the Bill[53] so once the Committee is actually formed, there will be intense pressure to produce the draft guidelines.

The final section of the Act amends the Civil Liability and Courts Act 2004 in order to provide that 'the court shall, in assessing damages in a personal injuries action – (a) have regard to the personal injuries guidelines … and (b) where it departs from those guidelines, state the reasons for such departure in giving its decision.'[54] This greatly reduces the amount of discretion currently available in assessing damages and should make for more uniform results.

<u>The Sentencing Guidelines and Information Committee</u>

This Committee will be established within six months of the first meeting of the Council.[55] The principal function of the Committee is to prepare draft sentencing guidelines to submit to the Board. It is also required to monitor the operation of the guidelines, collate information on sentencing and disseminate that information. There will be 13 members of this Committee; eight judges nominated by the Chief Justice and including one judge from each court, and 5 lay persons appointed by the Government, through the Public Appointments Service, at least two of which will be women.[56] They will serve a four year term and can serve no more than two terms.

Later in the Act, Section 92 specifies that in imposing a sentence a court 'shall have regard to sentencing guidelines relevant to the proceedings before it, unless the court is satisfied that to do so would be contrary to the interests of justice and the reasons it is so satisfied shall be stated by

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[47] Ibid at p 9.
[48] Ibid at p 15.
[49] 'The PIC acknowledges that the judiciary are the correct source of guidance on the appropriate levels of damages and are empowered in reaching their decisions to take into account factors such as Court of Appeal decisions and the output of this report.' See ibid at p 5.
[50] See Dáil Éireann debates, vol 986(6), Thursday, 26 Sep 2019, p 671.
[51] For example, see Amy Molloy, 'Woodland charity faces crippling bills as it's forced to defend personal injury claim', Irish Independent 9th October 2019.
[52] The Law Reform Commission also published an Issues Paper in December 2019, entitled Capping Damages in Personal Injuries Actions, which set out the constitutional issues in relation to capping awards for damages and launched a public consultation process, inviting submissions from any members of the public.
[53] See Dáil Éireann debates, vol 985 (1), Thursday, 4 Jul 2019, pp 60 et seq.
[54] S 99.
[55] S 23(1)b.
[56] S 24.

the court in its decision.' If departing from the guidelines, the court will have to give reasons for so doing. However, the subsequent section makes it clear that this does not affect the independence of the courts stating that 'nothing in the Act shall be construed as operating to interfere with the performance by the courts of their functions or the exercise by a judge of his or her functions'.[57] In a similar way to the personal injuries guidelines, this means that while they will not be mandatory as such, it is expected that in general, judges will apply the sentencing guidelines. If there are good reasons to do so, a judge may depart from the guidelines but these reasons will have to be explained and they may also be scrutinised.

This was also a later modification to the Bill, (which originally proposed a sentencing information Committee to simply collate and disseminate information), and one that came about largely due to pressure from Sinn Féin.[58] Much academic attention has focused on the lack of consistency in sentencing in Ireland[59] but for a long time there was little consensus on whether guidelines were appropriate or workable in this jurisdiction and there was resistance to the idea both from the courts and from the Oireachtas.[60] Attitudes gradually started to change on this, particularly with the advent of informal guidelines coming from the Court of Appeal. Increased media attention on this issue and the fact that judges themselves were not afraid to point out the inconsistencies in sentences[61] all led to the decision to provide for formal guidelines in an attempt to provide clarity and consistency in the administration of justice. It is envisaged that the Committee will follow the example of the Court of Appeal which has endeavoured to provide guidance on sentencing in recent years by indicating appropriate sentence ranges for particular offences. The key factor is the balance which must be found between allowing for judicial discretion and exceptional circumstances and the need for consistency. Mr Justice John Edwards has already provided some useful guidance in this respect.[62]

If the new Committee can continue to make progress in a similar manner to that made by the Court of Appeal, this alone will be of immense benefit. However, the success of this exercise will largely depend on funding and in particular, funding for resources which can capture existing sentencing practices in various courts and for various offences, as without the raw data, it will be very difficult for the Committee to begin any significant work.

Judicial Support Committees

The Act requires that the Council also establish what are referred to as Judicial Support Committees and there will be one for each court, comprising the head of that court and one further judge of that court elected by the ordinary members of the court.[63] The purpose of these

[57] S 93.
[58] See Elaine Loughlin, 'Government set to adopt SF policy on sentencing guidelines', Irish Examiner, 29 March 2019.
[59] For example, see Claire Hamilton, 'Sentencing in the District Court: Here be dragons' (2005) 15 (3) Irish Criminal Law Journal 9, Niamh Maguire, 'Consistency in Sentencing' 2010 IJSJ 14, Ivana Bacik, 'The practice of sentencing in the Irish courts', in P. O'Mahony (Ed.), *Criminal justice in Ireland* (2002) Institute of Public Administration 348, C. Austin, 'Inconsistent sentencing practice in Ireland: Is there a way forward' (2005) 13(146) Irish Student Law Review 146,
[60] See Tom O'Malley, 'A quiet revolution occurred this month: sentencing guidelines were introduced', Irish Times, 31 March 2014.
[61] For example, last year Ms Justice Úna Ní Raifeartaigh commented as follows: "One judge's substantial could be four years and another's could be 14 years. It's somewhat bizarre that an area that is so sensitive has so little in the way of guidance for a trial judge." See Donnchadh Ó Laoghaire, 'Time to help make judges' sentences more consistent', Irish Examiner, 10 May 2018.
[62] See John Edwards, 'Sentencing methodology – towards improved reasoning in sentencing', 2019 IJSJ 15.
[63] S 30.

committees will be to advise the Council in matters relating to particular courts. So for example, if the Council needs advice on a Supreme Court issue, it will seek the assistance of the Supreme Judicial Support Committee. Like the other committees, the term is for four years, renewable for one further term but eligibility returns following a further four years after the expiration of membership. It is not clear what led to the inclusion of these Committees in the Act and there is no discussion of them during the Oireachtas debates. Because of this, their exact role is not apparent and we will have to wait to see how they will function in practice.

The Judicial Conduct Committee

The establishment of some sort of disciplinary body was one of the main motivations behind the Judicial Council Act.[64] According to the Act, the function of the Judicial Conduct Committee (JCC) will be to 'promote and maintain high standards of conduct among judges, having regards to the principles of judicial conduct requiring judges to uphold and exemplify judicial independence, impartiality, integrity, propriety (including the appearance of propriety), competence and diligence and to ensure equality of treatment to all persons before the courts.'[65] The JCC will be made up of 13 members; the five court presidents, three judges elected by and from the ordinary judges, and five lay persons appointed by the Government, as recommended by the Public Appointments Service, at least two to be women. The term is four years, renewable for one further consecutive term.[66] The JCC is also to be provided with a 'Registrar', who may be the Secretary or another member of staff but will be known as Registrar when carrying out functions for the JCC.[67]

The working of the JCC

The first major task of the JCC will be to prepare guidelines on judicial conduct and ethics. These must be submitted to the Board within 12 months.[68] The JCC is also given all 'such powers as are necessary or expedient for the performance of its functions.'[69] In terms of its principal area of competence, the JCC is authorised to consider complaints, to refer them for resolution by informal means or undertake investigations, to publish guidelines on informal resolutions, provide advice and recommendations to judges, and take any action necessary to safeguard the administration of justice.[70] It is also authorised to specify procedures in relation to the making and investigation of complaints and the making of determinations.[71] The Act provides that in order to constitute a valid complaint for the purposes of the Act, the judicial misconduct must have occurred after the commencement of this part of the Act. Also complaints will only be considered in respect of sitting judges.[72] This means that if a judge ceases to be a judge before the referral or investigation of the complaint or during that process or before an Article 35.4.1 removal motion, the action will be discontinued.

[64] See the Regulatory Impact Analysis for the 2017 Bill http://www.justice.ie/en/JELR/Judicial_Council_Bill_2017_RIA.pdf/Files/Judicial_Council_Bill_2017_RIA.pdf
[65] S 43(2).
[66] Ss 44-46.
[67] S 49.
[68] S 43(1)(d).
[69] S43(5)
[70] S 43(3).
[71] S 52.
[72] S 42.

The Registrar is the first point of contact for complaints. A complaint about judicial behaviour which is alleged to constitute judicial misconduct may be made to the Registrar up to three months from the date of the occurrence of the conduct. However, the JCC may extend the time limit where it is felt it is just and equitable to do so.[73] A complaint can be made by any person directly affected by, or who witnessed, the conduct. Complaints can also be made on behalf of solicitors or barristers, as well as anyone unable to make a complaint themselves by reason of mental or physical capacity.[74] The fact that lawyers, or 'duly appointed officers', can make complaints though their professional bodies, the Bar Council or Law Society is crucial in that it enables practitioners to make complaints anonymously and without fear of reprisal. On receiving a complaint, the Registrar must first determine whether or not it is admissible; in other words, the complaint must be made by an authorised person and be within the time limit, not frivolous or vexatious, in compliance with procedures, and potentially constitute judicial misconduct.[75] If the Registrar determines that the complaint is admissible she or he will refer it to the JCC, who will decide whether to refer the matter to be resolved by informal means or whether to refer further to a panel of investigation. If on the other hand the complaint is held inadmissible, all parties will be notified of the decision in writing and given reasons for the decision. The complainant may then seek a review of the determination within 30 days.[76]

The Registrar plays a crucial role here in that he or she will make the initial call as to whether the behaviour complained of could constitute judicial misconduct. This is potentially a substantial power indeed. Although once guidelines on judicial conduct and ethics are drawn up by the JCC, it may be possible that a more precise definition of what constitutes judicial misconduct will be available and the scope of the decision-making power of the Register may be more limited in that regard. As it stands however, the Registrar retains a powerful decision-making capacity as gate-keeper of complaints and in this context it is surprising that no particular experience or expertise for the office is required by the Act.

A noted above, the Act makes it clear that it will only apply to conduct which has taken place after the commencement of this part of the Act.[77] Furthermore, complainants have only three months to complain about judicial conduct, (unless the JCC grants an extension), therefore, historic conduct will not be considered and conduct which occurred before a judge's appointment to the bench is excluded.[78] It is understandable that going forward, there must be a time limit for complaints but surely serious misconduct which has occurred before appointment is relevant and cutting off all historic conduct might be seen as unfair.

Any review will be carried out by the Complaints Review Committee, which will comprise three members of the JCC (two judges and one lay person), appointed by the JCC. Members of this Committee will serve a one to two-year term. If the admissibility relates to the time limit, the Review Committee can decide to extend that period. It can also decide that the complaint, or part of it, is admissible and if that is the case, all parties will be notified in writing and given reasons.[79] If a complaint is withdrawn while under consideration by the Registrar or the Review Committee it may still be referred to the JCC for a decision on whether the matter should be

[73] S 51.
[74] S 50.
[75] S 53.
[76] S 56. This review will be carried out by the Complaints Review Committee – see below.
[77] S 42.
[78] Unless a judge is appointed after the commencement of this part and the JCC decide the complaint is admissible. This issue is discussed further below.
[79] S 56.

pursued.[80] The JCC can also refer a matter for investigation even in the absence of a complaint if satisfied that there exists prima facie evidence of judicial misconduct and if it is necessary to safeguard the administration of justice.[81] This is an interesting power and a sensible one, particularly if a complainant is reluctant to come forward but the behaviour has already been made public knowledge – the ability to investigate in these circumstances is crucial to upholding public confidence in the system.

Section 58 of the Act allows a judge to consent to a reprimand, if requested in writing, before a panel of inquiry is appointed. In such circumstances, the JCC will consider the nature, gravity and circumstances of the complaint and if satisfied that it is appropriate and in the interests of the administration of justice may issue a reprimand. The reprimand may take the form of advice, recommendations to pursue a course of action, and/or admonishment. This section is likely to be controversial. First, unlike with informal resolution below, the consent of the complainant is not required in this situation. Furthermore, unlike judges reprimanded following an investigation by the JCC or a judge who receives a reprimand due to failure to co-operate with an inquiry, judges receiving voluntary reprimands will not have their names published in the Council's annual report.[82] It is unclear why details of reprimands in these cases will not be included. This may be an attractive option for an errant judge but it is likely to lead to dissatisfaction amongst complainants if the accused judge simply consents to a reprimand before any investigation is launched, thereby avoiding the entire process. The fact that a reprimand has been issued but that this will never become public knowledge will hardly be satisfactory to a complainant, who may see this as an escape mechanism for the judge. There does not appear to be any alternative avenue for a complainant in this scenario.

Informal Resolution

If a complaint is deemed admissible, the JCC will either refer the matter for resolution by informal means or refer to a panel of inquiry for further investigation. The whole procedure around resolution by informal means is very vague. The JCC will request one or more 'designated judges' to undertake the resolution of the complaint by informal means. The Act is silent on who designates these judges or how. The designated judge or judges will then appoint up to three judges from the relevant court to undertake the resolution by informal means of the complaint on behalf of the designated judge or judges.[83] The purpose of this additional step is unclear. These designated judges must report back to the JCC and the report must state whether or not they are satisfied that the complaint has been resolved and must provide details and reasons. The informal resolution route can only be undertaken with the consent of both the complainant and the judge concerned.[84] No further information is given on how a resolution by informal means should proceed other than to specify that payment of financial compensation is prohibited.[85]

This section is needlessly convoluted and confusing. Presumably there was a desire on the part of the judiciary to retain the sort of informal measures which are currently used to deal with questionable judicial behaviour. However, the lack of clarity in this section is problematic. First,

[80] S 57.
[81] S 59.
[82] S 87(6) states that the name of the judge will be published under S79(13) and the name and the reprimand issued under S 71 or S79(2)(b) will also be published but S58 is not mentioned here.
[83] S 61.
[84] S 62.
[85] S 62(4).

we are given no indication of what resolution by informal means will actually entail. However, given that section 43 requires the JCC to publish guidelines regarding the resolution of complaints by informal means, we can presume that the JCC is expected to provide detail on this once it is established. However, further difficulties remain including the seemingly unnecessary step of the designated judges appointing a further three judges to undertake the resolution by informal means. It is not clear who is to decide on what the informal means will be – the panel, the designated judges, or the further judges. Also it is not clear what role exactly the designated judges or further judges are to play; whether they are to be supervisors, helpers, investigators, mediators or watch dogs. A final issue here is that the Council's annual report will not contain any detail on complaints which were resolved by informal means other than to give the number so resolved in any given year.

It is to be hoped that once the JCC publishes guidelines on informal resolutions that some clarity will be achieved but it is hard to avoid the conclusion that this section was intended to remain vague in order to allow for maximum flexibility. It is a welcome requirement that the consent of all parties is required before this option can be used.

Panels of Inquiry

If the informal route is not appropriate, the JCC can decide to refer a complaint for further investigation by a panel of inquiry. The JCC will then appoint a panel of three persons; two judges who are not members of the JCC, one to be a judge in the relevant court and the other to be a judge of another court, and one lay person. There will be a separate appointments process for lay persons who may become members of panels of inquiry. The Government will request the Public Appointments Service to undertake a selection process[86]and will then nominate between seven and twelve persons to appointment by the JCC to a panel.[87] The 40% female requirement also applies to this process. A member of staff, other than the Registrar, will be appointed as registrar to the panel.[88]

In order to investigate the complaint, the panel may seek documents or information and may hold a hearing, which will usually be conducted in public.[89] While the hearing may be held in public, Section 82(1) specifies that proceedings relating to the investigation of a complaint are to be conducted in private. Section 68(5) also provides that in order to safeguard the administration of justice, the JCC can direct that a hearing may be conducted in whole or in part in private. Also under Section 64, a judge or complainant can request that the hearing be conducted in private but the JCC will not accede to such request in the absence of 'reasonable and sufficient cause'.[90] The Act does not provide guidance on what would constitute reasonable and sufficient cause.

There was opposition to this provision from the judiciary who felt that a judge under public investigation might be undermined to the extent that their independence and ability to do their

[86] S 65.
[87] S 66.
[88] It is a pity that the title registrar was decided upon for both of these roles. Given that they are separate and distinct surely a different title would have made more sense.
[89] S 68(5) specifies that 'A hearing of a complaint before a panel of inquiry shall be conducted in public unless the Judicial Conduct Committee directs that in order to safeguard the administration of justice the hearing should be conducted in whole or in part otherwise than in public.'
[90] S 64(4)

job would be affected.[91] This fear is understandable. However, fair procedures are carefully guaranteed at all stages in the process. Furthermore, there is a greater risk with private hearings that the public will envisage some special treatment being given to judges or that justice is not being served. This is potentially highly damaging to the administration of justice and also potentially damaging to the reputation of an individual judge who might be cleared of suspicion by a hearing but not in the eyes of the public who have not been allowed to witness the process. For these reasons, public hearings are common in many jurisdictions.[92] Thus, section 55 of the original bill, as published in 2017, provided that the default position would be that hearings would be conducted otherwise than in public but that the JCC could require a public hearing in order to safeguard the administration of justice. Following some criticism of this provision in the media[93] and pressure from opposition senators,[94] the Government amended this at committee stage in the Seanad to provide for public hearings.[95] The original bill also provided that in the case of unauthorised disclosure of confidential information relating to investigations, penalties of a class A fine or imprisonment of up to 12 months were available but this was later amended to take out the possibility of imprisonment.[96]

The structure of the hearing will involve the registrar to the panel presenting the particulars of the complaint. Testimony of witnesses will be given on oath and there will be a right to cross-examine and call evidence in reply. For this purpose, the panel will have all the power, rights and privileges that are vested in the High Court in this area.[97] If a complainant refuses to cooperate with an investigation, the panel will report back to the JCC, which will decide whether to proceed or discontinue the investigation. If a judge under investigation refuses to cooperate, the panel can decide to discontinue and report back to the JCC. The report will set out the circumstances and recommend a reprimand and or make further recommendations, which can

[91] 2015 memo from then Chief Justice Susan Denham to then Minister for Justice Frances Fitzgerald, as reported by Conor Gallagher who obtained it through FOI. See Conor Gallagher, 'Judiciary sought 'legal aid' for judges: Former chief justice wanted legal fees paid by State for judges accused of misconduct', Irish Times, 9th September 2017.
[92] This is particularly the case in civil law countries. For example, in France disciplinary hearings are public and all decisions are published on the website of the Conseil Superieur de la Magistrature, see http://www.conseil-superieur-magistrature.fr/. Belgium, Poland, Italy and Romania have similar processes. See Acquaviva Naïs, Castagnet Florence and Evanghelou Morgane, 'A Comparative Analysis of Disciplinary Systems for European Judges and Prosecutors', prepared for the 7th edition of the European Judicial Training Network's THEMIS Competition, 2012. On the US States, see Robert H. Tembeckjian, 'Judicial Disciplinary Hearings Should Be Open', (2007) 28(3), The Justice System Journal, 419-425, who outlines 35 States where public hearings are held. Similar processes are adopted in Canada, see Kate Malleson, *The New Judiciary: The Effects of Expansion and Activism* (Ashgate, 1999), though there is discretion here (See Judges Act, RSC 1985 c J-1, s 63(6)). The process in New South Wales is also discretionary (See, Judicial Officers Act 1986 (NSW) s 24(2). In New Zealand, once the matter becomes serious enough to be elevated to a panel process the hearing will then become public (See Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 (NZ) s 29.) In fact, Appleby and Le Mire have noted an increasing trend towards transparency in many jurisdictions, see Gabrielle Appleby & Suzanne Le Mire, 'Judicial conduct: Crafting a system that enhances institutional integrity' (2014) 38 Melbourne University Law Review, 1 at 61.
[93] See for example Fiona Gartland, 'Judges not named if censured under proposed Judicial Council Bill Publication of documents from investigations into judges could result in fine or jail', Irish Times, 26th August 2017, Elaine Edwards and Fiona Gartland, 'NUJ calls for 'unacceptable secrecy provisions in Judicial Council Bill to be revisited', Irish Times, 26th August 2017.
[94] Senators Clifford-Lee and Ó Donnghaile had put down amendments.
[95] See Seanad Debates, Vol. 264 No. 12, 2 April 2019.
[96] S 94 further provides that the Freedom of Information Act 2014 shall not apply to a record relating to the making or investigation, or the resolution by informal means, of a complaint or an investigation pursuant to a referral unless it was created before the making of the complaint or initiation of the investigation or unless it relates to an expenses inquiry
[97] S 69.

include advising on a course of action or issuing an admonishment. The JCC may accept, modify, or reject the report.

During the course of an investigation, if it becomes clear that the behaviour complained of relates to the health of a judge, the panel will give the judge an opportunity to address the matter and then report to the JCC, which will forward the report to the head of the relevant court, who may recommend that the judge seek medical assistance or take further appropriate steps and report back to the JCC. If the judge complies, the investigation will be discontinued. If the judge fails to comply, the JCC will direct the panel to continue the investigation.[98]

When a panel has concluded an investigation, it will send a written report to the JCC, specifying the particulars of the complaint, the evidence presented, the findings of the panel and the reasons for that finding. If the finding is that an allegation is proved, the report will also include such recommendations as the panel considers appropriate for reprimanding the judge and for safeguarding the administration of justice.[99] A recommendation for reprimand can include the issuing of advice, making a recommendation to pursue a course of action, or the issuing of an admonishment. No detail is provided in the Act on what constitutes an admonishment. Recommendations for safeguarding the administration of justice can include recommendations in relation to court procedure, practice directions, distribution of work and related matters.

Before a final report is sent to the JCC however, the panel will send an interim report to the judge concerned and the complainant, along with details of time periods for reply. If the complainant or the judge feels that fair procedures have not been observed, he or she may submit a statement to that effect and request the panel to review the report as a result. The panel may then amend its report or decline to amend and send the report, along with the reasons for not amending it, to the JCC.[100] Once the JCC receives the report it will notify the complainant and the judge that they may make submissions, written or oral, to the JCC within a specified time period. The JCC will then consider the panel's report and any further submissions made and make a determination. However, the JCC can conduct a further hearing for the purposes of assisting it in making a decision or in order to observe fair procedures.[101] A great deal of effort has been made to ensure fair procedures on all sides. A determination in writing, including reasons will then be given. The JCC may accept, modify, or reject any recommendation from the panel's report. If the determination from the JCC requires the judge to pursue a course of action, it may also require the judge to report to the JCC regarding compliance with the determination. If it is felt the judge has not taken appropriate action, the JCC can then take further action as it considers appropriate, including making a referral to the Minister to pursue an Article 35.4.1 removal motion.[102] If the hearing has been held in public, the JCC will publish the determination.[103]

It is interesting that towards the end of the investigatory process the language becomes mandatory. Earlier in the process, the Act provides that the JCC may suggest or advise a course of action; a judge cannot be forced to pursue a course of action due to the independence of the judiciary. However, once a final determination has been made, the Act states that the JCC can 'require' the judge to pursue a course of action and while independence still applies here and the

[98] S 72.
[99] S 76.
[100] SS 77 and 78.
[101] S 79(3).
[102] S 79(13).
[103] S 79(14).

JCC has no power to compel the judge to cooperate, in the absence of cooperation a removal motion will be proposed and so effectively, the determinations of the JCC will be compulsory.

Where hearings have been conducted and the JCC has determined that the complaint has not been substantiated, the judge can apply to the JCC for the recovery of reasonable legal costs and expenses associated with legal representation at the hearing.[104] Where the JCC considers that the interests of justice require the payment of such costs, it will nominate an independent solicitor to agree costs, which will be paid by the Minister.[105] This section was requested by the judiciary. In fact, the original request was that all judges before the JCC should receive access to legal representation and that the costs should be borne by the Minister.[106] There is no equivalent provision for those accused of misconduct before disciplinary hearings of the Law Society or the Medical Council. The decision was taken to provide for costs where accusations are not proven and this section was added to the Bill during the committee stage in the Seanad in April 2019, without much discussion. The provision is particularly interesting in light of the decision by the Supreme Court in *McKelvey v Iarnród Éireann*[107] which found that legal representation in disciplinary hearings was only necessary in exceptional cases. The judgment approved of the Court of Appeal's conclusion that lawyers at disciplinary hearings 'should be the exception rather than the rule' and that only 'exceptional circumstances' will justify a person's need to be represented. In contrast, the Act seems to assume legal representation as a matter of course for judges at hearings and specifies recompense 'in the interests of justice' for costs for unproven allegations.

Removal of judge

The JCC can also make a referral to the Minister in relation to an Article 35.4.1 removal motion, whether or not the conduct or capacity at question has been the subject of a complaint.[108] If such a referral is made, the Minister will then propose such a motion in either House of the Oireachtas. If the proposal to make a referral has come from a panel of inquiry, the JCC will send a copy of the panel's report to the judge together with notice periods for reply. It will then consider the report and any reply and when making the referral to the Minister will include the panel's report, the judge's reply (if any) and the views of the JCC. These documents should not accompany an Article 35.4.1 motion but the Minister may use them for the purposes of proposing the motion.[109]

The language is interesting here again in that it is mandatory; so if a referral is made, the Minister will have no choice and a motion will have to be proposed. This is in contrast to many of the earlier reform reports which contained much milder recommendations and more hesitant language. For example, in the Keane report, if the result of an inquiry meant that the Judicial Council recommended removal of the judge, a recommendation would be made that 'the executive consider the tabling of a resolution in both Houses of the Oireachtas calling for the removal of the judge from office for stated misbehaviour or incapacity.'[110] There is also potentially a question as to whether it is constitutional to impose a statutory duty on a member of the Oireachtas to propose a specific resolution. It is one thing to require a TD or Senator to

[104] S 88.
[105] If costs cannot be agreed this will be referred to the taxing Master of the High Court under S 88.
[106] See Gallagher (n 91).
[107] [2019] IESC 79.
[108] S 80.
[109] S 80(10) and (12).
[110] *Report of the Committee on Judicial Conduct and Ethics*. (Dublin Stationery Office, 2000) at p 55.

propose a motion that is required to end a breach of the Constitution,[111] however, giving power to a body of persons who are not members of either House to determine what should be debated in the two Houses seems to go further.

Further Issues and Questions on Judicial Conduct

Judicial misconduct is defined in section 2 the Act as:

> 'conduct (whether an act or omission) by a judge, whether in the execution of his or her office or otherwise, and whether generally or on a particular occasion, that—
>
> (a) constitutes a departure from acknowledged standards of judicial conduct, such standards to have regard to the principles of judicial conduct referred to in sections 7 (1)(b) and 43 (2), and
>
> (b) brings the administration of justice into disrepute;'

Neither the concept of judicial misconduct, nor the constitutional equivalent of 'stated misbehaviour' (Article 35.4.1 Bunreacht na hÉireann) have ever been defined in law in this jurisdiction so taking the step of defining misconduct in the legislation is welcome and will help to provide clarity around questions of misconduct. The definition here seems to involve a two-step test, that the conduct complained of must first constitute a departure from acknowledged standards of behaviour. Relevant here are the other sections of the Act referenced in the section which require judges 'to uphold and exemplify judicial independence, impartiality, integrity, propriety (including the appearance of propriety), competence and diligence and to ensure equality of treatment to all persons before the courts'. These are described as 'essentially … the Bangalore principles of judicial conduct … adopted at a round table meeting of chief justices held in the Peace Palace in the Hague in November 2002 and endorsed by member states of the United Nations Commission on Human Rights in 2003.'[112] The reference to 'acknowledged standards' was criticised by Senator McDowell during the debates in the Seanad as being vague and it was pointed out that there could be arguments over whether something is an acknowledged standard.[113] The conduct must also have brought the administration of justice into disrepute. It appears to include misconduct off the bench as well as misconduct in office. However, apart from this definition, there is no further guidance in the Act on how serious the misconduct must be in order to lead to a recommendation for removal, as opposed to a lesser sanction or indeed when or how to apply lesser sanctions.

The Act does not reference the constitutional standard of misbehaviour or give any indication as to how or whether this definition impacts on the constitutional standard. When introducing the Bill at the second stage in the Seanad, Minister for Justice Charlie Flanagan described the Bill as instituting 'a complaints regime for judges, which will address instances of misconduct which do not warrant the invocation of Article 35.4.1° of the Constitution. As Members know, that article relates to the removal of a judge from office for stated misbehaviour or for incapacity.'[114] However, this is somewhat misleading as the complaints regime will involve all forms of misconduct which come within the definition, including misconduct which might warrant

[111] See *Doherty v Government of Ireland* [2011] 2 IR 222 (HC), where the court, however, avoided making a specific order to that effect and instead relied on the Government acting appropriately on the declaration made

[112] *Seanad Debates* Vol 254 No 17 (22 November 2017) (Minister Charles Flanagan)

[113] *Seanad Debates* Vol 254 No 17 (22 November 2017) (Senator Michael McDowell)

[114] *Seanad Debates* Vol 254 No 17 (22 November 2017) (Minister Charles Flanagan)

removal. In the case where the Council forms the opinion, following an investigation, that the behaviour complained of is so serious as to warrant a removal motion then the Minister will be informed, as per section 80 and a removal motion will be brought before the Houses of the Oireachtas. The Act contains no detail as to the procedures which may be undertaken once the motion is proposed. A noted above, the Act is also silent as to the difference between 'misconduct' as set out here and 'misbehaviour' as per Article 35.4.1 ° of the Constitution. This was a question raised by Senator Bacik during the second stage in the Seanad and she queried the difference in practice between both phrases but no answer was provided.[115]

Given that, the JCC is tasked with preparing guidelines on judicial conduct and ethics, as well as procedures in relation to the making and investigating of complaints, and it is expected that some of these issues will be considered as part of that process.

The definition of judicial misconduct contained in the Act can be considered a 'yardstick' type definition. The Consultative Council of European Judges has insisted on the need for a 'precise definition of offences for which a judge may be removed from office and for disciplinary procedures complying with the due process requirements of the Convention on Human Rights.'[116] However, many jurisdictions opt for the provision of a yardstick rather than listing particular offences, given the obvious difficulty involved.[117] There can be difficulties with the yardstick option also as it is not always clear whether or not particular conduct will come within the yardstick but despite potential difficulties, the yardstick option offers the greatest degree of flexibility, particularly when combined with a detailed code of conduct as will be the case in this jurisdiction.[118]

What is clear from the Act is that as noted above, the Act only applies to sitting judges so it will not be possible to make a complaint about a retired judge. Also as referred to above, historic conduct in general is outside of the remit of the JCC given that only conduct which occurred after the commencement of the Act is admissible. This means that conduct which occurred before a judge's appointment to the bench is not applicable,[119] and so the Heather Perrin[120] scenario for example, would not have been within the competency of the JCC. This demonstrates that in some respects, the consideration of complaints will be somewhat limited.

As well as deciding what constitutes judicial misconduct, the JCC will also presumably provide some guidance as to what constitutes an admonishment for the purposes of the Act. In a number of different sections, the JCC is empowered to issue advice to a judge, make a recommendation that they pursue a course of action, including attending a course or training, or issue an admonishment but this term is never explained. The Oxford English dictionary defines admonishment as a type of warning, reprimand or rebuke and the connotations are of a person being scolded. But what good is a warning unless there are consequences for failing to obey? The

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115 *Seanad Debates* Vol 254 No 17 (22 November 2017) (Senator Ivana Bacik).

116 Recommendation No. R (94) 12, Principle VI(2) and (3) of the Consultative Council of European Judges (CCJE), also see Opinion No 1 (2001) of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on 'Standards Concerning the Independence of the Judiciary and the Irremovability of Judges' available at http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/CCJEIndependenceofJudges.pdf. Last accessed 12th November 2019.

117 For more on this, see Richard Devlin and Adam Dodek (eds), *Regulating Judges: Beyond Independence and Accountability*, (Edward Elgar, 2016).

118 See L Cahillane, 'Ireland's System for Disciplining and Removing Judges' 2015 DULJ 55.

119 Unless it occurred after the commencement of the Act.

120 See (n9)

fact that in some instances the issuance of an admonishment will be published in the Judicial Council's annual report along with the name of the offending judge may be consequence enough but in the case of voluntary reprimand for example, this consequence will not apply. Will a letter from the Council or the Chief Justice scolding a judge for their behaviour be punishment enough?

The fact that options such as a voluntary reprimand and informal resolutions are possible are welcome in theory in terms of balancing judicial independence and accountability. It is important that there are avenues for dealing with complaints which will not affect a judge's reputation and therefore his or her ability to administer justice. However, these sections in the Act are worryingly vague. They may reflect the traditional way of dealing with complaints within the judiciary as well as reflecting the tone of some of the reform reports, particularly the Keane Report, where moral rather than legal sanctions were preferred. However, in order to protect confidence in the administration of justice, it is essential that a complainant feels that due process has been carried out. The danger with the voluntary reprimand section in particular is that it could appear to be an escape mechanism for an accused judge, especially since consent from the complainant is not required and the name and detail of the reprimand will not be made public. Furthermore, because it is so unclear what a reprimand actually entails, this could lead to loss of confidence in the system.

A further question is whether any of this can be subject to judicial review. The Act is silent on the issue but it is likely that if the question arose, the procedures of the JCC would have to be judicially reviewable in order to ensure constitutional justice. An ongoing Canadian case might be relevant here. While significant differences exist between the Canadian Judicial Council and that which will be established in Ireland, the general principles under consideration are the same and so it is useful to follow the developments there.

In brief, the Canadian Judicial Council (CJC) is a statutory body comprising 39 chief justices, associate chief justices, and other senior judges, with the authority to review the conduct of federally appointed superior court judges. It is chaired by the Chief Justice of Canada. When a complaint is made, an Inquiry Committee is set up to investigate. After the inquiry has been completed, the CJC will report the conclusions and make recommendations to the responsible Minister.[121] Two inquiries were completed in the case of Justice Michel Girouard, a judge of the Quebec Superior Court. The judge had been caught on camera allegedly participating in a drug deal. The first inquiry rejected the allegations but did raise concerns about the credibility of the judge. The second inquiry related to this lack of credibility during the first inquiry and despite the fact that three dissenting members of the CJC found that Girouard had not been treated procedurally fairly, the conclusion of the inquiry was that his conduct disabled or incapacitated him from performing judicial functions and the CJC accordingly recommended to the federal Minister of Justice that he be removed from office. He then filed judicial review applications seeking to quash that decision. The CJC, however, contested the Federal Court's jurisdiction to review its decisions arguing *inter alia* that by virtue of s. 63(4) of the Judges Act it is deemed to be a superior court. However, at first instance, Noel J was not persuaded by the arguments of the CJC, concluding that the CJC is a statutory federal body subject to judicial review under the Federal Courts Act. He noted that while acting in their capacity as members of the CJC, the

[121] S 65 the Judges Act (Canada).

judicial members are not acting in their judicial capacity.[122] In a similar case in Federal Court in 2014, Mosley J came to the same conclusion and while the CJC appealed the decision it was later settled.[123] However, the *Girouard* case is shortly expected before the Supreme Court of Canada for a definitive answer on whether the CJC is subject to judicial review.[124]

In the Irish context then, neither the Council, nor the JCC is a court, although a panel of inquiry will have all the powers, rights and privileges that are vested in the High Court relating to witnesses and production of records.[125] However, this is not unusual in the context of tribunals and it is clear that the Council (and the JCC) is a statutorily-created public body of the type normally expected to be subject to judicial review. Just because the membership of the body comprises judges, this would not be sufficient to exempt it from review. As one commentator on the Canadian case put it: 'If an administrative decision-maker, no matter the rank of its members or their august titles, is put beyond review, we approach a government by executive fiat and prerogative, not a government of laws adopted lawfully.'[126] Thus in the negative sense it is likely that the Council's decisions will be subject to judicial review because otherwise complicated constitutional and administrative law questions arise.

As with many of the issues referred to above, it may be that once the Committees are up and running and when guidelines etc have been established that these issues may be worked out in practice. One thing that is clear is that the JCC, in particular, will be faced with an incredible workload in terms of determining guidelines and policies, not to mention the substantive work later involving considering complaints.

Sentencing Policy Review

One final point concerns a provision in the Act, which is not related to anything else in the Act; the requirement in section 29 for the Minister to conduct a review into mandatory and minimum sentencing within two years after the commencement of the section. The section has nothing to do with the Sentencing Guidelines and Information Committee despite being located in that section and it has no impact on the Judicial Council either but it was included in the Act at the behest of Senator Lynn Ruane who put it down as an amendment during the report stage in the Seanad. Senator Ruane felt that in the context of future sentencing guidelines which are to be provided by the Council, that mandatory, minimum and presumptive sentencing requirements should also be reviewed since in setting these legislative policies, the Oireachtas 'removes the

[122] See *Girouard v Canada* 2018 FC 865, available at https://www.cjc-ccm.gc.ca/cmslib/general/Girouard2_Docs/2018-08-29%20Girouard%20Order%20and%20Reasons.pdf Last accessed 12th November 2019.
[123] *Douglas v Canada* 2014 FC 299 , available at https://www.canlii.org/en/ca/fct/doc/2014/2014fc299/2014fc299.html?autocompleteStr=douglas%20v%20canada&autocompletePos=1 Last accessed 12th November 2019.
[124] For more information on this case, see Paul Daly, 'Channeling or Excluding Judicial Review of Administrative Action', Administrative Law Matters Blog, 12 September 2018, available at https://www.administrativelawmatters.com/blog/2018/09/12/channeling-or-excluding-judicial-review-of-administrative-action/, Mark Mancini, 'Girouard v CJC: An Administrative State Coup?', Double Aspect Blog, 5 September 2018, available at https://doubleaspect.blog/2018/09/05/girouard-v-cjc-an-administrative-state-coup/, Christin Schmitz, 'CJC to appeal Federal Court's ruling that judicial council subject to judicial review; discipline body alleges errors, appearance of bias', The Lawyer's Daily, 6 September 2018, available at https://www.thelawyersdaily.ca/articles/7270/cjc-to-appeal-federal-court-s-ruling-that-judicial-council-subject-to-judicial-review-discipline-body-alleges-errors-appearance-of-bias- Last accessed 12th November 2019.
[125] S 69 Judicial Council Act.
[126] Mancini (n126).

opportunity for judicial discretion and for judges to issue sentences which are sensitive to the details of an individual's case and circumstances.'[127] While mandatory sentences set by the Oireachtas have always been questioned from a separation of powers perspective,[128] in the case of *Whelan and Lynch*,[129] the Supreme Court decided that such provisions were not unconstitutional as long as the sentence was proportionate. Mandatory minimum sentences have been controversial however,[130] and in 2013, the Law Reform Commission recommended that they be repealed in their entirety.[131] A recent Supreme Court ruling has reopened this debate once again. In *Ellis v Minister for Justice*, section 27A(1) of the Fire Arms Act 1964 was struck down as unconstitutional.[132] The flaw in the section was that it provided for a mandatory minimum sentence but only in the case of a second time offender. The Supreme Court held that:

> 'it is not constitutionally permissible for the Oireachtas to determine or prescribe, by Statute a penalty to which only a limited class of persons who commit a specified offence are subject, by reason either of the circumstances in which the offence was committed, or the personal circumstances of the convicted person. This is because the law no longer simply determines the applicable penalty for all who are convicted of the crime and the selection of the appropriate sentence in accordance with law for the particular offence committed by the individual offender forms part of the administration of justice and is pursuant to Article 34.1 exclusively the domain of judges sitting in courts. That is what the Oireachtas purported to do by enacting s. 27A(8) of the 1964 Act, as amended.'[133]

Because the penalty did not apply equally to all offenders, it was struck down but crucially, the Court concluded that it was not the function of the Oireachtas to decide the relative weight to be attached to previous convictions in determining sentence, rather that was clearly within the realm of the administration of justice under Article 34.1. The result now raises questions about the constitutionality of a number of other mandatory minimum provisions. Thus, while the Judicial Council Act may have been the wrong location for such a provision requiring a review of mandatory and minimum sentences, given the current lack of clarity regarding some of these provisions, it is to be welcomed that a review of this policy will now be required.

Conclusion

It is desirable that judges are highly regarded and respected but not to the extent that we do not question questionable behaviour. A system for investigating and addressing judicial misconduct is crucial for public confidence in the administration of justice today. Judges themselves have publicly acknowledged this.[134] Just as important, is an appropriate system for training and

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[127] Seanad Debates, 2 June 2019.
[128] See *T.D. and Others v Minister for Education* [2001] IESC 101, [2001] 4 IR 259.
[129] *Lynch & Whelan v Minister for Justice Equality and Law Reform* [2010] IESC 34, [2012] 1 IR 1.
[130] See Daniel Hurley and Finn Keyes, 'Mandatory Sentences: Wayne Ellis v Minister for Justice and Equality' L&RS Oireachtas library report, 22 May 2019, available at https://data.oireachtas.ie/ie/oireachtas/libraryResearch/2019/2019-05-22_l-rs-note-mandatory-sentences-wayne-ellis-v-minister-for-justice-and-equality_en.pdf Last accessed 12th November 2019.
[131] Law Reform Commission, Report on Mandatory Sentences (LRC 108 – 2013) p. 183.
[132] [2019] IESC 30
[133] Ibid, at para 60.
[134] See Judicial Appointments Review Committee, 'Preliminary Submission to the Department of Justice and Equality's Public Consultation on the Judicial Appointments Process'

upskilling members of the judiciary. The advent of these systems in this jurisdiction will provide important safeguards to public confidence in the system and the added innovations such as the Sentencing Guidelines and Information Committee and the Personal Injuries Guidelines Committee will enhance this by addressing crucial concerns and problems and by promoting consistency and fairness. In the same way, it is important that there exists a body capable of representing judges and advocating for the interests of judges, particularly in light of recent developments in other jurisdictions such as Poland and Hungary.[135] This legislation has gone further than any of the previous reform reports which preceded it, particularly in the area of misconduct investigations and the ability to apply sanctions. But these can be regarded as positive developments. The earlier reports were written in a different climate both domestically and internationally. In today's world of increasing accountability and transparency, the establishment of the Council itself and the careful framework for investigations of misconduct and the provision of sanctions was always going to be necessary. Ireland will no longer remain an outlier internationally on judicial education and judicial conduct. It is clear that plenty of questions remain following the publication of the Act and that some detail has been left to be settled later but it is to be hoped that many of these issues will be addressed, if not resolved, once the Council and the Committees begin their work.

The provision of the Personal Injuries Guidelines is likely to be the first task accomplished by the Council, given the deadline specified in the Act. No doubt many await the publication of the guidelines and the reception of these will be determinative for the future work of the Council, particularly in relation to the sentencing guidelines. The provision of the sentencing guidelines, of course, is also crucial both in terms of trying to ensure consistency in the law but also with regard to public confidence in the administration of justice and the idea that justice must also be seen to be done. For many years, the public generally has struggled to understand many aspects of sentencing and so this is a significant opportunity to address that. Tasks such as the drawing up of the guidelines on conduct and ethics, as well as the guidelines on informal resolutions, will be critical to the success of the body. It is also to be hoped that, despite not being mentioned in the Act, induction or introductory training will be provided for future judicial appointees as this is currently a significant gap and is just as important, if not more so, than on-going training or upskilling. Despite the issues that remain to be worked out, it is of great benefit to the Courts system, the administration of justice and the public in general that this step has finally been achieved and that the Council will shortly begin its important work.

[Since this article was written and accepted for publication, the Council was officially established in December 2019 and held its first meeting in February 2020. This meeting mostly involved electing and nominating judges to the various Committees and positions as required by the Act. At the time of writing, all of the committees specified in the Act have been established and have begun work. The Council produced an annual report in July 2021 containing detail of the work completed to date and this can be accessed on the website of the Council.]

(2014) 4, available at http://www.supremecourt.ie/SupremeCourt/sclibrary3.nsf/(WebFiles)/51E71A71B9961BD680257C70005CCE2D/$FILE/A%20Preliminary%20Submission%20of%20J.A.R.C.%2030.01.2014.pdf last accessed 12 November 2019.

[135] See for example, European Parliament Press Release, 16 January 2020: https://www.europarl.europa.eu/news/en/press-room/20200109IPR69907/rule-of-law-in-poland-and-hungary-has-worsened (Last accessed 6 May 2020).