SUBMISSION TO THE JOINT OIREACHTAS COMMITTEE ON JUSTICE ON THE JUDICIAL APPOINTMENTS COMMISSION HEADS OF BILL 2020

By Dr Laura Cahillane, Dr Tom Hickey and Dr David Kenny

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We welcome the new legislation and the efforts at reforming this area which, if successful, will provide crucial public confidence in the administration of justice.
There are many positive aspects to this Bill which wille result in practical improvements on the current system for judicial appointments.

We feel that the decision to make the Chief Justice chair of the Commission is a wise one which will engender more support for this Bill than its predecessor. We also commend the move to provide for a permanent office with a director and staff to deal with this crucial issue.

However, we also feel that there are many improvements which could be made to the Bill as it stands.

Most importantly, we feel that there is a lack of sufficient guidance in the legislation with regard to eligibility criteria, assessment mechanisms etc. We expand on this point below. If the legislation does not contain enough direction to guide these processes, the JAC could be no more effective than the JAAB has been, and even become a near copy of that body, recommending 5 rather than 7 names, but lacking the crucial reforms in the area of proper assessment of candidates to make these changes meaningful.

Genuine reform in this area necessitates a body which is truly advisory, in the sense that it will actually assess the candidates and only put forward names of the most suitable in order to help and guide the use of the government's constitutional discretion to appoint judges.

We are also of the opinion that, in order to provide for transparency and secure confidence in the new system, it would be preferable to include detail in the legislation about the process for selection once the names are sent to the Minister. This is something which has led to controversy recently due to the lack of transparency or agreed process in the present system for the making of this determination. A clear direction in the Bill about this decision-making process would provide much-needed re-assurance in the fairness of the system.

Our summary recommendations are:

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- that there should be a requirement for equal "lay" and "legal" representation on the JAC. This can be done by removing the Attorney General from the JAC.

- that the Attorney General be ineligible for membership of the JAC, as the advisory process set up to aid government should not include the government's chief legal advisor, who will presumably advise the government in respect of its final choice.

- that applicants for judicial appointment would be required to complete application forms and that shortlisted candidates undergo formal interview by the JAC.

- that, correspondingly, the JAC would be obliged to carry out formal interview and assessment of shortlisted candidates – and that consideration be given to appropriate role play/moot court elements to such a process.

- that further detail is provided on the concept of "merit", and that specific eligibility criteria be specified, in line with international best practice.

- that the legislation require the formulation of a diversity strategy for the JAC to realise the statutory priority of a diverse judiciary, and report on the progress of this strategy in its annual reports.

- that the candidates sent forward to the Minister should be ranked in order of preference.

- that there be a requirement that these names, and the ranking, would be formally brought before an appropriate sub-committee of the Cabinet comprising at least three members of Cabinet; that their application detail also be made available to relevant persons, and that Government be formally required to consider these names first.

- that if the Government wishes to appoint a person other than one of those recommended by the JAC, that it make a statement to that effect in Iris Oifigiúil.

- that the Attorney General be ineligible for appointment as a judge of the Supreme Court or Court of Appeal for a period of at least 12 months after leaving office.

Detailed observations and recommendations on the Heads

Head 2 – Definitions

- The definition of layperson should spell out the period for which a person should not have been a practicing barrister or solicitor in this definition; it should be left to be otherwise prescribed by law.

Head 6 - Recommendations to be based on merit

- 1(b)'s provision for diversity is very welcome.
- It might be better if 'equal numbers of men and women' was expressed as equality.
- It would be useful to include a requirement for a diversity strategy and for diversity data management, or at least a requirement to include a diversity report in the annual report.

- While a commitment to a merit-based process is welcome, further detail is required to elaborate on what merit, in practice, means.
  In England and Wales merit is measured by six core qualities – which are then further broken down. This approach was recommended by the Judge's submission in the 2014 consultation process:

  Intellectual Capacity
  - Expertise in your chosen area of profession
  - Ability to quickly absorb and analyse information
  - Appropriate knowledge of the law and its underlying principles, or the ability to acquire this knowledge where necessary

  Personal Qualities
  - Integrity and independence of mind
  - Sound judgement
  - Decisiveness
  - Objectivity
  - Ability and willingness to learn and develop professionally

  An Ability to Understand and Deal Fairly
  - An awareness of the diversity of the communities which the courts and tribunals serve and an understanding of differing needs.
  - Commitment to justice, independence, public service and fair treatment
  - Willingness to listen with patience and courtesy

  Authority and Communication Skills
  - Ability to explain the procedure and any decisions reached clearly and succinctly to all those involved
  - Ability to inspire respect and confidence
  - Ability to maintain authority when challenged

  Efficiency
  - Ability to work at speed and under pressure
  - Ability to organise time effectively and produce clear reasoned judgments expeditiously
  - Ability to work constructively with others

  Leadership and Management Skills
  - Ability to form strategic objectives and to provide leadership to implement them effectively

- Ability to motivate, support and encourage the professional development of those for whom you are responsible
- Ability to engage constructively with judicial colleagues and the administration, and to manage change effectively
- Ability to organise own and others time and manage available resources.

Scotland has a similar set of detailed criteria, measured under various headings: 'knowledge of the law, skills and competence in the interpretation and application of the law, court experience and skills, intellectual capacity and powers of reasoning, personal characteristics, case management skills and efficiency and communication skills.' These are further broken down into sub-headings.

Merit, without more, is not a meaningful guide to judicial appointments because it cannot guide decisions on appointments unless it is elaborated upon, guiding the JAC on what types of candidates are desirable and meritorious.

Head 9 – Membership of Commission

- As noted above, we think the inclusion of the Chief Justice as ex-officio Chair of the Commission is positive, as the lay chair included in the previous proposal garnered a great deal of criticism with little benefit in terms of the quality of the appointments procedure.
- We see no merit in the inclusion of the Attorney General on the JAC and would go so far as to say it is inappropriate. The Attorney is said to be a key figure in advising government on the final choice of candidate to appoint. Having the Attorney General also sit on the JAC gives this law officer an outsize influence on the process. The JAC is being set up as an external assistant to the government's selection of candidates, and is expressly stated in Head 11 to be independent. It thus should not have this overlap with the government's process and its chief legal advisor. Moreover, it has been common in the past for Attorneys General to take up a position as a judge in the superior courts upon leaving office, making it questionable that they should be intimately involved in the selection process of judges.[1]
- If the Attorney General is removed from membership of the JAC the Commission would then have equal lay and legal representation, which reflects international best practice.

Head 14 – Recommendation of lay person for appointment as member

- We feel it is not necessary that the lay appointees should have knowledge and experience in 'as many as possible' of these areas. Particular expertise in one or more would be preferable. Finding suitable and qualified lay members may be difficult in any event; finding members who have experience in many of the listed areas would be even more so.

[1] As a trusted legal advisor to government, it is unrealistic to expect that the Attorney General will not advise the government on their final choice. As such, our preferred solution to this problem is to render the Attorney ineligible

Head 19 – Procedures Committee

- In our view, far too many core decisions in relation to the selection criteria and process surrounding recommendations are being left to be decided by this Committee, once established, rather than determined in the Act. In this there is a significant danger that the JAC may simply follow the very informal process that currently exists under the JAAB, without very specific criteria and without interview and other procedures. These are largely absent because the JAAB never decided to implement them, and because the legislation establishing that body did not require it to. If this Committee opted for a similar approach, very little change would be achieved. It is unclear to us why the Oireachtas would delegate so many of the matters at the heart of the issue of selection to this Committee.
- The legislation should specify that certain procedures are required for all recommended applications. For example in Scotland, assessment usually takes the form of 3 parts:
  - a case study/ role play;
  - an interview with the candidate;
  - a presentation by the candidate.

  These or other condign procedures should be set out in the primary legislation as requirements; it should not be in the discretion of the Committee to decide to forego these matters.

Head 23 – Removal of members of the Commission

- The removal of lay members under this section is to be welcomed; it is sufficiently onerous that it ensures the independence of the Commission. This is suitably balanced by accountability of the Commission as a body to the various Oireachtas Committees in Heads 24 and 25.

Head 30 – Confidential Information

- The definition of confidential information here is very important, and not at all elaborated in the General Scheme. While this is an essential prohibition, the definition should not be so wide as to prevent accountability and transparency in respect of the Commission's work.

Head 38 – Amendment of Act of 1961 (legal academics)

- The inclusion of academic appointments is welcome as it provides a useful opportunity to widen the net of potential candidates and provide for more diversity, and provides the possibility for additional perspectives on the law. It is common in many common law jurisdictions for academics to be appointed to, in particular, appellate courts.
- We would question the need for the requirement of practice as a practitioner. 4 years of practice would equate to a relatively junior stage, raising the question of what skills and knowledge this period of practice is supposed to engender. Furthermore, many solicitors at this level may not even engage in court duties. If the purpose of this requirement is to ensure a level of knowledge of procedure and practice of the courts, we do not feel it

necessarily achieves it, and such knowledge as is necessary should be available for all appointees through judicial education and shadowing/mentoring for new appointees. This is essential if it is seen as desirable to appoint judges in great numbers from outside the Bar of Ireland.

- The English equivalent of this requirement requires practice of law-related activities, and this *includes* research and teaching of law.
- The practice requirement might be more relevant to appointment to lower courts, and less relevant to appointment to collegiate/appellate courts. It is presumably expected that it is this level where academic appointments would occur (as is common in other jurisdictions). Academics without practice experience could, in practice, be found unsuitable for trial court appointment if the Commission thought this appropriate, without a blanket practice requirement being necessary.
- The inclusion of this requirement might make it unlikely that academics will be appointed in reality, as it is much less common now for academic lawyers to engage in legal practice alongside academic work. If there is an advantage to academic appointments—and we feel there is—the legislation should make it realistic that they may occur.

Head 40 – Recommendation of names to Minister: principal conditions to be satisfied

- As touched upon above, a blanket requirement for 'an appropriate knowledge and appropriate experience of the practice and procedure' may make it difficult to appoint judges from academic or non-court practice backgrounds. Knowledge of procedure can be acquired by training and judicial education, and we would query if it is a suitable blanket requirement. Head 41 makes it clear that any candidate must undertake to complete any training or judicial education required of them.
- As noted above in respect of merit and the Procedure Committee, this section of the General Scheme is severely lacking in specificity as to the personal and professional attributes that make a good judge. It is not clear to us why so much of this is left out of the primary legislation.

Head 41 – Recommendation of names to Minister: further conditions to be satisfied

- Head 41 does not add anything to the existing criteria for appointment, which have long been said to be vague, general, and lacking in any specificity as to the characteristics that are desirable or necessary to become a judge.
- Specificity as to a candidate's suitability 'on grounds of character and temperament' would be desirable, as would some suggestion of a process that the Commission might follow to establish this. There has been criticism of the JAAB system for its reliance on "soundings", informal impressions of people's professional conduct and character. This Bill should take the opportunity to set out better ways of establishing this.
- Compared to obvious comparator countries, and international best practice, the proposals in the General Scheme would be very scant as to how good judicial candidates can be selected.

Head 44 – Judicial vacancy: recommendation by Commission of persons for appointment

- This is the core provision that will determine the character of the JAC, and the extent to which it changes the system of appointments for the better. At present, it is not strong enough, in our view, to have a major effect.
- It is widely agreed that the reason that the JAAB had little effect on the appointments process was the large number of candidates it recommended, without ranking. This left the government at large to choose between these candidates for any reason. Thus, conforming to JAAB recommendations did not shape government decision-making in any real way.
- Though the number of candidates to be recommended is reduced slightly from the JAAB, it is not reduced sufficiently, in our view. Three candidates per vacancy would be preferable.
- We feel very strongly that, however many are recommended, it is crucial that the JAC would be required to rank candidates in order of preference. Having carried out assessment procedures it might be very obvious that certain candidates are more or indeed less suitable for appointment, and it would be appropriate that this would be conveyed to Government so that this can be taken into account with regard to the final selection. If candidates are unranked, governmental discretion will once again be largely unguided by this addition to the appointments process and any assessment procedures will be rendered nugatory.
- Any suggestion that ranking candidates, or limiting the number of recommended candidates to three, is unconstitutional is, in our view, mistaken. The government's choice will remain completely unfettered as a matter of constitutional law: it can pick anyone it wishes, regardless of JAC recommendations, with no consequences other than disclosure of this departure from the recommendations. The government's only obligation, under Head 51, is to consider JAC recommendations first.
- If the government feels that it will not, in practice, depart from JAC recommendations for political or public perception reasons, that is not a constitutional fetter on the government's power. Rather, it is ensuring that the Government is selecting candidates based on merit, quality or other publicly-defensible reasons. If the government feels it cannot publicly defend a departure from a recommendation, it is not at all clear to us why this departure would be justified.
- We feel very strongly that ranking the names put forward to Government is critical in order to maintain the integrity of the new process but if it is ultimately decided that the names will not be ranked, we then feel that the number of names to be recommended must be reduced to three in order to avoid very wide governmental discretion, the perception of political patronage on appointments, and a replication of the existing process.

Head 48 – Appointment as Chief Justice, President of the Court of Appeal and President of the High Court

- This Head should specify that interviews or assessment are required for these appointments.
- It is unclear to us why the Attorney General is involved in this process and, as above, we recommend the Attorney General be ineligible for membership.
- As well as recommended names, a statement of all candidates who applied should be forwarded to the Government in same way as regular judicial vacancies.

Head 50 – Statement of recommendation

- We reiterate here our comment above that the names of recommended candidates must be ranked in order for this advisory process to be meaningful.

Head 53 – Notice of appointment to be published

- This Head replicates the current practice of requiring a statement only that a candidate *was* recommended by the JAAB, not that a candidate was not. We believe that the statement provided with each judicial appointment should state **whether or not** the candidate was recommended by JAC. A government decision to not appoint a JAC-recommended candidate should be clear, not inferred by the absence of a statement.
- In the event that our recommendation to rank names be accepted, it may also be necessary to include a statement if the Government decided to appoint a candidate outside of the top 3 ranked candidates.
- Following on from our firm view that names be formally ranked by JAC, we suggest that it would also be necessary that significant departure by Government from the JAC ranking would also trigger a requirement of a formal statement to that effect. In our view, it would be appropriate for the Government to have scope to select freely from within the top 3 ranked applicants (i.e. without triggering any requirement for a statement), but that the appointment of the 4th or 5th ranked applicant would trigger such a requirement.
- We recognise the political pressure that might be brought to bear in the event that Government wished to appoint a 2nd or 3rd ranked applicant over the top-ranked applicant. Accordingly, it may be appropriate that the legislation would expressly protect the confidentiality of selection from within the three highest-ranked candidates, or indeed would oblige Government to maintain confidentiality in such circumstances.

Head 54 – Statement to the Houses of the Oireachtas

- Laying these matters before the Oireachtas is welcome, but it would be more desirable for this to be done in respect of each appointment a certain number of weeks after it is made rather than once annually. This would allow for more proximate scrutiny of the appointment by the Houses if any questions arise in respect of it.

Head 55 – Preparation of published statement

- As discussed above, under Head 19, it is not appropriate that the Procedures Committee have such a major role in development of the selection procedures as well as the statement of skills and attributes that will be required of candidates.
- It is appropriate for a body such as this to design the details of the process and perhaps elaborate further on how traits and criteria should be searched for and tested, but it should do this under much more guidance in the primary legislation than is currently proposed.

Head 56 – Matters relating to the Statement of selection procedures.

- We are unclear as to what is being referred to by 'recognised best practice standards in recruitment processes for judicial and other related offices'. It would be more appropriate if these were specified.
- We make the same comment in relation to wording that equality rather than equal numbers might be more suitable.
- As above, 1b is welcome.
- 1(e) Rather than saying the PC shall have regard to the need for selection procedures it would be preferable to specify that the PC shall devise comprehensive selection procedures, including interviews and other selection tests – this would make it mandatory. As noted above, if this direction is not provided in the legislation, it is entirely possible that the body may decide to follow existing informal procedures rather than establishing new assessment-based processes based on international best practice.
- It should also be considered that it might be useful to allow for the possibility of recommending persons with expertise in particular areas which are in demand or lacking eg. expertise in family law if that is needed at the time.

Head 58 – Approval of statements by Commission

- We would question the need to consult the Minister before approving the statements.

Head 63 – Status of recommendations made by JAAB

- The purpose of the provision seems appropriate – that JAAB recommendations should essentially lapse upon its dissolution – but the details of this section are important. If the Bill purported to prevent such a person's appointment at all, as the current Head suggests, this would fetter the government's constitutional discretion on appointments in an unconstitutional manner. Rather, the Bill should merely state that the JAAB's recommendation should have no effect after the dissolution of the Board.

Other comments on matters not included in the Heads

- There is no detail in the draft legislation on what is to happen once names are brought to Minister. We feel it would be preferable to give some guidance on this, which would clarify the procedure to be adopted.

- As mentioned above, we feel that the three ranked, shortlisted candidates should be forwarded to an appropriate sub-committee of cabinet along with the results of any assessment and also a list of all candidates who applied. The Government should then be required to consider the ranked names first and in the case that they wish to choose a name other than a ranked one, a statement to this effect would be published. Similarly, in the case of 5 ranked names being put forward, if Government decided to choose a name outside of the top 3 ranked candidates, a statement to this effect should also be published.
- We feel that clarifying the procedure to be adopted at this stage would be a crucial step in providing much needed transparency on this issue of such importance.

Concluding comment

This legislation is a critical opportunity to provide for fairness and transparency in a process that is currently regarded as flawed. It is crucial that the opportunity is taken to ensure real reform and to guarantee that the existing process is not simply replicated under the guise of reform. Providing appropriate guidance in the legislation as to the processes to be adopted, as well as the eligibility criteria that are desirable is an important part of this. Requiring ranking of recommended candidates, the removal of the Attorney General from the membership of the JAC, and providing further transparency on the Cabinet decision-making process are also of fundamental importance in order to ensure that the most suitable candidates are appointed in a system that is transparent and reflects international best practice.

We are happy to provide any further information as necessary.

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