

## Law Society of Ireland – Responses to EC Survey on the Rule of Law

### Independence

#### **Appointment and selection of judges, prosecutors and court presidents**

(The reference to 'judges' concerns judges at all level and types of courts as well as judges at constitutional courts)

*3000 character(s) maximum*

Judges in all levels of Court jurisdiction, including the Constitutional Courts (High Court, Court of Appeal and Supreme Court) are formally appointed by the President of Ireland but, in practice, are chosen by the Government.

At present, there is a system whereby vacancies for judicial appointments are openly advertised and applications sought by a Judicial Appointments Advisory Board ('JAAB') which is made up of serving judges, the Attorney General, representatives of the legal profession and the Minister for Justice. JAAB submits a short list of suitable candidates for judicial appointment to Government. The short list is not ranked and the Minister for Justice may decide not to nominate a candidate from that list. It is also open to the Government to select a lawyer who has neither applied for, nor been shortlisted for, the post.

There has been an emerging consensus that modernisation of the system of judicial appointments is needed to both enhance transparency and lessen political influence. The Judicial Appointments Commission Bill 2016 sought to provide a modern framework for the appointment of judges while retaining public representation in the process and protecting the independence of the judiciary. However, the recent appointment of the former Attorney General to the position of judge on the Supreme Court has led to considerable public discourse about the process of judicial appointments and, in particular, how the merit of each candidate is assessed. In response, the Government has published the General Scheme of the Judicial Appointments Commission Bill 2020. The Bill proposes to replace JAAB with a new nine person Commission which will be required to nominate candidates based on merit which will be only process by which a judge may be appointed or promoted to judicial office. At the moment, the detailed draft legislation is awaited.

#### **Irremovability of judges; including transfers, dismissal and retirement regime of judges, court presidents and prosecutors**

*3000 character(s) maximum*

Once appointed the independence of the judiciary is protected by the Constitution (Article 35.2), which protects against political or other interference in the discharge of judicial duties.

Article 35.4.1 of the Constitution provides that a judge of the Supreme Court or the High Court may not be removed from office except for stated misbehaviour or incapacity and this can only be done by the passing of a resolution by Parliament (Dáil Eireann and Seanad Eireann), which resolution is notified to the President who must then order the removal of the judge to whom the resolution relates. This has never happened to date. It is further noted that the same process would apply to judges of the District Court and Circuit Court.

However, in light of the high threshold for the removal of a judge and the difficulty this poses for ensuring that a judge (who fails to discharge their office in an appropriate manner) is either sanctioned or removed, the Judicial Council Act 2019 was passed by the legislature. The Judicial Council commenced its work in 2020 and may now investigate complaints against Judges and, if such complaints are upheld, require a judge to take a particular course of action and report to the Judicial Council in that regard. The Judicial Council may also refer a matter to the Minister for Justice if it considers that the conduct of the judge merits possible removal under Article 35.4.1 of the Constitution.

## **Promotion of judges and prosecutors**

*3000 character(s) maximum*

See above in relation to the Judicial Appointments Commission Bill 2020 which also provides for the promotion of judges in Ireland.

## **Allocation of cases in courts**

*3000 character(s) maximum*

The allocation of cases in each Court is essentially the responsibility of the President of each court, who may then delegate that function to other judges who preside over a particular aspect of Court work. Depending on the Court concerned, the relevant President will assign judges to particular areas of work. In this regard, the allocation of cases is controlled by the judiciary and follows a defined practice that is transparent and known to all parties.

## **Remuneration/bonuses for judges and prosecutors**

*3000 character(s) maximum*

Non-interference with the remuneration of judges is a recognised aspect of judicial independence. Article 35.5 of the Constitution, as originally enacted, prohibited the reduction of such remuneration while a judge continued in office. However, following the economic crisis in 2008, Article 35.5 of the Constitution was amended by a 2011 referendum and now provides that:

*The remuneration of judges shall not be reduced during their continuance in office save in accordance with this section.*

*The remuneration of judges is subject to the imposition of taxes, levies or other charges that are imposed by law on persons generally or persons belonging to a particular class.*

*Where, before or after the enactment of this section, reductions have been or are made by law to the remuneration of persons belonging to classes of persons whose remuneration is paid out of public money and such law states that those reductions are in the public interest, provision may also be made by law to make proportionate reductions to the remuneration of judges.*

While, following this amendment, subsequent legislation reduced public sector salaries, including those of judges, the amendment excludes the possibility of judges having their salaries cut on an individual or collective basis outside the context of a general measure to cut public sector salaries.

## **Independence/autonomy of the prosecution service**

*3000 character(s) maximum*

There is an office of the Director of Public Prosecutions which is an independent statutory office (section 2(5) Prosecution of Offences Act 1974) appointed through a transparent competitive process.

The duties of the Director are to:

- enforce the criminal law in the courts on behalf of the People of Ireland;
- direct and supervise public prosecutions on indictment (formal written accusations) in the courts;
- give general direction and advice to the Irish police force in relation to summary cases (less serious cases which can be heard in the District Court); and
- give specific direction to An Garda Síochána (the Gardaí) in cases where requested.

## **Independence of the Bar (chamber/association of lawyers) and of lawyers**

### ***3000 character(s) maximum***

The Guide to Professional Conduct for Solicitors clearly sets out the professional responsibility of solicitors to retain their professional independence as a core value of their profession. The guide states:

#### ***Independence***

*Solicitors must always retain their professional independence and their ability to advise their clients fearlessly and objectively. Independence is essential to the function of solicitors in their relationships with all parties and it is the duty of solicitors that they do not allow their independence to be compromised. Solicitors should not allow themselves to be restricted in their actions on behalf of clients or restricted by clients in relation to their other professional duties. A solicitor's independence is necessary because of his various relationships of trust. The independence of a solicitor's advice is an essential value.*

#### **Significant developments capable of affecting the perception that the general public has of the independence of the judiciary:**

While there has always been general confidence amongst the population around the independence of the judiciary in office, there has been debate about the political nature of the appointments process which has gained momentum more recently.

In 2017, there was some public controversy when a judge was appointed directly to the Court of Appeal after her term in office as Attorney General had ended, although she had not applied for the position through the JAAB. The process was in focus again in 2020 when a former Attorney General was appointed directly to the Supreme Court. There was considerable controversy in the media around alleged breaches of Covid-19 restrictions by the individual concerned. In response, the Chief Justice of the Supreme Court initiated a process by which to determine whether the individual was suitable to sit on the Supreme Court. This process was the focus of much media attention, as was the political process by which the individual was appointed to judicial office and questions raised in parliament around same. It was in light of this most recent controversy that it was decided not to proceed with the enactment of the Judicial Appointments Bill 2016 but to propose new legislation in the form of the General Scheme of the Judicial Appointments Bill 2020.

A separate incident in June 2020 also underlined the vigilance required to ensure that the independence of the judiciary is protected. The incident concerned personal comments and criticism levelled by an elected politician against a Judge of the High Court, as a result of a judgment issued by the judge, with which the politician did not agree. The comments by the politician were condemned by the Association of Judges in Ireland, the Minister for Justice, the Law Society and the Bar Council.

## Quality of justice

(Under this topic, you are not required to give statistical information but should provide input on the type of information outlined under "type of information".)

Accessibility of courts (e.g. court fees, legal aid, language)

3000 character(s) maximum

The issue of the availability of legal aid remains a problem in the Irish context. Ireland operates separate systems of civil and criminal legal aid system.

### *Court Fees:*

Court fees are not applied in some areas which include family law, domestic violence and wardship. All other court applications attract stamp duty, irrespective of the means of the person concerned. Such fees can be considerable - for example, the cost of issuing a summons in the High Court is currently €190 and the minimum cost of lodging a Judicial Review application is €330. Such fees may prove prohibitive to those on a low wage or social welfare.

### *Civil Legal Aid:*

The scope of civil legal aid is defined by the Civil Legal Aid Act 1995 and supplemented by regulations made by the Minister for Justice. It is administered and delivered by the Legal Aid Board, a statutory, publicly funded organisation which provides civil legal aid and advice through a mixture of law centres and referrals to a panel of private practitioners.

In order to qualify for legal aid, an applicant must satisfy a number of tests including:

- i. a Merits Test (likelihood of success);
- ii. a Means Test (provides that an applicant's disposable income must be below €18,000 with no flexibility i.e. an applicant with an income which is €1 over the limit can be excluded from the scheme. This financial limit was established in 2006 (S.I. 460/2006) and has not been reviewed since that time); and
- iii. the case must come within an area of law which is not excluded from the provision of legal aid.

In reality, a person has to have very limited financial means before they can qualify for legal aid in Ireland.

Civil legal Aid is not free. All legal aid applicants are expected to make a financial contribution (€130 for legal aid and €30 for legal advice). Again, no fee applies in cases which involve domestic violence.

While the remit of the Legal Aid Board includes free mortgage arrears support, international protection services and criminal legal aid, the vast majority of legal aid relates to family and child care law. The 2019 Annual Report of the Legal Aid Board recorded that family law continues as the predominant area where the Board provides legal services. Of the cases handled in 2019, 74% were in private family law, 14% in international protection, 4% involved child care and just 8% dealt with "other civil matters".

A number of areas of law are excluded entirely from the provision of legal aid such as social welfare claims and appeals, employment and anti-discrimination claims before the Workplace Relations Commission and the Labour Court. This has particular significance where these cases involve and engage matters of EU law. Further areas of exclusion include

defamation, disputes in respect of land, “test” cases or class actions. A decision of the High Court in September 2020 found that an environmental NGO was excluded from applying for legal aid on the basis that legal entities, as opposed to natural persons, are wholly excluded from the ambit of the Civil Legal aid Act 1995 (See *Friends of the Irish Environment v Legal Aid Board* [2020] IEHC 454).

Waiting times for a first appointment with a Legal Aid Board Solicitor continues to be a significant problem. As of December 2020, the longest waiting time for a first consultation with a lawyer from the Legal Aid Board stood at 33 weeks in Smithfield Dublin, while there was a waiting period of 29 weeks for a second consultation in Navan, although most other Law Centres did not have a waiting period for a second consultation.

Currently, the right to legal aid and representation for victims of sexual and gender based violence is ad-hoc and piecemeal. Legal aid is limited to those who are victims of certain serious sexual offences and where their prior sexual history is being raised in the context of a defence to the prosecution, but not otherwise.

The Department of Justice published a Justice Action Plan on 22 February 2021, which make proposals for reform and commits to commencing a review the civil legal aid scheme during the latter part of 2021 .

The Action Plan is available [here](#).

#### **Resources of the judiciary (human/financial/material)**

**Material resources refer e.g. to court buildings and other facilities.**

*3000 character(s) maximum*

The number of judges per head of population in Ireland remains the lowest in the EU with less than 5 per 100,000 of population. (EU Justice Score Card 2020 at p. 32).

Statistical information relevant to waiting times before each Court is available through the Courts Service Annual Reports. The waiting time in the Court of Appeal was 20 months in 2019 (Courts Service Annual Report 2019 at p. 110). Arising from the problem with these excessive waiting times, six new judges were appointed to the Court of Appeal in 2020 which is expected to relieve some pressure.

#### **Training of justice professionals (including judges, prosecutors, lawyers, court staff)**

*3000 character(s) maximum*

Solicitors are required, as part of their professional obligations, to undertake continuing professional development (CPD) training on an annual basis. The current requirement is for solicitors to complete 20 hours annually which must be certified by each practising solicitor every year and the Law Society may audit an individual solicitor to ensure compliance.

The full annual CPD requirement in 2020/2021 for a solicitor who is not a sole practitioner or a compliance partner and/or an anti-money laundering compliance partner is 20 hours (to include a minimum of 3 hours management and professional development skills and a minimum of 2 hours in respect of regulatory matters).

### *Training for Judges:*

Continuing education for the Irish judiciary is facilitated by the Committee for Judicial Studies. Section 19 of the Courts and Court Officers Act, 1995, provides that:

*“A person who wishes to be considered for appointment to Judicial office shall undertake to the Board (The Judicial Appointments Advisory Board) his or her agreement, if appointed to Judicial Office, to take such course or courses of training or education, or both, as may be required by the Chief Justice or President of the Court to which that person is appointed.”*

Section 48 of the same Act further provides that:

*“The Minister may, with the consent of the Minister for Finance provide funds for the training and education of Judges.”*

However, the website of the Association of Judges of Ireland states that:

*“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. During these conferences speakers are invited to present papers on a range of subjects. The Judicial Studies Committee receives some administrative support from The Courts Service in the making of arrangements for, and the organisation of, these conferences.”*

There is, in fact, little information available to the public around the ongoing training of judges and there is no specific objective or strategy for the Department of Justice to increase investment in the training of judges.

**Digitalisation (e.g. use of digital technology, particularly electronic communication tools, within the justice system and with court users, including resilience of justice systems in COVID-19 pandemic) (Factual information presented in Commission Staff Working Document of 2 December 2020, SWD(2020) 540 final, does not need to be repeated) 3000 character(s) maximum**

The Irish legal system remains primarily paper based. To date, there has been little investment in ICT systems for the Courts Service and little adaptation of legal rules to allow for the use of electronic means in the conduct of litigation. However, the response to Covid-19 pandemic by the Courts Service and judiciary has been to focus on technology as a means to ensure that courts have remained operational, despite the public health restrictions which have applied over the last year.

In this regard, both the Court of Appeal and Supreme Court (which deal with appeals from the High Court and so, do not rely on oral evidence) were very quick to migrate to an online platform for the purposes of case management and hearings. Similarly, the High Court has moved to online platforms for cases which do not involve oral evidence (such as statutory appeals, some judicial reviews and certain non-jury actions), however this has delayed other cases where oral evidence is needed or where there is a jury involved e.g. personal injury actions and defamation proceedings.

The experience across the District and Circuit Court (where the bulk of every day litigation takes place) has been less consistent in terms of the use of ICT, with the most recent public health restrictions introduced in January 2021 resulting in wide scale adjournments of

actions. It is noted, however, that urgent family law and domestic violence application have continued to be dealt with throughout the pandemic.

**Efficiency of the justice system (Under this topic, you are not required to give statistical information but should provide input on the type of information outlined under "type of information".) Length of proceedings 3000 character(s) maximum**

The length of proceedings is published annually by the Courts Service in its annual report. The most recent report is from 2019 when, in the District Court, the length from the issuing of proceedings to their final disposal was 144 days, down from 163 days in 2018.

Similarly the length of time between issuing and disposal in the Circuit Court reduced from 749 days in 2018 to 725 days in 2019 and increased in the High Court from 749 days to 785. At 1,220 days, civil proceedings in the Court of Appeal represented the longest period between lodgement and disposal of an appeal (up from 1,101 days in 2018) . As mentioned, it is hoped that the addition of six judges to this court in 2020 will assist in reducing these lengthy delays. Finally, the Supreme Court remained the Court with the greatest delay between the date of lodging or certification of the appeal and its disposal, standing at over 8 years in 2019.

In October 2020, the Review of the Administration of Civil Justice Group issued a substantial report with extensive recommendations. Membership of the Group included representatives of the judiciary, the legal profession and senior civil servants and its terms of reference were to improve access to justice, to improve efficiency and to identify steps to achieve more effective Court outcomes for court users. The review considered issues which included court procedures, discovery, judicial review, litigation costs, facilitating court users and the use of technology.

The Minister for Justice has indicated that an Implementation Group will be established to progress implementation of the Report's recommendations which are available [here](#).

Other - please specify  
*3000 character(s) maximum*

As previously mentioned, the Department of Justice issued a Justice Action Plan in February 2021. It is the first such plan to be published and a commitment has been made to review and update the plan each year. Goal 2 aims to "Improve access to justice and modernise the courts system" The objectives and action identified include the reduction of legal costs; modernising the operation of the judiciary and the appointment of judges; the establishment of a dedicated family court and modernising the courts and legal system.

For ease of reference, the Action Plan is again available [here](#).

## Anti-Corruption Framework – Ireland

### Other institutional issues related to checks and balances - Ireland

#### The process for preparing and enacting laws

Framework, policy and use of impact assessments, stakeholders'/public consultations (particularly consultation of judiciary on judicial reforms), and transparency and quality of the legislative process *3000 character(s) maximum*

Before a Bill is drafted, a Regulatory Impact Assessment (RIA) is carried out identifying initial options to address the policy matter concerned which then is consulted on with Government Departments and an updated RIA accompanies draft heads of legislation.

While a practice of consultation processes around draft Bills and Laws exists (even though Parliament is not required to hold public consultations in relation to draft legislation) and calls are regularly made for submissions in that regard, it has been our experience that the period of time which is permitted to produce well-researched submissions is not always conducive to meaningful engagement, which is much very a cause of concern.

Before a Bill is finalised, a General Scheme of the Bill may be published. The General Scheme of a Government Bill undergoes scrutiny by a Parliamentary Committee before the text of the Bill is finalised. The relevant Committee may invite stakeholders to participate by attending meetings to discuss the General Scheme of the Bill. At the end of pre-legislative scrutiny, the Committee produces a report which is laid before both Houses of Parliament and which makes recommendations on the Bill based on the Committee's scrutiny of same. Documents laid before the Houses of Parliament are available to the public online. Private Members' Bills undergo a similar process of scrutiny by a Parliamentary Committee but only if they pass the second stage in the Lower House and in practice, Private Members Bills rarely receive the necessary government support for enactment.

Article 17.2 of the Constitution deals with what are referred to as "money bills". The Article provides:

"Dáil Éireann shall not pass any vote or resolution, and no law shall be enacted, for the appropriation of revenue or other public moneys unless the purpose of the appropriation shall have been recommended to Dáil Éireann by a message from the Government signed by the Taoiseach."

This recommendation is known as a "money message", without which certain legislation, which involves a financial implication for the State, cannot proceed to be considered by the Dáil. The Ceann Comhairle (Chairman) of the Dáil decides whether a proposed Bill requires a money message. In practice, the absence of a money message has acted to prevent Bills being initiated by anyone other than the government of the day. At the end of 2019, four Independent elected representatives commenced legal proceedings challenging an alleged overuse of the money message requirement by the Ceann Comhairle. The Court granted leave for the legal challenge to proceed, the case was ongoing throughout 2020 and is listed for hearing in April 2021.

The decision on the leave application is available [here](#).

### **Regime for constitutional review of laws.**

*3000 character(s) maximum*

The Constitution allows for constitutional review of laws by the Courts. Any action to challenge the constitutionality of legislation must be commenced, at first instance, in the High Court and thereafter, may be subject to appeal to the Court of Appeal and in certain limited cases of exceptional public importance, may be subject to further appeal to the Supreme Court. As such, these cases can take many years to reach a final resolution.

The Irish Courts adopt a strict approach to the rules around legal standing and, as such, an action to invalidate legislation must generally be brought by the person who can show that they are directly affected by the alleged unconstitutionality. While a potential litigant would not be automatically excluded from legal aid to bring such an action, it is apparent that this does not happen in practice. The Irish Human Rights and Equality Commission has standing, by virtue of its founding legislation, to institute proceedings to challenge the constitutionality of legislation in certain circumstances (see section 41 of the Irish Human Rights and Equality Commission Act 2014)

**Covid-19: provide update on significant developments with regard to emergency regimes in the context of the Covid-19 pandemic judicial review (including constitutional review) of emergency regimes and measures in the context of Covid-19 pandemic oversight by Parliament of emergency regimes and measures in the context of Covid-19 pandemic measures taken to ensure the continued activity of Parliament (including possible best practices)**

*3000 character(s) maximum*

The Irish Constitution only allows for the suspension of the constitutional review of legislation by the Courts “in time of war or armed rebellion” (Article 28.3.3). Therefore the occurrence of a pandemic is not a basis on which constitutional review of legislation could be suspended. Accordingly, all legislation introduced to deal with the pandemic has been subject to the normal procedure for passing legislation, although the time for debate around the legislation was often guillotined.

The two primary pieces of legislation introduced to deal with the pandemic are the *Health (Preservation and Protection and other Emergency Measures in the Public Interest) Bill 2020* and the *Emergency Measures in the Public Interest (Covid-19) Bill 2020* which grant the Minister for Health extensive powers to restrict the freedom of all individuals in order to prevent the further spread of Covid-19 in Ireland.

In practice, the Minister for Health can introduce far-ranging measures to curtail the civil liberties of citizens by way of secondary legislation which is not required to be reviewed or debated in Parliament and which would require a parliamentary resolution to invalidate any such secondary legislation (this does not happen in practice). Arguably therefore, there is a lack of parliamentary oversight in relation to the extension and ambit of the restrictions placed on public movement and the ability of individuals to associate, the right of children to be educated, the right to work and earn a livelihood and so on.

In response to questions around a lack of parliamentary oversight around many of the responses to the pandemic, a Special Oireachtas Committee on Covid-19 Response was established in August 2020 and reported in October 2020. The final report of the Special Committee is available [here](#).

At present, there is currently no single Parliamentary Committee retaining oversight of the government’s response to the pandemic. It is notable, in terms of the legislative response, that the Special Committee recommended (at Recommendation 11) that:

“All sectoral committees should review the relevant Covid-19 legislation which is regulating activity in their sectors and every proposal to extend regulations after 9 November 2020 should require approval by the Houses of the Oireachtas or the relevant joint committee.”

This has not been implemented and restrictions continue to be made by the Minister for Health alone.

#### **Independent authorities**

**Independence, capacity and powers of national human rights institutions (‘NHRIs’), of ombudsman institutions if different from NHRIs, of equality bodies if different from NHRIs and of supreme audit institutions Cf. the website of the European Court of Auditors: <https://www.eca.europa.eu/en/Pages/SupremeAuditInstitutions.aspx#>**

*3000 character(s) maximum*

The Irish Human Rights and Equality Commission is an “A” Rated national human rights body in accordance with the Paris Principles. Since its establishment in 2014, it has been provided with an increase in funding year-on-year and has been in a position to comment on

measures introduced during the pandemic, highlighting the disproportionate impact of same on more vulnerable groups in society.

The Ombudsman can review administrative actions and decision-making and is an independent office. Following the consideration of complaints regarding poor administration, the recommendations of the Ombudsman, while not binding, are complied with in practice.