Preliminary Submission on the Review of Procedures for Appointment as a Judge

FLAC

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About FLAC

FLAC is an independent human rights organisation which exists to promote equal access to justice for all.

FLAC Policy

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For ***more information***, contact us at

FLAC,
13 Lower Dorset Street, Dublin 1
T: 1890 350250 / 01 887 3600 | E: info@flac.ie | W: www.flac.ie

Recommendations by FLAC

1. FLAC recommends that appointments to the judiciary should be made by the President on the nomination of the Government. Applications for judicial posts should be made to the Judicial Appointments Advisory Board (JAAB) which should, applying the criteria listed below, send forward three recommendations to the Government in respect of each vacancy. The Government should select one of the three nominees except for specific reasons which should be communicated to the Board. In the event that the Government decides not to appoint any of the persons nominated, the Judicial Appointments Advisory Board should be asked to make further nominations.

2. FLAC recommends that the Judicial Appointments Advisory Board should consist of eleven members, four of whom should be nominated by the Presidents of the Supreme, High, Circuit and District Courts and one each by the Bar Council and the Law Society. Five members should be nominated by the Government to represent civil society, including organisations with a particular interest in the justice system. The membership of the Board should be gender balanced and to the extent possible reflect the diversity of Irish society.

3. FLAC recommends that the Judicial Appointments Advisory Board should, subject to the criteria set out below, seek to promote diversity in the judiciary with reference to gender, ethnicity, sexual orientation, persons with disabilities, religion and age. To assist in this the Board should monitor the composition of the judiciary and of the persons applying for judicial appointments with a view to encouraging applications from under-represented groups.

4. FLAC recommends that all judicial appointments should be made on the basis of objective criteria similar to those developed by the Scottish Judicial Appointments Board, including knowledge of the law; skill and competence in the interpretation and application of the law; intellectual capacity and powers of reasoning; personal characteristics; case management skills and communication skills.

5. FLAC recommends that a formal judicial training procedure should be developed for all levels of the judiciary, including an introductory course and mandatory continuing professional development sessions

6. FLAC recommends the re-drafting of the Judicial Council Bill 2010 as soon as possible to provide for the regulation of judicial conduct, the establishment of an effective complaints mechanism and mechanisms for ensuring judicial accountability.

1. Introduction and context of FLAC's submission

As an organisation centrally concerned with access to justice, FLAC welcomes the consultation on the Judicial Appointment Process initiated by the Department of Justice and Equality. The courts and the judiciary are for many people their last resort in their quest for justice. They are the guarantors of the rights set out in the Constitution, a key factor in preserving the rule of law and protecting the public against crime, and the public's ultimate defence against the abuse of power.

It is essential to our democracy that the public have confidence in the courts and the judiciary, that they believe that the judges are independent of the executive and of vested interests, that they are impartial, that they are broadly representative of Irish society, and that they are alert to and have an understanding of the social issues of the day and an appreciation of the growing cultural diversity and changing nature of our society.

Because the judiciary are so central to the development of a just and fair society, we believe that the method of appointment of our judges is a crucial aspect of the justice system and of our democracy and we are glad to have the opportunity to contribute to a discussion about how they should be chosen. We would like as well to say something about the need for accountability of our judges and for a credible and effective way of dealing with judicial misconduct and complaints about the judiciary.

The current system of appointments has been criticised as ineffective and there have been criticisms that the appointment of some judges has been influenced by their political affiliations. Despite these concerns, it must be acknowledged that the Irish judiciary has served the people and the State well, with very few exceptions, but our justice system must have the confidence of the people. That confidence may be undermined if people feel that some have been appointed for political reasons. Similarly sections of society may lose confidence in the justice system if they feel people of their gender, ethnicity or other characteristics are seriously underrepresented in the judiciary. We believe the system of appointing the judiciary should be and should be seen to be free from political patronage and should aim to ensure that the judiciary is broadly representative of all sections of society and is appointed on a basis of merit and experience alone.

2. Overview of judicial appointment system in Ireland

Having established the principles on which judicial appointment should be based, this submission will provide an overview of judicial appointment systems in Ireland and the following common law jurisdictions: England and Wales, Northern Ireland, Scotland and Canada. Prior to any examination of other common law jurisdictions, a critical examination of the Irish judicial appointment procedure is necessary. This exercise will be repeated for each of the named common law jurisdictions through the lens of the established principles above.

2.1 Judicial appointments in Ireland

According to Article 35.1 of the Irish Constitution, the President of Ireland appoints the members of the judiciary.[1] But the power of the President in this regard is exercised on the advice of the Government, in accordance with Article 13.9.[2] In effect the Constitution places the power to appoint judges firmly in the hands of the Government. The procedures and qualifications for appointment to the judiciary are laid out in statute. Whereas the qualifications for judges have been laid out in statute since 1924, the procedures for the appointment of judges was not formally laid down until the enactment of the *Courts and Court Officers Act 1995* ('the Act'). Part IV of the Act established the Judicial Appointments Advisory Board ('the Board').

2.2 The Judicial Appointments Advisory Board

The functions of the Board are to identify persons and inform the Government of the suitability of those persons for appointment to specified judicial office in accordance with section 13(1) of the Act. Under the current system the appointments are made by the government and the role of the Board seems to be merely to forward the names of applicants who meet certain minimum requirements. They are required to send forward a minimum of seven names for each vacancy and there is no upper limit. As a result the Government always has a wide group from which to select judges which leaves the process open to charges of political favouritism. In circumstances where the government decides to fill a vacancy by promoting a serving judge they do not have to consult the Board at all. Since its inception, the procedures and operations of the Board have been further criticised on the following grounds: diversity of candidates and composition of the Board, criteria for appointment, judicial training, procedural transparency and judicial accountability.

[1] Article 35.1 of Bunreacht na h'Éireann states: "*The judges of the Supreme Court, the High Court and all other Courts established in pursuance of Article 34 hereof shall be appointed by the President.*"

[2] Article 13.9 of Bunreacht na h'Éireann states: *"The powers and functions conferred on the President by this constitution shall be exercisable and performed by him only on the advice of the Government, save where it is provided by this Constitution that he shall act in his absolute discretion or after consultation with or in relation to the Council of State, or on the advice or nomination of, or on receipt of any other communication from, any other person or body."*

2.2.1 Diversity of candidates and composition of the Board

The *Courts and Court Officers Act 1995* provides for the establishment of the board and outlines its associated functions. There are no underlying principles guiding the establishment of the Board or the carrying out of its functions. As a result, the composition of the board does not reflect the diversity of society and this is reflected in the carrying out of its functions, particularly the selection of candidates for judicial appointment.[3]

Prior to the establishment of the Board, women represented only 13% of the judiciary. In general there has been a year on year increase in female representation. There has been less year on year change in the High Court however. In fact, in 1993 women comprised 18% of that court. By 2013, that proportion had dropped marginally to 17%, illustrating the need for a statutory requirement to ensure gender diversity within the judiciary. Such a mechanism is also required to ensure diversity in the context of ethnicity and social background.

The lack of a statutory requirement to promote diversity within the judiciary has contributed to the failure to develop a more inclusive judiciary. Additionally, the composition of the board does little to promote diversity in the selection process. The board is made up of at least ten members, seven of whom are required to be "legal" members, including the Chief Justice; the President of the High Court; the President of the Circuit Court; the President of the District Court; the Attorney General; a practising barrister nominated by the Bar Council of Ireland; and a practising solicitor nominated by the President of the Law Society. The rest of the Board is comprised of at least three lay members. As a result, there is an imbalance between the number of legal professionals over lay representatives, which could inhibit the expression of lay views as against judicial and legal professional views. From a gender perspective, the current board is well balanced with six male members and five female members. This balance is however not required by statute. From an ethnicity perspective, all board members are white. The fact that five of the positions on the board are reserved for serving judges and the Attorney General may contribute to the lack of diversity in appointments. Moreover, the absence of civil society and relevant NGO representation on the board limits the societal perspective of the board considerably. Dermot Feenan, Barrister-at-Law argues in his paper '*Judicial Appointments in Ireland in Comparative Perspective*' in the Judicial Studies Institute Journal that "the narrow representation of gender and ethnicity on the Board is problematic in so far as Board homogeneity may militate against recognition of the importance of diversity in the process of appointments".[4]

[3] The Board may adopt such procedures as it thinks fit to carry out its functions in accordance with *Courts and Court Officers Act 1995*, s. 14(1). It may also; (a) advertise for applications for judicial appointment, (b) require applicants to complete application forms, (c) consult persons concerning the suitability of applicants to the Board, (d) invite persons, identified by the Board, to submit their names for consideration by the Board, (e) arrange for the interviewing of applicants who wish to be considered by the Board for appointment to judicial office, and (f) do such other things as the Board considers necessary to enable it to discharge its functions under this Act, according to *Courts and Court Officers Act 1995,* s. 14(2).

[4] Feenan, 'Judicial appointments in a comparative perspective' (2008) *Judicial Studies Institute Journal* 46

2.2.2 Criteria for appointment

Section 16 of the Courts and Court Officers Act provides that the Board must not recommend a person unless, in the Board's opinion, that person, among other things, 2(b) "*is suitable on the grounds of character and temperament"* and (c) "*is otherwise suitable*". These criteria are both ambiguous and highly subjective. Speaking with regard to the subjective criteria for judicial appointment in the UK, Kamlesh Bahl, Chairperson of the former Equal Opportunities Commission in England and Wales stated that *"[w]henever there is subjective judgment, sex bias can easily occur".* The criteria for judicial appointments lack specifying criteria that are more explicitly tied to the functions of the judge. The process adopted in Ireland appears not to follow best practice in jurisdictions elsewhere which also face challenges in social and cultural diversity. In those jurisdictions applicants for judicial office must also show an understanding of the social issues of the day and an appreciation for the cultural diversity of their society. This will be examined with regard to other common law jurisdictions in section 3.

In practice the Judicial Appointment Advisory Board here does little more than check that applicants for judicial office have the minimum legal qualifications and length of service as barristers or solicitors. The Board does not rank the candidates in any order or express any preference or recommendation for particular candidates. They just forward the names of all the candidates who meet the minimum requirements.

2.2.3 Judicial training

In order to maintain confidence in the judiciary and to ensure that newly appointed judges are equipped to deal with areas of the law in which they may not have practiced, judicial training procedure and regular continual professional development sessions are necessary. Currently, there is no formal induction for any level of the judiciary, apart from the District Court which involves the assignment by the President of a new judge to sit with another District Court judge for one week. A proper induction course would help to ensure competence in all areas of court work for newly appointed judges.

2.2.4 Procedural transparency

Apart from the operation of the Board, the judicial appointments process is seen to lack transparency, particularly the Government's selection of candidates nominated by the Board. The Government does not publish criteria on the process of selection, nor does it publish reports on its deliberations.[5] This lack of transparency has given rise over the years to fears that some of those appointed to judicial office may have had owed their appointment to their connections with the political party or parties in power at the time.[6]

[5] Irish Council for Civil Liberties, 'Independence, Accountability and the Irish Judiciary' (Dublin, 2007).

[6] Byrne and McCutcheon, *The Irish Legal System* (Bloomsbury Professional: Dublin, 2009).

This lack of transparency is compounded by a lack of any independent audit of the process for judicial appointments. This is in stark contrast to best practice in other jurisdictions. For example, in Northern Ireland the judicial appointment process is overseen by the Northern Ireland Judicial Appointments Ombudsman.[7] The Ombudsman is empowered to investigate complaints from applicants for judicial appointments where maladministration or unfairness is alleged to have occurred in the process by the Northern Ireland Judicial Appointments Commission, the Northern Ireland Courts Service, or the Lord Chancellor. In the Republic of Ireland, the only legal sanction against the Government or Judicial Appointments Advisory Board would appear to be judicial review.[8]

We would suggest that a method of challenging alleged unfairness or maladministration in appointments could be associated with the new regulatory system and mechanism for judicial accountability that we hope will be incorporated in an updated version of the Judicial Council Bill originally introduced in 2010.

2.2.5 Judicial accountability

Complaint mechanisms and appropriate sanctions are also important elements to consider as well as reviewing the judicial appointment procedure. It is crucial that the notion of judicial independence and irremovability from office is balanced with the democratic principle of accountability.[9] The UN Basic Principles on the independence of the Judiciary set out basic standards for discipline, suspension and removal of the judiciary. For example, the Principles recognise the necessity of the drafting of a judicial code of ethics[10] and stress that judges can only be suspended or removed for very serious reasons such as incapacity or unethical behaviour.[11]

The Consultative Council of European Judges also recommends that methods of dealing with judicial misconduct should be legislated for at a national level.[12] A report of the Committee on Judicial Conduct and Ethics indicates that the Irish judiciary is supportive of the concept of judicial accountability. As part of the report, several Irish judges were interviewed, including a Circuit Court Justice who opined that "*…it's a very useful protection for the judiciary that there's a complaints mechanism, and that the Constitution is amended to deal with it. I've nothing to hide and I don't think most judges do […] [i]f people feel strongly that they're being dealt with badly, they*

[7] Established by the *Constitutional Reform Act 1995* which commenced on 25th September 2006.

[8] *Supra* note 4 at 50.

[9] Russell, 'Toward a General Theory of Judicial Independence', in Russell, PH and O'Brien, DM (eds) *Judicial Independence in the Age of Democracy – Critical Perspectives from around the World (*University Press of Virginia, 2000) at 14.

[10] Principle 19.

[11] Principle 18.

[12] Principle 5.1.

should have a right to complain".[13] Currently, there is no complaints mechanism for members of the public or legal professionals who might feel mistreated by a judge.

Several incidents involving judicial misconduct have come to light in recent years which have highlighted the notable lack of a proper accountability mechanism for the judiciary.[14] The issue of judicial accountability has been considered by numerous bodies and groups. The most extensive set of recommendations is to be found in the Report of the Committee on Judicial Conduct and Ethics which later resulted in the publication of the *Judicial Council Bill 2010.*[15]

The *Judicial Council Bill 2010* sets out a process for investigating allegations of judicial misconduct and provides options for dealing with misconduct where the nature of the misconduct is not sufficiently serious to call for the removal of the judge from office.[16] The Bill proposes to establish a Judicial Conduct Committee with lay participation in the investigation and consideration of complaints and provides that in any case where an allegation turns out to be well-founded, the disciplinary process will be able to recommend a range of sanctions depending on the nature of the breach of judicial ethics involved. The Bill defines a "breach of judicial conduct" as "*misconduct by a judge whether in the execution of his or her office or otherwise, and whether generally or on a particular occasion, which constitutes a departure from acknowledged standards of judicial conduct and brings the administration of justice into disrepute....*"[17] Another feature of the Bill is its proposal to set up a Judicial Council of all judges to promote high standards of conduct among judges and supports for judges. In considering the *Judicial Council Bill* from a human rights perspective, it is evident that many of its proposals are in line with the UN Basic Principles which will be analysed below. At present, the bill is being redrafted and we would urge that this should be completed as soon as possible.[18]

[13] Committee on Judicial Conduct and Ethics, 'Committee on Judicial Conduct and Ethics Report' *(Dublin:* Government Stationary Office, 2000).

[14] Chief Justice, Liam Hamilton (14 April 1999) *Report on the Role of the Judiciary,* available from the Irish Courts Services.

[15] *Supra* note 14.

[16] Department of Justice and Equality, Press release by Dermot Ahern on publication of the Judicial Council Bill, 23 August 2010. Available at: www.justice.ie [last accessed 21 January, 2014].

[17] Head 2 of the *Judicial Council Bill 2010.*

[18] Alan Shatter, Written answer to parliamentary question no. 174, 5 December 2013.

3. Judicial appointments in other common law jurisdictions

This section will examine judicial appointment systems in other common law jurisdictions through the lens of the established principles of diversity of candidates and decision makers, objective meritocratic criteria, transparency and accountability.

3.1 England and Wales

The Judicial Appointments Commission is responsible for recommending candidates for a wide range of judicial offices listed in the *Constitutional Reform Act 2005*. As well as selecting candidates on the basis of merit and good character, the Commission must have regard to the need to encourage diversity in the range of people available for selection for appointment.[19] The Commission puts forward only one name to the Minister for Justice, who will invariably, approve the recommendation or provide a reasoned request that a new process of appointment be engaged, thus adding a layer of transparency to the process. Furthermore, to protect further against any abuse of the process, Parliament legislated for a Judicial Appointments and Conduct Ombudsman responsible for, among other things, auditing, and complaints about the appointments process.[20]

Data kept on judicial appointments in England and Wales now routinely records ethnicity, gender and professional background, with reference to those who have applied, been interviewed, been appointed, or placed on reserve. The introduction of the Judicial Appointments Commission has coincided with a significant increase in applications for judicial appointment by women and persons from a minority ethnic background.[21] The Office of Judicial Complaints provides a medium through which individual litigants can complain about the personal conduct of a judge. Sanctions may include formal advice, formal warning or reprimand, or suspension in certain circumstances.[22]

3.2 Scotland

Scotland was the first jurisdiction in the United Kingdom to introduce an independent judicial appointments body – the Judicial Appointments Board for Scotland. The Board is tasked with selecting and making recommendations on judicial appointments following concerns about a lack of transparency in the old

[19] S. 64(1), *Constitutional Reform Act 2005*.

[20] *Constitutional Reform Act 2005*. The Ombudsman commenced work on the 3rd April 2006. See, also, the first report: Annual Report 2006-2007 (London: HMSO, 2007).

[21] *Supra* note 4 at 58.

[22] As per: www.judiciary.gov.uk [last accessed 21 January 2014].

appointments system.[23] In addition to recommending candidates to the First Minister on the basis of merit, the Board must consider ways of recruiting a judiciary which is as representative as possible of the communities in which they serve.[24] The Board currently monitors applications with particular reference to age, gender, ethnicity, national origin and disability.

In 2007, the Board created a Diversity Working Group to research applications with reference to diversity in the legal profession in Scotland and to suggest measures to increase any under-representation in applications for judicial office. For the purpose of the Working Group, the Board notes that diversity "may" relate to gender, ethnicity, disability, age, religion or belief, and/or sexual orientation.[25] Once the Board has drafted a long list of candidates through its 'sift' and 'interview' processes, members of the Board give their views on the suitability of candidates. Interestingly, the lay members of the Board contribute their views first – thus reducing the possibility that they may feel the need to defer to judicial/legal members. The First Minister has never rejected a recommendation of the Board. If the First Minister were to do so, reasons in writing must be given to the Board.[26]

In Scotland, the Judicial Appointments Board sets out seventeen precise criteria for judicial appointment which aim to preclude bias. These include: "ability to marshal facts and competing arguments and reason logically to a correct and balanced conclusion" and "ability to communicate with all types of court user, including lay people, giving instructions, explaining complex issues and giving decisions clearly, concisely and promptly, either orally or in writing".[27]

Judicial accountability in Scotland is provided for by the *Complaints about the Judiciary (Scotland) Rules 2013.* These rules apply in relation to complaints about the conduct of a number of judicial office holders. The rules outline the complaint application process and the procedure and conduct of the investigation.[28]

[23] Scottish Executive, 'Judicial Appointments: An Inclusive Approach' (Edinburgh: Scottish Executive, 2000).

[24] The Judicial Appointments Board for Scotland, 'Annual Report 2002 – 2003' at 3. For discussion of the background to, and brief assessment of the Board, see Paterson, 'The Scottish Judicial Appointments Board: New Wine in Old Bottles?' in Malleson and Russell (eds.), *Appointing Judges* at 13. The Scottish Executive has laid draft legislation before parliament – *Judiciary and Courts (Scotland) Bill 2006 ('*SP Bill 06*')* – following consultation to, among other things, put the Board on a statutory footing.

[25] The Judicial Appointments Board for Scotland, 'Annual Report 2006 – 2007'.

[26] *Supra* note 4 at 59.

[27] *Supra* note 5 at 46.

[28] See: http://www.scotland-judiciary.org.uk/Upload/Documents/ComplaintsAbouttheJudiciaryScotlandRules2013.pdf [last accessed 21 January 2014].

3.3 Northern Ireland

The Judicial Appointments Commission for Northern Ireland was established in June 2005 to conduct the appointments process and make recommendations to the Lord Chancellor regarding all judicial offices up to and including the High Court. Candidates can only be recommended on the basis of merit, and the Commission must engage in a programme of action to secure in so far as is practicable that appointments are reflective of the community in Northern Ireland.[29]

As of 2006, the auditing of judicial appointments and handling of complaints in respect of appointments to judicial office falls under the mandate of the Judicial Appointments Ombudsman.

Perhaps of particular interest in relation to judicial appointments in this jurisdiction, the Commission established early a Diversity Committee whose programme of action includes seeking to broaden the pool of potential applicants to ensure that a judicial career is open to as wide a range of people as possible.[30] To this end, the Committee agreed a number of key objectives, including evaluation of each appointment scheme and improvement, where appropriate, to increase the diversity of the applicant pool. The Commission has sought to augment existing "equity" monitoring data on applicants to judicial office since 2004 to include former judicial office holders. This data will cover age, gender, community background, race, disability, and geographical location.[31] Notably, the Lord Chief Justice's Office issued a Code of Practice in relation to complaints about the conduct of judicial office holders.[32] This complaints mechanism helps to ensure judicial accountability.

3.4 Canada

Within the federation of Canada, judicial appointments are made in different ways for the federal level and for the provincial/territorial level. Appointments to the highest court, the Supreme Court of Canada, are made by the Prime Minister. This process has been criticised for its lack of transparency. Concern about the substantially increased power of the Supreme Court justices following the introduction of the Charter of Rights and Freedoms has prompted calls for reform.

The approach to judicial appointments in the province of Ontario is quite different. The Judicial Appointments Advisory Committee encourages applications by groups that are underrepresented in the judiciary. According to Dermot Feenan (*referenced above)* "applications are particularly encouraged from aboriginal peoples,

[29] *Justice (Northern Ireland) Act 2004* and *Justice (Northern Ireland) Act 2002.*

[30] See its first annual report: Northern Ireland Judicial Appointments Commission, 'Annual Report and Accounts 2005-2006' (London: The Stationery Office, 2007).

[31] *Supra* note 5 at 60.

[32] Available at: http://www.courtsni.gov.uk/sitecollectiondocuments/northern%20ireland%20courts%20gallery/about%20us/code-of-practice.pdf [last accessed 21 January 2014].

francophones, persons with disabilities, racial minorities and women."[33] The Committee recommends to the Attorney General candidates for the Ontario Court of Justice Bench. The Committee is composed of 13 members; three representing the judiciary, three representing the legal profession, and seven lay members appointed by the Attorney General. The Committee is legislatively required to conduct the assessment of candidates in "*recognition of the desirability of reflecting the diversity of Ontario society in judicial appointments*".[34] In operation, the criteria used in assessment of candidates are as follows: "[t]he Judiciary ... should be reasonably representative of the population it serves. This requires overcoming the under representation in the judicial complement of women, visible, culture, and racial minorities and persons with a disability".[35]

In Canada, judicial accountability falls under the mandate of the Canadian Judicial Council. Any member of the public can make a complaint to the Council provided the complaint is about judicial conduct, is made in writing and is about a specifically federally appointed judge, the Council will review the matter. Although the Minister of Justice or a provincial Attorney General can initiate a formal inquiry about a federally appointed judge, most complaints come from the general public.

If a provincial Attorney General or the Minister of Justice of Canada submits a complaint, the Council must appoint an Inquiry Committee to consider whether a recommendation should be made to the Minister of Justice to remove the judge from office. The Inquiry Committee must hold a hearing, normally in public. The Council then considers the report of the Inquiry Committee and makes a recommendation to the Minister of Justice. In accordance with the complaints process, the Canadian Judicial Council can also initiate an inquiry into a judge's conduct.[36] In the fiscal year 2012-2013 (reporting as of 21 March 2013) a total of 138 new complaint files were opened. The total number of complaint files closed for the same period was 131. As of 21 March 2013, there were 44 complaint files under review at various stages of the complaint process.[37]

[33] *Supra* note 4 at 62.

[34] *The Courts of Justice Statute Law Amendment Act 1994*, s. 43(9)(3).

[35] Judicial Appointments Advisory Committee, 'Policies and process' (Toronto; Judicial Appointments Advisory Committee, 2005) at 10.

[36] See: http://www.cjc-ccm.gc.ca/english/conduct_en.asp?selMenu=conduct_complaint_en.asp [last accessed 21 January 2014].

[37] Canadian Judicial Council Annual Report 2012 – 2013, at 3.

4. Overview of international human rights standards relating to judicial appointment procedures

The international standards on judicial appointments are outlined in several international human rights treaties applicable to Ireland. Thus, it is important to assess the adequacy of Irish law and policy in light of this international framework. Access to a competent, independent and impartial court or tribunal is a fundamental human right and is found in several legally binding human rights treaties applicable to Ireland including: the *International Covenant on Civil and Political Rights,* the *International Convention on the Elimination of All Forms of Racial Discrimination*, the *Convention on the Elimination of All Forms of Discrimination Against Women,* and the *European Convention on Human Rights* as well as the EU *Charter of Fundamental Rights*, which is binding on all EU member states and guarantees the same rights as the ECHR.[38]

At a regional level, the *European Convention on Human Rights* was incorporated into Irish domestic law by the *European Convention on Human Rights Act 2003* and obliges Irish courts to interpret statutory provisions or rules of law in a manner which is compatible with Convention rights. Article 6(1) expressly recognises a right to a fair trial before an independent and impartial court. The European Court considers the overall manner of judicial appointments as a relevant factor when determining whether a court or tribunal meets the requirements of independence.[39]

In the international sphere, Article 14(1) of the *International Covenant on Civil and Political Rights* ('ICCPR') unequivocally recognises the right to a hearing before an independent judiciary.[40] Notably, the ICCPR makes explicit the requirement of 'competence'. Hence, the criteria for judicial selection should involve competencies that are transparently meritocratic and precise. Secondly, the UN Human Rights Committee has unambiguously held that the *"right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception".*[41] Furthermore, Article 2(c) of the *Convention on the Elimination of All Forms of Discrimination Against Women* obliges state parties to pursue appropriate measures to *"... establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other*

[38] Ward, 'Independence, accountability and the Irish judiciary' (2008) *Judicial Studies Institute Journal* 1.

[39] *Bryan v United Kingdom* (1995) 21 EHRR 272, para. 37, referring to *Le Compte, Van Leuven and De Meyere v Belgium* (1982) 4 EHRR 1. However, in *Campbell and Fell v United Kingdom* (1984) 7 EHRR 165, the Court found that the appointment of judges by executive is not necessarily in breach of article 6.

[40] Article 14(1) states that: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...."

[41] *M. Gonzales del Rio v Peru* Communication No. 263/1987: Peru 28/10/92.

public institutions the effective protection of women against any act of discrimination". Article 5(a) of the *International Convention on the Elimination of All Forms of Racial Discrimination* similarly guarantees everyone equality before the law and specifically *"in the enjoyment of the right to equal treatment before tribunals and all other organs administering justice"*. It is submitted that a transparent and competency-based process of judicial appointment is cornerstone to the effective administration of justice. Ireland is a state party to all of the aforementioned treaties and thus the State is legally obliged to ensure the rights set out above are fully protected.

Internationally recognised standards are also found in the form of guidelines or declarations emanating from institutions that garner a high level of international support. These standards complement the basic principles of judicial independence enshrined in treaty law and offer a useful reference point in assessing State practice relating to judicial independence and the appointment of judges.[42] Article 10 of the *Universal Declaration on Human Rights* provides that "*[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him".*

Adopted by the United Nations General Assembly in 1985, the *United Nations Basic Principles on the Independence of the Judiciary* set out standards for member states to incorporate into their national legislation and practice.[43] The Basic Principles provide that the independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution.[44] The Basic Principles also impose a duty on governmental and other institutions to respect and observe the independence of the judiciary.[45] Principle 10 outlines the standards for judicial selection as the following: *"[p]ersons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives".* Principle 10 also prohibits discrimination during the process of judicial appointment. The Basic Principles recognise the necessary standards to be adhered to during the judicial appointment process in order to ensure the protection of the independence of the judiciary and the quality of the judges. In 1994, the UN appointed a Special Rapporteur on the Independence of Judges and Lawyers whose role involves publicising UN international human rights standards, coupled with the Basic Principles. The *Bangalore Principles of Judicial Conduct* are complementary to the Basic Principles and were endorsed by the UN

[42] Interights, 'Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights' (London, May 2013) at 15.

[43] Adopted by the 7th United National Congress on the prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by United Nations General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. The Economic and Social Council also adopted *Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary* (Resolution 1989/60, 15th plenary meeting, 24 May 1989) which requires UN Member States to respect and integrate the Basic Principles into their justice systems, and publicise them to all acting judges.

[44] Ibid at Principle 1.

[45] Ibid.

Human Rights Commission in 2003.[46]

At a European level, the Council of Europe has issued numerous guidelines on the appointment of domestic judges. In its recommendation on independence, efficiency and the role of judges, the Committee of Ministers stated that:

> "*All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency*".

The committee also said: "*The authority taking the decision on the selection and career of judges should be independent of the government and the administration*,"[47] but it added that where "*constitutional or legal provisions or tradition allow judges to be appointed by the government, there should be guarantees to ensure that the procedure to appoint judges are transparent and independent in practice*."

One such guarantee suggested by the Committee of Ministers is an "*independent and competent body to give the government advice which it follows in practice*."[48] Notably, the European Court of Human Rights has used this recommendation as a guide for interpreting Article 6 of the European Convention of Human Rights and this is essentially what we also recommend to ensure that our judiciary is independent, impartial, accountable and reflective of the diversity of Irish society.[49]

[46] UN Commission on Human Rights, Resolution 2003/43.

[47] Recommendation No. R(94)12, adopted by the Committee of Ministers on 13 October 1994, para. 2(c).

[48] Ibid at para. 2(c)(i).

[49] In several dissenting judgments, reference is made to the Recommendation, for example, Judge Martens in *Saunders v United Kingdom,* cited by Ward, 'Independence, accountability and the Irish judiciary' (2008) *Judicial Studies Institute Journal* 1 at 3.