



THE BAR  
OF IRELAND  
*The Law Library*

**European Commission  
Annual Rule of Law Report 2021  
Targeted Stakeholder Consultation  
Responses**

**March 2021**

## Contents

<b>Length of proceedings .....</b>	<b>3</b>
<b>Digitalisation of the justice system .....</b>	<b>4</b>
<b>Alternative dispute resolution .....</b>	<b>5</b>
<b>Legal Costs, Kelly Report, DC Rules, Criminal and Civil Legal Aid .....</b>	<b>6</b>
<b>LSRA, Competition, Education and Training .....</b>	<b>9</b>
<b>Specialised Tribunals, Legal Practitioners' Disciplinary Tribunal .....</b>	<b>11</b>
<b>Special Criminal Court .....</b>	<b>11</b>
<b>Judicial Appointments Bill .....</b>	<b>12</b>

## LENGTH OF PROCEEDINGS

1. **Could you elaborate on the main challenges faced by the Irish justice system as regards length of proceedings? Are there courts/instances where particular challenges arise?**

### **Courts Service Statistics**

The Courts Service Annual Report publishes statistical information in relation to average length of proceedings across the various courts. In 2019, the length from the issuing of civil proceedings to their final disposal in the District Court was 144 days, down from 163 days in 2018. The length of time between issuing and disposal in the Circuit Court reduced from 749 days in 2018 to 725 days in 2019. In the High Court the time increased from 749 days in 2018 to 785 days in 2019, as did the number of days in the Court of Appeal, from 1,101 days in 2018 to 1,220 in 2019. The Government approved the appointment of seven new judges to the Court of Appeal in 2019 in light of significant delays. The greatest delays were recorded in the Supreme Court at 8 years.

COVID-19 has resulted in the adjournment of a substantial number of cases. Significant efforts have been taken to facilitate the continued operations of courts through remote hearings which commenced in April 2020, however remote hearings are suitable for a narrow range of cases only and we are likely to see an increase in the length of proceedings reported across all courts in the Courts Service Annual Report for 2020. A high demand for the court to deal with debt, possession, civil jury and other matters is expected post-Covid, resulting in a recent request from the President of the High Court to the Government to appoint up to 20 additional judges in anticipation of “a tsunami” of litigation once the Covid-19 crisis eases. Legislation would be required to implement such a request and it is understood that the matter is being examined by the Department of Justice in consultation with the Department of Public Expenditure.

### **World Bank Statistics**

According to the Doing Business survey of the World Bank Group for 2020, Ireland ranks 91 out of 190 countries in the category relating to “ease of resolving a contractual dispute” which measures whether each economy has adopted a series of good practices that promote quality and efficiency in its court system. Of the common law jurisdictions referred to in the survey, Ireland performed the second worst in the category of “time” which measures in calendar days the average duration of dispute resolution in commercial cases (from the moment that a claim is filed until payment). Only Canada (910 days) takes longer than Ireland’s score of 650 days, which is well above the average of 442 days across the eight common law jurisdictions surveyed. Albeit that the World Bank survey data pertains to commercial disputes, the deficiencies identified resonate across most areas of litigation, and are, in some areas of law, far worse.

### **European Commission Statistics**

According to the latest data available (2018) from the European Commission for the Efficiency of Justice (CEPEJ), Ireland has the second lowest clearance rate in Europe at 63% (European average is 99%) which is a measure of how well a system processes the volume of cases it works with. The ability of courts to cope with caseload is closely related to a continuing shortage of judges (at 3.3 per 100,000 inhabitants) and this must be confronted as a possible factor in delays and inefficiencies of the courts system.

### **Proposed Reforms**

There are a wide range of reforms required so that timely and efficient access to justice is accessible to all those that need it. The appointment of additional judges is an obvious solution, and reforms to the discovery process, the increased use of electronic filing and service procedures, improvements to the process for listing cases, enhanced case management tools across all courts, and class action litigation are but some of the other changes which would increase the efficiency of civil litigation in Ireland and reduce costs.

The Courts Service is commended in its efforts to reduce time for case processing and facilitating greater efficiency in the way trials are managed through initiatives such as e-filing, the e-courts system and other procedural and legislative reforms such as the recent amendments to the Rules of the Superior Courts in relation to the conduct of trials and pre-trial procedures. Its recently published long-term strategic vision for the digitalisation of justice aims to introduce new and enhanced digital services including e-filing and digital case management which will reduce the need to file and process paper, reduce non-value-added work, and drive greater efficiency in accessing justice. The recommendations of the Report of the Review of Administration of Civil Justice (the “Kelly Review”) will also help to address inefficiencies, subject to appropriate resourcing.

## **DIGITALISATION OF THE JUSTICE SYSTEM**

### **2. How do you assess the current level of digitalisation of the justice system?**

#### **Poor investment**

Ireland has one of the lowest investment rates in the court system (per GDP) in the European Union and this has manifested itself in an under-resourced ICT capability. Information and communications technology (ICT) systems in Irish courts were unprepared for the rapid changes that were needed in response to COVID-19. The existing ICT infrastructure was deemed unfit for purpose by the Courts Service in an organisational capability review published in April 2019 – a fact reiterated in a report of the Oireachtas Library and Research Service on Remote Court Hearings in July 2020.

#### **European Commission Statistics**

According to the latest data (2018) from the European Commission for the Efficiency of Justice (CEPEJ), Ireland spends just €56 per inhabitant on its judicial system budget. When compared to other European countries in the same GDP bracket, they are spending €197 - €220 per inhabitant. Notwithstanding the differences between Civil and Common law jurisdictions, this is an alarmingly poor public service investment and clearly the State is shifting the cost burden of the judicial system to the user.

#### **Courts Service Strategy**

The Courts Service Strategic Plan 2021-2023, together with its long-term strategic vision for the digitalisation of justice, aims to fundamentally transform how the Courts Service delivers services by improving access to justice in a modern, digital Ireland. The Bar of Ireland supports the Courts Service in its endeavours to bring new technology and modern ways of working to the administration of justice so that it operates to the highest standard for everyone, from vulnerable court users, witnesses and litigants to judges and legal professionals.

### **Kelly Recommendations**

The Bar of Ireland welcomes the analysis devoted by the Kelly Review to the use of technology in court practice. The response to Covid-19, on the part of practitioners, the Court Service and the Judiciary, has been heavily technology-led. Unfortunately, this has also been constrained by ICT resourcing, capacity building and the speed at which the professions have adapted. The recommendations in the Report in the area of e-litigation and scaling the IT infrastructure are welcomed. Technology will play a fundamental role in supplementing the Court activities and in providing greater access to court users.

### **AI and Legal Services**

A recent paper by Dr. Rónán Kennedy of NUI Galway entitled Algorithms, Big Data and Artificial Intelligence in the Irish Legal Services Market offers useful commentary on the role of technology in the justice sector. “Lawtech” could lead to better access to justice, more affordable legal services, and a better quality of service. However, it could also strengthen existing biases and inequalities, widen the digital divide, and lead to the provision of unregulated services which do not serve consumers well. The Law Society of England and Wales has examined the potential of Lawtech to enable better access to justice, and found that while it has a role, it is not ‘the silver bullet to making the justice and legal system more accessible.’

## **ALTERNATIVE DISPUTE RESOLUTION**

### **3. How do you assess the current level of alternative dispute resolution methods available?**

Alternative legal mechanisms are long established in Irish legislation to resolve disputes out of Court and present a number of potential advantages to the parties, when compared to litigation.

#### **Mediation**

The Mediation Act 2017 requires that solicitors must advise their client to consider mediation to resolve a dispute, as well as the possible advantages of resolving a dispute otherwise than by court action. Solicitors are now obliged to certify that they have given this advice. The Act also provides for the Court to invite parties to litigation to mediate having regard to the circumstances of the case. The Court could penalise a litigant in costs where they have been unreasonable in their refusal to consider mediation.

The Bar of Ireland is of the view that where mediation or another alternative dispute resolution process is proposed by the Court this should not be so extensive as to make alternative dispute resolution mandatory. For example, given the particular dynamics at play in family law proceedings, there will be some cases that may not be suitable for the application of ADR processes, namely situations involving child protection or domestic violence. While ADR should not be made mandatory and the constitutional right of access to the courts to be stringently upheld, information about non-court based solutions and its benefits in suitable cases should be widely promoted.

#### **Arbitration**

Although often used in the context of international commercial disputes, the arbitral process can be applied to a diverse range of areas, and provides a legally enforceable alternative to litigation. In Ireland, arbitral proceedings are provided with a statutory basis under the Arbitration Act 2010, which incorporates current international best practice into Irish domestic law. The UNCITRAL Model Law (as revised in 2006) has been adopted in its entirety into this Act, subject to some modifications. This is the model set out by the UN and is followed by many nations across the globe, making it familiar to all arbitration specialists.

#### **Alternative Dispute Resolution Appointment Service**

Trained barristers can act as mediators or arbitrators and The Bar of Ireland provides an Arbitration and Alternative Dispute Resolution Appointment Service. This scheme provides a fast and free service whereby the parties to a dispute can, if they agree, ask the Chairperson of the Council of The Bar of Ireland to appoint a Barrister to act as Arbitrator or Mediator to the dispute. In selecting the arbitrator or mediator, the Chairperson of the Council of The Bar of Ireland will have regard to the nature of the dispute, its value and its complexity. The Chairperson will make the appointment within five working days of the date of acknowledgment of the request for appointment.

#### **World Bank Statistics**

According to the Doing Business survey of the World Bank Group for 2020, which measures whether each economy has adopted a series of good practices that promote quality and efficiency in its court system, Ireland scores favourably in comparison to other jurisdictions under the heading of alternative dispute resolution (2.5 out of 3).

#### **EU Statistics**

According to the EU Justice Scoreboard 2020 however, Ireland is at the lower end of the scale when it comes to promoting the voluntary use of alternative dispute resolution methods through specific incentives, which may vary depending on the area of law.

Currently in Ireland, structures for ADR methods remain significantly under-resourced, and often people must wait 12-26 weeks for an appointment, particularly in the area of family law.

### **LEGAL COSTS, KELLY REPORT, DC RULES, CRIMINAL AND CIVIL LEGAL AID**

#### **4. The Justice Plan 2021 mentions that work would commence to introduce new scales in order to reduce legal costs. What are your views on this point?**

The issue of legal costs in Ireland continues to undergo significant consumer-focused reforms. That the Kelly Review endorses and supports the initiatives contained within the Legal Services Regulation Act 2015, is a positive and must be allowed to establish and prove themselves. A crude and rigid approach to the management of legal costs can give rise to a number of perverse incentives impacting negatively on litigants and creating an inequality of arms, particularly those litigating against the State and well-resourced parties. Allied with a starved legal aid system, serious concerns in respect of rule of law and access to justice arise where litigants are effectively dissuaded from vindicating their rights.

Recent consumer reforms under the 2015 Act include:

- Part 10, which sets out the duties of solicitors and barristers when charging and billing their clients. These new rules came into force on 7 October 2019, and also include a regime for determining and resolving disputes in respect of costs.
- The establishment of the Office of the Legal Costs Adjudicator has been reformed, including the provision of a publicly available register of determinations, that assist both client and practitioner.
- Section 150 empowers consumers to make informed decisions as to the cost of legal services, as well as supports a competitive legal services market.

The Kelly Review has considered the issue of costs in depth, and the technicalities that apply. By a majority, it has advocated that the new costs regime in place since October 2019 should be assessed once fully effective, but in addition supports the drawing up of guidelines for the assistance of parties and their representatives, by reference to individual items that could be outlined in a table. The obligation to produce such guidelines could be achieved with minimal legislative intervention, with the function assigned either to the Legal Costs Adjudicators or the LSRA (with input from the former). Those guidelines should be non-binding but intended to improve the certainty and transparency of the adjudicative process.

Many of the recommendations in the Report will have a positive impact on reducing the cost of litigation and require the active cooperation of the legal professions. The Council of The Bar of Ireland has written to the Minister for Justice noting that it is imperative that representatives of the legal professions have opportunity to input into the implementation plan development.

#### **What are your views on the recommendations of the Peter Kelly report?**

The Bar of Ireland welcomes the publication of the Report of the Review of Administration of Civil Justice (the “Kelly Review”), which has since early 2018, considered a wide number of reform initiatives along with the experience of similar overseas jurisdictions.

The publication presents a comprehensive telling of how the litigation system currently works and offers 90 recommendations on matters relating to technology, court users and innovations such as multiparty actions. Practitioners have for many years observed that the processes and procedures of the court could be better streamlined to improve both the administration of cases as well as efficiency and speed in accessing justice for citizens. Careful consideration, such as undertaken by the Kelly Review, as well as ongoing and further analysis of reforms, will greatly assist in balancing the necessity for fair and clear procedures with effective and constitutionally sound justice, for all parties.

Recommendations for reforms will need to be carefully benchmarked against the fundamental and core constitutional tenets. For example, in the sphere of judicial review, the Review Group has recommended that the threshold for leave (the standard that must be reached for the High Court to permit the challenge proceed) be modified to include a requirement that the applicant show a ‘reasonable prospect of success’. In many cases, this may cause difficulty in practice, and indeed work in the favour of the State where important community and national issues require review. The Council is of the view that reforms of a legal technical nature such as this will have to be carefully assessed before implementation.

The Bar of Ireland made a range of submissions to the Review Group relating to a wide number of areas of practice and procedure and we look forward to actively participating in the Implementation Group, alongside other key stakeholders, to ensure that the reform proposals are carefully considered and fit for purpose. With appropriate resourcing and continued analysis, the Report can give rise to productivity and performance gains for all involved in the judicial system, while also ensuring that existing reforms are permitted to establish.

The resource context of the Irish court system cannot be divorced from the issues considered by the Review Group. With one of the lowest investment rates to the court system (per GDP) in the European Union, this has manifested itself in an under-resourced ICT capability and the fewest number of judges per capita. Procedural reform is an objective the Bar supports, however it must to be matched with the necessary resourcing: human, technological and financial. Effective legal aid, better case management, adoption of technology, more judges - these are clear determinants of costs, and greater efficiencies that accrue to citizens and businesses.

**What is your assessment of the changes made with District Court (Order 36) Rules 2020 (S.I. 496/2020)?**

The SI within provides the rule change that ‘Where the Court makes an order in any case of summary jurisdiction (including an order to “strike out” for want of jurisdiction) it may make an order in accordance with law ordering any party to the proceedings to pay to the other party such costs and witnesses’ expenses as it shall think fit to award.’

Under the new rule there is no longer an immunity in respect of costs for the Director of Public Prosecutions (DPP) or prosecuting Garda. In effect, this change brings the District Court in line with the Courts above it, where costs can be awarded in an unsuccessful prosecution. In most cases it will not happen because the defendants will have been in receipt of legal aid and therefore have no costs. It was long the position that no costs could be awarded in an unsuccessful prosecution where the case had reached the jury (i.e. where it was a stateable case even if not successful), however the Superior Courts changed this about ten years ago.

Prosecutors in criminal proceedings in the Central and Circuit Criminal Courts do not enjoy an immunity in respect of costs and this amendment therefore better aligns the District Court rules with those pertaining to indictable matters and that where defendants have the benefit of the Criminal Legal Aid scheme, the question of costs will not arise.

**The Justice Plan 2021 mentions a General Scheme of the Criminal Legal Aid Bill. What is your opinion in this regard?**

The Justice Plan commits to publishing a General Scheme of the Criminal Legal Aid Bill to transfer the operation of the criminal legal aid scheme to the Legal Aid Board and otherwise update and modernise the law on criminal legal aid.

The Bar of Ireland has no difficulty in principle that the operation of the Criminal Legal Aid Scheme would transfer to the Legal Aid Board, which oversees the Civil Legal Aid Scheme, however, we are concerned that the operation of the scheme is not adversely affected by the move. For example, we would be concerned that the institutional knowledge of how the

scheme is administered is retained amongst staff. This may necessitate that they transfer out of the employment of the Department of Justice to the employ of the Legal Aid Board to ensure a seamless transition.

**The Justice Plan 2021 mentions a review of civil legal aid scheme. What is your opinion in this regard?**

#### **European Commission Statistics**

According to the latest data (2018) by the European Commission for the Efficiency of Justice (CEPEJ), Ireland's legal aid budget per inhabitant is €22.95 which represents 0.034% as a percentage of GDP. By contrast, our common law neighbours in England and Wales and Northern Ireland allocate a generous €31.26 (0.101% of GDP) and €48.35 per inhabitant (0.205% of GDP) respectively. Ireland's legal aid budget per inhabitant is poor relative to its wealth in GDP.

#### **Reforms needed**

The Bar of Ireland welcomes the Department's intention to review the civil legal aid scheme and bring forward proposals for reform. Legal aid is becoming increasingly insufficient to meet a growing need in Ireland. At the end of 2019 there were 2,019 people waiting on legal aid services. A 15% increase on the 1,754 people who were waiting at the start of the year. This need is compounded by the COVID-19 crisis. Between March and August 2020, employment law queries to FLAC (Free Legal Advice Centre) increased by 58.7% compared to the same period in 2019, an area of law that is not covered by legal aid.

There is manifest desirability for improvements to the civil legal aid system in Ireland in terms of eligibility and the areas of law to which legal aid applies. In the event that civil legal aid was to be made more widely available this would help, not only to achieve equal access to justice and to secure effective legal representation for all, but also to address the increasing incidence of litigants in person in the Courts. The Courts have increasingly had to determine cases that have (at least) one litigant in person participating. There are a number of reasons behind self-representation but the inability to afford legal representation and non-qualification for legal aid are predominant factors. Greater investment in civil legal aid would help to address the increasing incidence of litigants in person in the Courts and ensure the smoother and more efficient administration of justice in the civil courts.

## **LSRA, COMPETITION, EDUCATION AND TRAINING**

- 5. What is your opinion on the initiatives already taken by the LSRA? Could you elaborate on the effect of these measures on the legal market? What are the main remaining barriers to competition in this sector?**

Barristers practice in a highly competitive market. Members of the Law Library are independent sole practitioners, who compete with each other on a daily basis. There is no set scale of fees and the fee and manner of payment is usually negotiated by the solicitor on behalf of the client. It is a longstanding requirement that, on receiving instructions from a client, a barrister must on request provide the client with a written fee estimate. This requirement is set out in the Code of Conduct of The Bar of Ireland and the obligation is now

reinforced under the new costs provisions of the Legal Services Regulation 2015 Act which demand a certain level of detail to enhance clarity and transparency for the client.

Transparency in legal costs will have the inevitable effect of generating more competition among legal service providers. By increasing the amount of information available to consumers about the price of legal services it enables consumers to make informed decisions about which lawyer to choose and at what rates. If consumers are able to compare the prices for legal services, this creates an additional incentive for lawyers to compete on price. This empowers the client to shop around and ensure they obtain the best representation and the best value for money.

On the other hand, barristers who undertake work on behalf of the State or large institutions such as insurance companies are, in the main, working to a set schedule or scale of fees. As such there is little or no negotiation, and in many cases, this involves barristers appearing for a client at less than the normal commercial rate.

The Law Library has a current membership of approximately 2,150 practising barristers. Recent data indicates that Ireland has the highest number of barristers per 100,000 population in comparison to other jurisdictions where there is an independent referral bar in existence. The pool of legal service providers is furthermore enhanced by the recent establishment of legal partnerships as provided for in the 2015 Act, thereby increasing consumer choice.

**The LSRA is working with the Department of Justice to implement recommendations made to reform the training and education of legal practitioners including reforms to increase competition in the legal education and training market. What is your opinion in this regard?**

### **Education and Training Reforms**

Where the Honorable Society of the King's Inns has the responsibility for the education and training of students in order to be admitted to the degree of Barrister-at-Law, The Bar of Ireland is concerned with the delivery of ongoing professional training and education for newly qualified and practising barristers. Continuing professional development (CPD) is a vital tool in ensuring consistently high standards of practice and regular reviewing of developments in the law as they arise.

The Bar of Ireland CPD Scheme is a very well established and expertly managed scheme that is regularly reviewed to ensure that it is in keeping with international best practice and is provided to members as part of their annual membership subscription fee. The Bar of Ireland has developed vast expertise in the provision of ongoing education and training for barristers.

The Legal Services Regulatory Authority (LSRA) published a report in September 2020 in relation to education and training standards for legal practitioners. One of the areas that the report addresses is Continuing Professional Development (CPD) and it makes a series of recommendations with the objective of ensuring that CPD for legal practitioners is of a high standard, purposeful, relevant and aligned directly with the Legal Practitioner Competency Framework. In response to this recommendation, The Bar of Ireland is in the process of revising and updating its CPD requirements and is developing a new CPD scheme which will be aligned to a new Competency Framework that outlines the knowledge, skills, abilities, and

behaviours needed to remain current and up to date in practice. It is intended that the new CPD scheme will be introduced from 1st October 2021.

### **Increasing Competition in the legal education and training market**

As regards proposed reforms to increase competition in the legal education and training market, should the LSRA consider the accreditation of bodies or institutions to provide, or procure the provision of, courses of legal professional education and training, The Bar of Ireland would request that it be consulted in that regard and provided with the opportunity to be confirmed as an accredited provider in the area of ongoing training and education.

## **SPECIALISED TRIBUNALS, LEGAL PRACTITIONERS' DISCIPLINARY TRIBUNAL**

### **6. Could you provide your views on the functioning and independence of the existing specialised tribunals, such as the Labour Court?**

The system for the adjudication of employment disputes in Ireland was reformed significantly by way of the Workplace Relations Act 2015. During its preparation and passage through parliament the Employment Bar Association (a specialist group of our members) raised a number of significant concerns regarding certain elements of the legislation. For example, attention was drawn to the necessity for legal training and expertise on the part of persons hearing employment claims, together with the need to observe certain other fundamental standards. Regrettably, the legislation as enacted did not reflect these submissions. It should be noted that there is currently a challenge before the Supreme Court to the constitutionality of certain aspects of the 2015 Act in which some of these issues feature. The matter was heard over two days in December 2020 and judgment is awaited.

### **The Justice Plan 2021 includes among its foreseen actions the facilitation of the coming into operation of the new Legal Practitioners' Disciplinary Tribunal and embed other new justice structures to ensure improved outcomes for the public. What is your opinion on this?**

Since the 7<sup>th</sup> October 2019, the LSRA oversees the consumer disciplinary protections for legal services clients and their work to date is detailed in their biannual reports published on their website. The Bar of Ireland continues its proactive & ongoing commitment to ensure that the Council and members of the Law Library are aware and assure compliance with their obligations under the Legal Services Regulation Act 2015.

## **SPECIAL CRIMINAL COURT**

### **7. A Review Committee will examine the Offences Against the State Acts, and the functioning of the Special Criminal Court. Could you elaborate on your views on the functioning of the Special Criminal Court?**

The primacy of trial by jury is a core constitutional protection but situations can arise where a trial could not be effectively held in the ordinary courts. The Special Criminal Court is used in trials of dissident republican and gangland criminals with no jury in order to avoid any potential intimidation of jury members. Insofar as there is a need for the Special Criminal Court it is important that its use remains very much an exception.

## JUDICIAL APPOINTMENTS BILL

### 8. What is your opinion on the new Draft General Scheme on a Judicial Appointments Bill?

A number of reforms to the appointments process are currently under consideration under the Judicial Appointments Commission Bill 2020. Such reforms include the establishment of a new body, the Judicial Appointments Commission, to replace the Judicial Appointments Advisory Board (JAAB). In a recent submission to the Department of Justice (January 2021) in relation to the Bill, the Council of The Bar of Ireland indicated that the establishment of a new separate body such as the Judicial Appointment Commission is costly and unnecessary where the JAAB could be reorganised so as to perform the same functions. Alternatively, administrative support functions could be shared with the newly established Judicial Council. It is the Council's view that scarce resources are better used underpinning and supporting the judiciary in its functions.

#### **Composition of Commission**

Nevertheless, as regards the proposed reforms, The Bar of Ireland welcomes the reduction in the number of members of the Commission from 17 to 9 and agrees that a reduced number encourages consensus and aids decision making. However, it is of concern that neither the Chair of the Council of The Bar of Ireland nor the President of the Law Society are included as members of the Commission, resulting in no member of the Commission representing either of the professions from which candidates may be selected. This is in contrast to the Legal Services Regulation Act, 2015 which includes both the Chair of the Council and the President of the Law Society on the Advisory Committee for the grant of Patents of Precedents. The Chair of the Council is acutely aware of the full set of skills required by an applicant for a judicial position to ensure excellence in that role, and would be an asset to the Commission in that s/he would bring an additional perspective, insights and knowledge to the Commission.

#### **Selection and Recommendation**

##### Number of recommended candidates

The Council of The Bar of Ireland submits that where there are sufficient suitably qualified candidates, the maximum number of persons recommended to the Minister should be 3 as opposed to 5 as is recommended in 2020 Bill. There is no rationale for recommending 5 people for one available role, particularly where the recommended candidates are not ranked.

##### Ranking of recommended candidates

As is evidenced by the long list of recommendations forwarded to the Minister in connection with previous judicial vacancies, many (if not all) applicants will have the requisite experience, competence and good character to satisfy the necessary conditions. The Council recommends that the Commission therefore undertakes an exercise of ranking such applicants on the basis of merit. This is particularly important if the proposed legislation does not reduce the long list from 5.

##### Where no candidates are recommended

The Council recognises that, under the Constitution, the executive retains the power to nominate judges for appointment by the President. The Council believes that only candidates recommended by the Commission should be eligible for appointment. However, the Bill

provides that where the Commission cannot recommend any of the candidates or it can only recommend a lesser number of candidates, then it may provide to the Minister a statement of the name of each eligible person who made a relevant application. It is not clear why the Minister would receive such a list of names from the Commission, in circumstances where the Commission concluded, having conducted the selection process, that none or a lesser number of candidates were suitable for recommendation. It appears that the 2020 Bill envisages that the Minister would appoint a person not recommended by the Commission despite it having conducted, at great expense, a selection process. The Council does not believe that such a provision is necessary, and recommends that the position should be re-advertised if no suitable candidate applies for the position.

#### Elevation of serving judges and appointments to international courts

The Council welcomes the introduction of a process where judges must participate in the same selection process for appointment to a higher court as other candidates. However, the Council notes that appointments to international Courts are not covered by the 2020 Bill and submits that the Bill should include the nomination by the State to international judicial positions, including the EU, Strasbourg and international criminal courts. There is no rationale for treating this category of judges any differently from national appointments.

#### Eligibility of legal academics

The Council does not believe that any case has been made out for the extension of eligibility for appointment to legal academics and that what constitutes a legal academic has been poorly defined. It is further submitted that the inclusion of such a category is inconsistent with requirements for candidates to demonstrate experience and competence. In the case that provision is made for the inclusion of legal academics as a category of persons eligible for appointment, it is submitted that practice as a barrister or solicitor for a period of four years is an insufficient period within which to acquire and be able to demonstrate the necessary competence, probity, knowledge of decisions and knowledge of practice and procedure that will be required of applicants. It is submitted that the period of four years should be increased.