



The Seamus Woulfe controversy and the deficiencies in Ireland’s judicial appointments process

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ABSTRACT

The ‘Golfgate’ controversy of 2020 caused significant public anger, led to resignations of a number of high-profile figures, and caused questions to be asked about political culture and elitism in Ireland. A more unexpected consequence of this episode was that it exposed the serious inadequacies in the process of appointing judges in Ireland. Scrutiny of the manner in which Judge Seamus Woulfe was appointed to the Supreme Court revealed worrying inconsistencies and a serious lack of transparency in the process. While legislative reform is forthcoming to reform this process, it is not clear that the failings highlighted by this episode will be rectified in this process. This article examines Ireland’s appointment process in light of the Woulfe controversy and assesses the proposed reforms currently before the Oireachtas, on their adequacy to address these problems.

Keywords: judges; judicial appointment; Judicial Appointments Commission; Golfgate; legislative reform; judicial diversity.

INTRODUCTION

Judicial appointments in Ireland have long been the subject of dispute, due to the unfettered discretion of government to appoint any candidate it wishes for judicial office and its use of the power to appoint candidates on the basis of personal political connections. Following a major appointment controversy, a 1995 reform attempted to address this problem and – it is widely agreed – entirely failed to do so. A new process of reform was begun a decade ago, which resulted in a controversial legislative proposal that floundered and failed after a prolonged legislative process. It was in that context that Ireland had its most recent judicial appointments controversy.

In 2020, the newly elected Government, which had promised reform to appointments in its programme for government, appointed the Attorney General of the previous Fine Gael minority Government – Seamus Woulfe – to the Supreme Court almost immediately after he

vacated that role. Relatively uncontroversial at the time, this process came under scrutiny later after Judge Woulfe's involvement in the 'Golfgate' affair, where he attended a controversial Oireachtas Golf Society dinner in Clifden at a time when indoor events were restricted due to Covid-19 regulations. As controversy persisted, and a retired judge conducted a review of his actions, questions arose about the manner of his appointment, leading to significant attention on the Government's process in relation to such appointments and whether other candidates – sitting judges who applied for promotion – were given proper consideration in this process. This ultimately led – despite the Government's resistance to this on the basis of separation of powers concerns – to the Minister for Justice taking questions in the Dáil on the process surrounding the appointment.

This controversy spurred yet another wave of calls for reform, and a new legislative process is now in train. However, as with previous reform proposals, it is not clear that the proposed measures will entirely remove the problems – perceived and real – in the Irish judicial appointments process. In this article, we examine Ireland's appointment process in light of the Woulfe controversy, to illustrate how certain problems are likely to persist even after the proposed legislative changes are made. In the first part, we discuss the history of judicial appointments, outline the problems with the current system, and the recent failed attempts at reform. In the second part, we look at the Woulfe controversy: first, the Golfgate affair that led to consideration of a motion to remove him, and then the contemporaneous controversy about his appointment. In the third part, we canvass the many issues brought into focus by the Woulfe affair, including the two parallel appointments processes for new applicants and promotions; the inappropriate use of the appointments board recommendations as a justification for selection; the question of who actually decides on the candidates brought to Cabinet; and the total lack of transparency of the system. In the fourth part we assess the suitability of the current reforms and their ability to address these problems. We conclude with some comments on further changes that are necessary in order to avoid appointment controversies in future.

PROBLEMS WITH IRELAND'S SYSTEM OF JUDICIAL APPOINTMENTS

History

Since before the foundation of the state, judicial appointments in Ireland were made on the basis of personal connections, and what

was known as the 'tap on the shoulder' system.¹ Article 68 of the Irish Free State Constitution specified that judges would be appointed by the Governor General 'on the advice of the Executive Council'. The Governor General formally bestowed the seal of office on the successful candidate, but the choice lay with the Executive Council. When the new Constitution was promulgated in 1937, this system was retained, substituting the President of Ireland for the Governor General. Article 35.1 of the Constitution 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'; article 13.9 clarifies that this power, like many granted to the President, is only exercisable 'on the advice of the Government'.

Since the Constitution provides no further guidance on how this appointment should be made or who is an appropriate candidate, the Government had complete discretion in terms of what candidates to select for any vacancy on the courts. As Carroll MacNeill has outlined, the appointments were made on the basis of 'personal networks and political allegiances'.² This was not controversial at the time. In 1994, a particularly problematic appointment brought this matter to a head.

Relying on an apparent convention that the Attorney General of the day had first refusal on any new vacancy in the Superior Courts,³ then Taoiseach Albert Reynolds announced that Attorney General Harry Whelehan SC would be nominated as President of the High Court, filling a vacancy created by Liam Hamilton's appointment to the Office of Chief Justice. The was not supported by the Labour Party, the junior coalition partner in government, due to recent media revelations that the Attorney General's office had delayed processing an extradition application for Fr Brendan Smyth, who was wanted on charges of sexual assault against children. Whelehan was appointed over Labour's objection but resigned only two days later due to the controversy and to avoid further damage to the administration of justice. The issue ultimately brought down the Government after a motion of no confidence was passed the same day.⁴

1 See P C Bartholomew, *The Irish Judiciary* (Institute of Public Administration 1971); Raymond Byrne, J Paul McCutcheon, Laura Cahillane and Emma Roche-Cagney, *The Irish Legal System* (Bloomsbury 2020) ch 4; J Carroll MacNeill, *The Politics of Judicial Selection in Ireland* (Four Courts Press 2016), ch 2; B Chubb, *The Politics of the Irish Constitution* (Institute of Public Relations 1991).

2 Carroll MacNeill (n 1 above) 59.

3 This had certainly become a practice; whether it was truly a convention is debatable.

4 Byrne et al (n 1 above) 192. For more information, see Ruadhán Mac Cormaic, *The Supreme Court* (Penguin 2016).

Following this controversy, it was decided to establish a Judicial Appointments Advisory Board (JAAB) and new sections were added to the Court and Court Officers Act 1995, which was going through the Oireachtas at the time, in order to establish the Board. It would be composed of senior judges, members of the legal professions, the Attorney General, and some lay members. Section 6 of the Act specifies that: 'In advising the President in relation to the appointment of a person to a judicial office the Government shall firstly consider for appointment those persons whose names have been recommended to the Minister pursuant to this section.'

However, the reform was skin-deep; it was a rushed fix for a political problem.⁵ Members of the ministerial subcommittee which designed the scheme even urged the Dáil to reject the proposal, stating that the JAAB was a 'charade' and 'a political response to a temporary political problem' that would itself cause problems.⁶ At best, the new system may have improved some formal aspects of the appointment system, with some limited criteria for appointment being drawn up. However, there are deep problems with the JAAB.

Problems with the JAAB system

The first obvious issue with the JAAB is that there are significant limits to its role; it is only used for new judicial candidates, having no involvement in promotions of sitting judges applying to higher courts, or in appointing the president of a court or Chief Justice. This results in a strange state of affairs whereby for a single vacancy there could be parallel application processes: practitioner applicants applying through the JAAB, and judicial promotion candidates applying through the Office of the Attorney General by an unregulated process. The unsatisfactory nature of this process is illustrated by the Woulfe appointment, discussed below.

Secondly, though presented as an advisory body, the JAAB is, in practice, nothing more than a filtering mechanism or long-listing process whereby undesirable or clearly unqualified candidates are excluded. The 1995 Act requires the JAAB to recommend to the Minister at least seven persons for appointment to any particular post. There is no interview or assessment, and no ranking of candidates. Seven names would already give the Government huge discretion, but for fear (we think ungrounded) of falling foul of the Constitution by fettering government choice, the JAAB – apparently of its own motion – decided it should simply remove any unqualified or undesirable candidates and present all other otherwise qualified applicants to the

5 Carroll MacNeill (n 1 above) 64–65.

6 Dáil Debates, vol 459, 29 November 1995.

Government.⁷ In practice, this meant that the Government could be presented with a list of 20 or so names for a High Court appointment or up to 90 names for a District Court appointment. While the JAAB may have discontinued this practice more recently, there is nothing in law to prevent the practice or to require the Board to narrow the field.

Although the 1995 Act empowers the JAAB to interview candidates, the JAAB chose not to exercise this power, or to assess candidates in a meaningful way beyond an application form. Instead, a questionable method of taking 'soundings' has been used, where views are sought about the candidate in the legal community, and a candidate's professional reputation is considered by the JAAB. This may have a tendency to disadvantage solicitor applicants, as well as barrister applicants who are less well-known or practice on the more rural circuits. It also has the effect of side-lining the lay members of the JAAB. One JAAB member compared the process to vetting new members of the golf club.⁸ The JAAB also uses other questionable metrics – such as what a candidate has earned in their legal practice – to judge quality.⁹

The third problem is the continuation of 'political appointments',¹⁰ since the JAAB system has done little to direct governmental discretion. While seven names would still leave broad discretion for government, the practice of sending on all potentially qualified candidates means it does not even perform a limited filtering function. A former Minister for Justice suggested that the process allowed the Government to 'cherry-pick' between candidates.¹¹ It may also choose to promote judges from outside this process. And, as noted above, the Government may select from the list of names provided by the JAAB, but can choose another candidate if it wishes.¹² The Government is not given recommendations by the JAAB, or any useful guidance; it is thus unsurprising that candidates known to the Government might be preferred.

7 Carroll MacNeill (n 1 above).

8 Ibid 118.

9 Ibid 117.

10 In 2014, there were two separate Bills published which proposed to remove the political influence from the judicial appointments process; one by Independent TD Shane Ross and one by Sinn Féin. The 2017 Bill, championed by Shane Ross, was also principally influenced by the need to reduce political influence in appointments. See also D Kenny, 'Merit, diversity, and interpretive communities: the (non-party) politics of judicial appointments and constitutional adjudication' in Laura Cahillane, James Gallen and Tom Hickey (eds), *Judges, Politics and the Irish Constitution* (Manchester University Press 2017).

11 Carroll MacNeill (n 1 above) 124.

12 Ruadhán Mac Cormaic, 'Séamus Woulfe's selection for Supreme Court "differed from normal practice"' *Irish Times* (Dublin 19 November 2020).

It is undeniable that many judicial appointments have been made on the basis of political allegiance. Certain judges have been open on this point, with one retired judge commenting on RTE radio that such an approach was 'common'.¹³ In a submission to the Department of Justice in 2014 on judicial appointments reform, senior members of the judiciary criticised the role of party political patronage in the current appointments process.¹⁴ Carroll's 2004 study of the Irish judiciary concluded that the general view among members of the judiciary was that the JAAB had made little difference to the political patronage system of appointments in Ireland.¹⁵

However, while the appointments process is clearly political in this sense – people may be affiliated with parties or be known to those in government – there is no evidence that this has had any effect on judicial decision-making. A case to the contrary could be made: a study conducted in 2016 analysed over 5,000 decisions of the Supreme Court and found no evidence of partisanship in decision-making.¹⁶ However, this study is of limited value as it had to exclude constitutional cases involving a challenge to a post-1937 statute, where no dissent was allowed until a constitutional change in 2013. Since these cases may be the most politically salient, or most likely to cause problems for the government of the day, it is unclear what if any conclusions we can draw from this study.

But even if the political nature of appointments does not suggest any attempt to manipulate the outcomes of judicial decisions, it is clearly problematic. The known role of political connections undermines the appearance of a fair process in raising suspicions of bias in particular cases. More generally, public trust in the administration of justice is put at risk if there is a pervasive sense that judges are chosen for their political connections. These perceptions are damaging even if there is no political bias in decision-making. Few, therefore, deny the need to reform this system in some way. We would not suggest that government should not be involved in appointments at all. The government's core involvement is a constitutional imperative in Ireland, and a crucial connection between the political branches and the judiciary in the separation of powers. International standards, such as the Mount Scopus Standards on Judicial Independence, suggest government must

13 RTE Radio One Interview with retired judge Michael Patwell, 25 August 2012.

14 Judicial Appointments Review Committee, 'Preliminary Submission to the Department of Justice and Equality Public Consultation on the Judicial Appointments Process' (Judges Report) 30 January 2014.

15 J Carroll, 'You be the judge part II – the politics and processes of judicial appointments in Ireland' (2005) 11 Bar Review 186.

16 R Elgie, A McAuley and E O'Malley, 'The (not-so-surprising) non-partisanship of the Irish Supreme Court' (2018) 33(1) Irish Political Studies 88–111.

play a role in the appointments process.¹⁷ Balance is needed between government involvement and overly politicised appointments.

A related issue is the lack of transparency in the process. Carroll MacNeill notes that even applicants can be unclear as to how their applications have been dealt with.¹⁸ The Government is not required to, nor does it, provide any reasons for its decisions. There is almost no official information on how the decisions are made in government, and by whom. The practice has seemed to vary from administration to administration, but in general, once the Minister for Justice receives the names from the JAAB, a committee of the Minister, the Taoiseach, the Tánaiste (if a coalition is involved), and the Attorney General makes a decision on one name, which is then brought forward for approval at Cabinet level.¹⁹ Discussions at Cabinet are confidential, but according to at least one former Minister, candidates are generally accepted with no discussion.²⁰ The lack of a formal, established practice at this stage of the process led to difficulties in the context of the Woulfe appointment, as discussed below.

Further problems exist with the eligibility criteria for appointment, which are highly vague. Section 16(7) of the 1995 Act specifies the selection criteria to be applied by the JAAB. It provides that the Board shall not recommend a candidate unless she/he:

- (a) has displayed in his or her practice as a barrister or solicitor, as the case may be, a degree of competence and a degree of probity appropriate to and consistent with the appointment concerned,
- (b) is suitable on grounds of character and temperament,
- (c) is otherwise suitable, and
- (d) complies with the requirements of section 19 of this Act. [This involves an undertaking to take courses or training.]

Other than these ambiguous criteria, there is no substantive assessment of candidates, so the ultimate basis for appointment decisions is nebulous.

A further issue is that there is no requirement for the JAAB process or the Government to consider diversity in appointments. Indeed, until recently, there has been a marked reluctance to view this as relevant

17 International Association of Judicial Independence and World Peace (JIWP), 'Mount Scopus International Standards of Judicial Independence' 2008, principle 4.2(a): 'The principle of democratic accountability should be respected and therefore it is legitimate for the Executive and the Legislature to play a role in judicial appointments provided that due consideration is given to the principle of Judicial Independence.'

18 Carroll MacNeill (n 1 above) 113.

19 Ibid.

20 Shane Ross, 'Golfgate debacle lifting the lid on a far bigger can of worms' *Irish Independent* (Dublin 15 November 2020).

in judicial appointments.²¹ While the gender balance of the courts has improved in recent years, there is still some way to go in order to ensure an appropriate balance in terms of gender, socio-economic background and ethnicity on the bench. Carroll's 2004 study profiled superior court judges in Ireland:

The person who is most likely to be a judge of the Superior Courts in Ireland in 2004 is male, was born in Dublin and grew up in an urban setting. He lived in Dublin and was a practising Senior Counsel at the time of his appointment. He did not necessarily come from a legal family background. He attended a private secondary school and studied at University College Dublin ... He was appointed after he was forty-five, but most likely after he was fifty. He describes himself as middle class but believes that it is very difficult to define or apply a social class structure to the Irish context.²²

Nearly 20 years later, this description is still familiar. There is currently no requirement to promote diversity in terms of gender, ethnicity, background, geography, or anything else, though current government informal practice is to try to achieve gender diversity.²³

Finally, the composition of the JAAB has also been contentious. The current membership comprises the five presidents of the courts; the Attorney General; a practising barrister and a practising solicitor; and up to three lay members having experience in commerce, finance, administration or as consumers of legal services. The overwhelming majority of the Board are lawyers. In order to preserve judicial independence, it is appropriate that judges should be involved in the selection process.²⁴ International practice has also demonstrated that increasing the lay members on the committee helps to ensure that issues such as diversity are considered.²⁵ It also helps to avoid the appearance

21 See Judges Report (n 14 above). See also L Cahillane, 'Judicial diversity in Ireland' (2016) *Irish Journal of Legal Studies* 1.

22 J Carroll, 'You be the judge part II – the politics and processes of judicial appointments in Ireland' (2005) 11 *Bar Review* 186.

23 L Cahillane, 'Judicial diversity in Ireland' (2016) *Irish Journal of Legal Studies* 1.

24 This is also in line with determinations from the Council of Europe on Judicial Appointment Bodies: Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe on 'judges: independence, efficiency and responsibilities' calls for at least half of the members of judicial councils to be judges (that includes magistrates) elected by their peers from all levels of the judiciary

25 Council of Europe Consultative Council of European Judges Opinion No 10: Council for the Judiciary in the Service of Society (23 November 2007), para 30. Opinion No 10 on 'the Council of the Judiciary in the Service of Society', finding: 'A mixed composition would present the advantages both of avoiding the perception of self-interest, self-protection and cronyism and of reflecting the different viewpoints within society, thus providing the judiciary with an additional source of legitimacy.'

of self-perpetuation²⁶ by the judiciary (and could help reduce claims of political bias, if the role and influence of the JAAB were strengthened). However, the lay members of the JAAB – in a small minority, and lacking knowledge of applicants and the practices of law and judging – are likely to be marginalised, or deferential to their legal colleagues. Some jurisdictions – Ontario, for example – have tackled this issue by having a majority of lay members. Others, such as Scotland, have provided for equal representation amongst lay and legal members. In England & Wales, the chair of the Judicial Appointments Commission is a layperson. The lay/legal composition of a new appointments body was a major point of contention in reform debates in Ireland in the last decade.

Attempts at reform

Following criticism from various quarters, the Department of Justice and Equality in 2013 initiated a public consultation process seeking views on reforms (within the boundaries of the Constitution) which might be considered necessary, specifically including:

- eligibility for appointment;
- the need to ensure and protect the principle of judicial independence;
- promoting equality and diversity;
- the role of the JAAB, including its membership and its procedures.²⁷

In January 2014, the Judicial Appointments Review Committee (a body made up of judges selected to formulate submissions) published a detailed preliminary submission on the review. It admitted that the 'present system of judicial appointments is unsatisfactory' and that the state should 'make a radical improvement in the judicial appointments process in Ireland'. It recommended that:

- political allegiance should have no bearing on appointments to judicial office;
- the appointment system should enhance the principle of judicial independence;

26 A point which was referred to by the Chief Justice recently during an address to the Irish Association of Law Teachers (IALT): '[P]art of the argument in favour of a lay majority or equality of lay and judicial members, is to prevent the views of one group being overborne and to protect against what might be described as a form of self-replication.' Donal O'Donnell, Address to the IALT Annual Lecture, unpublished paper, 24 May 2022. He also said: 'Nothing I have seen suggests that there is particular identity of views between all judges in all courts.'

27 'Public consultation on a review of procedures for appointment as a Judge', 6 December 2013.

- legislation should state that all appointments should be made on the basis of merit;
- a properly resourced judicial education system should be established without delay;
- the number of candidates for a single judicial post submitted by an advisory board for Governmental decision should be reduced to three, with increases of one for any additional vacancies;
- promotions and the appointments of the presidents of the courts should be subject to advisory board recommendations;
- the advisory board should be empowered to rank candidates and to designate any particular candidate as 'outstanding', and advise that it considers that there are no candidates of sufficient quality.²⁸

The Law Society and the Bar Council made similar recommendations: that the advisory board conduct a detailed evaluation of each candidate to select them on a meritorious basis, and that the names of candidates provided by the board should be ranked.²⁹

This attempt at reform ground to a halt with the resignation of Justice Minister Alan Shatter – who had championed this reform – as a result of an unrelated controversy. Following the 2016 general election, one of the minority Government's independent members – the Independence Alliance's Shane Ross, who became Minister for Transport – insisted on appointments reform as a key commitment in the programme for government. A new Bill was published in 2017, and while it was drafted by the Department of Justice, Ross was a driving force behind the proposal. This Bill garnered significant opposition almost immediately from many different quarters, partly due to comments from Ross about cronyism and corruption in appointments, and partly due to the Bill's contents. Amongst the controversial features was a lay chair of the new appointments commission, and a lay majority on the new appointments commission.

Ultimately, the Bill was subject to the longest filibuster in the history of the state during its passage through the Seanad. While it eventually passed all stages, it was described as a 'dog's dinner' by the then Attorney General due to various inconsistencies introduced during its long course.³⁰ The Dáil was dissolved in January 2020, and the Bill lapsed before further changes could be considered by the Dáil. The

28 Judges Report (n 14 above).

29 Bar Council of Ireland, [Submissions on the Procedures for Appointment as a Judge](#), 30 January 2014, Appendix A; Consultation on the Review of Procedures for Appointing Judges, [Submission of the Law Society of Ireland](#), 30 January 2014.

30 Kevin Doyle, 'Judges Bill is "complete dog's dinner", claims AG' *Irish Independent* (Dublin 24 March 2018).

new Government, formed in June 2020 after months of negotiation, included appointments reform in its programme for government. But one of its early actions as a government – the appointment of Seamus Woulfe to the Supreme Court – would put renewed focus on this reform.

THE Woulfe CONTROVERSY

Golfgate and calls for removal

Judge Woulfe's appointment to the Supreme Court was announced on 15 July 2020. This appointment was the subject of little comment at the time and would not have been the subject of general public attention but for the later Golfgate incident. The summer of 2020 was marked by the gradual relaxation of Covid-19 rules that had very strictly limited social gatherings in event spaces and in dwellings. Over time, the rules were eased to allow small events, but there were still strict regulations controlling these and limiting their size etc.³¹ On 18 August, however, with rising case numbers, the Government announced that more severe restrictions would be reintroduced on these events, which would bring the number of people allowed at indoor events to only six, from a previous limit of 50. As with many pandemic measures, the regulations making this change in the law lagged behind the announcement; the rules were not changed for more than a week.

The day after this announcement, on 19 August, the Oireachtas Golf Society met at the Station House Hotel and the Ballyconneely Golf Club for an event to mark its 50th anniversary that would come to be known as 'Golfgate'. The Society was composed of elected representatives and other members of parliamentary staff that met socially to play golf. Mr Justice Woulfe had, while Attorney General, attended several such events of the Society and was invited to this one. Upon being appointed to the bench, Judge Woulfe asked the Chief Justice if it would be a problem for him to attend this golf event, given it was purely social and not political, and the Chief Justice said he thought it acceptable. At this point, Judge Woulfe said, he was not aware of any plans for a dinner.³²

Mr Justice Woulfe came to the event from a family holiday in Donegal, and he did not hear of the government announcement. Only when he registered for the event on the afternoon of the 19 August did he learn of a planned dinner. He believed that gatherings of 50 were

31 C Casey, O Doyle, D Kenny and D Lyons, *Ireland's Emergency Powers during the Covid-19 Pandemic*, Report of the Irish Human Rights and Equality Commission, February 2021.

32 Non-statutory Review by Ms Justice Susan Denham for the Supreme Court arising out of the attendance of Mr Justice Seamus Woulfe at an event in the west of Ireland on 19 August 2020 (Denham Review) 6.

allowed and was assured that all regulations would be complied with. At the dinner that evening, Judge Woulfe was seated in a room with 45 people. There was a retractable wall, which he apparently had his back to, behind which another 36 people were seated. There was a gap in the wall where staff and perhaps certain guests passed through. This arguably put the event well in excess of the 50-person limit. (The six-person limit did not, at this point, have legal effect.)

On 20 August, the *Irish Examiner* broke the story about the Society's dinner being held in possible breach of the Covid rules. Following huge public anger, various high-profile attendees, including the Minister for Agriculture and Ireland's EU Commissioner, resigned in the following days. Parliamentary attendees lost their party whip. Judge Woulfe did not resign. He issued a somewhat half-hearted apology, and, as controversy continued to build, the Supreme Court asked retired former Chief Justice Susan Denham to conduct a review into Judge Woulfe's conduct. This review found that, though he should not perhaps have attended the dinner, it would be disproportionate for him to resign.³³

The controversy was reignited on 2 October with the publication – with Judge Woulfe's consent – of the appendices to the Denham Review, which included a transcript of the discussions between Judge Woulfe and the reviewer. The reaction to the transcript was very negative, as it revealed that Judge Woulfe believed he had done nothing wrong since he had broken no laws (organisers rather than attendees were bound by these rules, and the organisers were ultimately not convicted of any offences) and that the media had blown the event out of proportion.³⁴ The transcript included some intemperate remarks about the media and its conduct. This called into question, for some, his temperament and suitability for the judicial role. In the following days, some newspapers and politicians began to call for his resignation.³⁵ Later, the Chief Justice met with Judge Woulfe to tell him the Supreme Court as a whole believed his actions had damaged the reputation of the judiciary and expressed his 'personal view' that he felt Judge Woulfe should resign.³⁶ When the correspondence between the Chief Justice and Judge Woulfe was published, there was discussion of possible removal proceedings, but there was no consensus that the constitutional threshold of removal for 'stated misbehaviour' had been met. The Government ultimately decided against instigating such a process, and Judge Woulfe, at the

33 Ibid 28.

34 Mark Tighe, 'Woulfe hits out at government over Golfgate' *Sunday Times* (London 4 October 2020).

35 See for example, 'Editorial: Time for Mr Séamus Woulfe to show judgment by stepping down' *Sunday Times* (London 4 October 2020).

36 See 'Letters from Chief Justice Frank Clarke to Mr Justice Woulfe', 5 November 2020, 9 November 2020.

Chief Justice's suggestion, did not sit on the court for several months as an informal resolution of the matter.³⁷

Appointment controversy

As the question of removal was being discussed, the *Irish Times* broke the story that a number of senior judges had written to the Government to express interest in the Supreme Court vacancy that was ultimately filled by Seamus Woulfe.³⁸ Apparently, neither the Cabinet nor the Taoiseach had been told of this when Woulfe's nomination had been approved, where he had been presented – accurately, as far as it went – as the only candidate to come through the JAAB process. As noted in the earlier section above, the JAAB does not have a role where a sitting judge wishes to apply for a vacancy in a higher court. This means that, for this Supreme Court vacancy, sitting judges wishing to apply would have to register their interest by writing to the Attorney General. It is very rare (though not unprecedented)³⁹ for Supreme Court vacancies to be filled by direct appointment rather than promotion, so this promotion process would have been particularly important for such a vacancy. Names from both processes should be delivered to the Minister for a decision. In this case, the sitting Attorney General would have received the promotion applications when he himself had applied to the JAAB – on which he also sits – for that vacancy. Added to this, the Minister for Justice who ultimately made the decision, Helen McEntee, was a member of Fine Gael, the party that had appointed Judge Woulfe as Attorney General. The Taoiseach Micheál Martin, of Fianna Fáil, had apparently not been told of the other candidates. Questions were raised as to whether this appointment had been a political manoeuvre.⁴⁰

The waters were muddied further by a timeline with significant gaps in it. The vacancy had existed since the previous June (2019) on the retirement of Ms Justice Finlay Geoghegan, but the process to replace her did not begin until four days before the general election – on 4 February 2020 when the Chief Justice wrote to then Minister for Justice Charlie Flanagan asking that the vacancy be filled. On 7 February Minister Flanagan requested a list of suitable candidates for

37 For a detailed account of this incident and what it highlights about Ireland's system of judicial discipline and removal, see Laura Cahillane and David Kenny, 'Lessons from Ireland's 2020 Judicial Conduct Controversy' (2022) 51(1–2) *Common Law World Review* 24.

38 Ruadhán Mac Cormaic and P Leahy, 'Cabinet not told judges applied for post filled by Séamus Woulfe' *Irish Times* (Dublin 13 November 2020). It was reported that there were at least three sitting judges that expressed interest in the role.

39 The current Chief Justice Donal O'Donnell, for example, was appointed to the Supreme Court directly from legal practice.

40 Michael Brennan, 'Appointment of Woulfe leapfrogged judge vetting system' *Business Post* (Dublin 22 November 2020).

the vacancy from the JAAB. Apparently, around the same time Seamus Woulfe informed Taoiseach Leo Varadkar that he intended to put in an application for the vacancy, though noting his preference to stay on as Attorney General once the new government had been formed.⁴¹ On 9 March, the JAAB met to consider applications for the position. Woulfe of course recused himself; he was the only applicant.⁴² The JAAB sent Woulfe's name to the Department of Justice as the only qualified applicant.

Government formation talks delayed progress on this matter. When the new Government was formed on 27 June, Helen McEntee succeeded Charlie Flanagan as Minister for Justice, and she then received the file on the Supreme Court vacancy. Around this time, Taoiseach Micheál Martin was informed that Woulfe had been recommended by the JAAB. He was apparently not told that current sitting judges had also expressed an interest in the role. At some stage in mid-July, Minister McEntee spoke to the Taoiseach, Tánaiste Leo Varadkar and Minister Eamon Ryan to inform them that she intended to bring forward Woulfe's name to Cabinet, which she did on 15 July. Cabinet was informed that Woulfe had been recommended by the JAAB, and his nomination was approved. On 23 July, he was formally appointed by the President.⁴³

A number of questions were raised about the appointment once these details emerged. First, it was not clear who had actually made the decision to select Woulfe's name as the sole nominee to bring to Cabinet, or why the Taoiseach and others were apparently not involved in that process. Secondly, it was not clear how, if at all, this process had considered the sitting judges who had applied. Had the Minister seen and considered these names? Why was Woulfe chosen over them? Thirdly, why had the Cabinet (and apparently even the Taoiseach) not been told of these other applicants? There was some suspicion that there might have been some political trade-off at work in this process. Given that the incoming Taoiseach wished to appoint his own Attorney General, the parties might have agreed to give Woulfe, as outgoing Attorney General, the Supreme Court seat instead. It might also have been a plan by Fine Gael to ensure their colleague was appointed to the Supreme Court. These concerns meant that Opposition Deputies wished to question the Government on its decision.

At first the Government refused to take questions on this matter, citing (specious) concerns about the separation of powers and judicial

41 Mac Cormaic (n 12 above).

42 JAAB Annual Report 2020.

43 Helen McEntee, 'Statement by the Minister for Justice on the appointment of Mr Séamus Woulfe SC as a judge of the Supreme Court' (Department of Justice 26 November 2020).

independence,⁴⁴ but ultimately relented. Minister McEntee, in the Dáil chamber, said that she had received a draft memorandum on 6 July 2020, that

included details of the recommendation that had been made by JAAB; expressions of interest from serving members of the judiciary; and all other judges eligible for the position. The expressions of interest from serving judges were received over a number of years and retained on file for any current or future vacancy that might arise.⁴⁵

She specified her belief that the practice was to bring forward only one name to Cabinet and felt that this was important because ‘an open debate on the merits or otherwise of sitting judges, as well as others who have been nominated by the JAAB, would amount to a complete politicisation of the judicial appointments process’.⁴⁶ That the practice was that only one name was ever discussed at Cabinet was disputed by former Cabinet members.⁴⁷ Minister McEntee decided that Judge Woulfe was the best candidate, apparently by herself. She declined to give any details on how she assessed the candidates, or if anyone advised her as to this, given that she had only very recently been appointed to her ministry. She stressed that Judge Woulfe had been recommended by the JAAB. Other than this, no details on the factors that were considered relevant were forthcoming. Minister McEntee also announced her intention to pursue reform of the appointments process. While members of the Opposition complained that many points had not been satisfactorily explained, interest in the story soon waned.

JUDICIAL APPOINTMENT ISSUES ARISING FROM THE WOULFE CONTROVERSY

The Woulfe controversy highlights several core inadequacies with the judicial appointments system in Ireland that need urgently to be addressed.

Parallel appointments processes

The Woulfe controversy provided a vivid illustration of the flaws in the current parallel processes for appointments. Sitting judges register an interest in a higher vacancy with the Attorney General, while non-judicial candidates apply through the more formal JAAB process. It also showed that judges appear to generally apply for ‘promotion’, and

44 D Kenny, ‘Government silence over Séamus Woulfe appointment does not stack up’ *Irish Times* (Dublin 19 November 2020).

45 McEntee (n 43 above).

46 Ibid.

47 Mac Cormaic (n 12 above).

their names are kept on file, rather than specifically applying for a given post. It is hard to say what the effect of this might be, as we have no idea how promotion candidates are considered, and what factors are used to assess them, but it may be unfair on promotion applicants. These two entirely separate lists of candidates present serious difficulties, illustrated here by the fact that the Cabinet – and the Taoiseach – were told that JAAB had recommended only one name and were not told about promotion applicants.

It is particularly problematic for Supreme Court appointments because the vast majority of Supreme Court appointments are made by way of promotion. Only three judges in the last 30 years – Judges Hardiman, O'Donnell, and Woulfe – were appointed straight to the Supreme Court from legal practice without first serving on a lower court. This means that the JAAB process has very little role in respect of these vacancies, and the entirely opaque promotions process, run through the Attorney General, produces most Supreme Court judges.

Use of the JAAB as a justification for choice

Related to this is another major problem presented by this controversy: the recommendation of the JAAB is used as a justification for choices in a way that is completely unsupported by the reality of the JAAB's process. The fact of Judge Woulfe's recommendation by the JAAB was repeatedly relied on by the Government as a way to justify its choice, including by the Minister when defending her decision in the Dáil. There are two problems with this. First, the JAAB did not consider the promotion applicants, and there were no other applicants, so the fact of Judge Woulfe being the only JAAB-recommended candidate said nothing. Secondly, the JAAB's process does not recommend particular people be appointed. It has no way to rank candidates and is not *recommending* them for appointment. The scant process that the JAAB goes through for vetting applicants cannot, and does not purport to, make a decision on whom to appoint. In short, the JAAB 'recommending Judge Woulfe means that it found him appointable, but it did not recommend his appointment over other candidates'.⁴⁸ Yet the Government's reliance on the JAAB recommendation shows that the current process is used to justify decisions that it cannot credibly be said to support. This hides the breadth of the Government's discretion and suggests the Government receives direction on appointments when in fact it does not.

48 Kenny (n 44 above).

Who actually decides?

A third key question brought to light by this episode is: who actually decides on the nomination in practice? According to the Constitution, the President appoints a judge, on the advice of the Government. This means it is a Cabinet decision – not a decision of the Taoiseach, or of a single Minister. The Woulfe controversy made it clear that it is a single Minister, or a small group of senior government members and the Attorney General, who make this decision. The Government suggested that it was a virtue – perhaps a necessity – that the Cabinet not openly debate the merits of competing candidates. But this just means that the actual decision is taken from the hands of the constitutional decision-maker – the Cabinet, which becomes a rubber stamp – and given to a small subset of that group. It is entirely unclear why this is deemed to be a virtue.

In the Woulfe process, the Government's assertion is that it was Minister McEntee alone, with no help, guidance, or assistance, who made this choice. There was speculation that there may have been other decision-makers – perhaps the Fine Gael and Fianna Fáil party leaders in government formation talks – but this was strenuously denied. None of these possibilities is particularly appealing. The very limited information given to Cabinet – about the existence of other nominees, say – deprived the Cabinet of any meaningful opportunity to disagree. This may fall short of unconstitutionally removing the decision from Cabinet,⁴⁹ as the Cabinet could still reject the proposal, but it is certainly suboptimal.

Temperament

A related problem illustrated by these events is that it is unclear at what point the temperament of candidates is properly taken into account in the appointments process. In the Woulfe controversy, there was significant concern that Judge Woulfe's attitude and comments over the 'Golfgate' incident displayed a lack of appropriate temperament for a judge.⁵⁰ However, lacking judicial temperament is

49 The unconstitutionality argument relates to the idea of executive power and whether, if something is classed as an executive power then it cannot be decided by one member of the executive alone. This issue arose in the case of *State (C) v Minister for Justice* [1967] IR 106 where it was argued that powers formerly exercised by the Lord Lieutenant must be treated as executive powers and that therefore the power given to the Minister under s 8 of the Criminal Justice Act 1960, re committal of a prisoner, could only be properly exercised by the Government rather than by the Minister. However, the court did not answer this question as it was decided that the power in question was not an 'executive power' within the meaning of the Constitution. See in particular the judgment of Walsh J.

50 'Editorial' (n 35 above).

not a reason to remove a judge from the bench, unless it results in the 'stated misbehaviour' required to meet the constitutional standard, something unlikely to happen outside of extreme cases.⁵¹ Therefore, the appointments process is the only time where such considerations can be adequately dealt with. But it is not clear that this is adequately dealt with in the appointments process. The strange process of informal soundings taken by the JAAB appears to be the only way in which this is assessed. It is unclear how, if at all, the Government makes any such determination. It might be done by consultation with the Attorney General, but this is nowhere made clear.

Lack of transparency

The controversy around Judge Woulfe's appointment also showed, in several different respects, the long-noted and deeply problematic lack of transparency that besets the current system. First, absent the Golfgate controversy, the details around this appointment would not have come to light. Second, there is no transparency, for candidates or the public, on why a certain candidate is chosen over another. The Government's consideration of candidates is a black box. Third, the processes the Government goes through are entirely opaque. Even after direct questioning of the Minister in the Dáil on the Woulfe appointment, there is still a great deal we do not know. It is not clear when the Department of Justice received the names of the judicial candidates; it is not clear when these judicial candidates applied; it is not clear whether or, if so, how these candidates were actually considered. It does seem clear that neither the Taoiseach, nor the other members of the Cabinet were aware of the existence of this list. Even when an unprecedented level of attention is focused on the process, it is still not clear.

The place of the Attorney General

Further problems are evident from the Woulfe controversy in respect of the strange role of the Attorney General in the judicial appointments process. The Attorney General has three roles in the process: they are a member of the JAAB, the point of contact for judges who wish to apply for judicial vacancies, and advisor to government on whom to choose for particular vacancies. The Attorney General is the only figure involved at all stages of the process and is probably influential at each stage. In one sense, they are the only one who makes the process potentially coherent. But, as we see here, the Attorney General may themselves be an applicant for a vacancy. In such a case, the Attorney General may absent themselves from the JAAB, as Judge Woulfe did here, but that itself undermines the process as it is currently constructed and leaves

51 See further Cahillane and Kenny (n 37 above).

the Government without guidance. Having the Attorney General as custodian of the promotion process is also problematic, as this instance demonstrated.

The JAAB is, as noted above, not a functionally advisory body, but if it were, the Attorney General's role in it would be problematic. This gives the government's lawyer great influence in the advisory stage. It is not clear that this is either necessary or desirable; the advice should be given independently of any government actor, and the government, in consultation with their Attorney General, could consider it and make a decision.

This all raises a more general question of whether it is, in general, a good idea to appoint Attorneys General straight to the bench. The apparent convention that the Attorney General should get first refusal of a judicial vacancy – which also prevailed in England & Wales and Northern Ireland until around the 1960s⁵² – seemed to fall away, fortunately, after the Whelehan episode as it is highly questionable to consider a senior judicial vacancy as a reward for political service. However, two recent Attorneys have been appointed straight to the bench. In 2017, the Fine Gael minority Government appointed Attorney General Máire Whelan to the Court of Appeal without any application to the JAAB, even though sitting judges had also expressed an interest in the position, and this was criticised in the Dáil. Seamus Woulfe, her successor, was then appointed to the Supreme Court in 2020. This presents a problem in terms of the Attorney General's central role in advising governments. The Attorney General may be considering applying for future vacancies while advising the government on whom to appoint to the courts, which could of course have a bearing on their own application. Moreover, since the Attorney General has advised on almost all government policy and represented the government in litigation, there are likely to be many cases in their early years as a judge where they must recuse themselves. Particularly on the Supreme Court, many or most cases outside of the criminal sphere will have involved the Attorney General in an advisory or litigation capacity, making them a less useful member of the court.

52 Edwards documents the informal practice of 'preferment for judicial positions'; John Llewelyn Jones Edwards, *The Law Officers of the Crown* (Sweet & Maxwell 1964) 309–315. This practice probably stemmed from the older view that the Attorney General had a right of reverter over the Lord Chief Justiceship of England, which itself was seen for a long time as a quasi-political office. See Robert Stevens, *The English Judges* (Hart 2002) 15, 21.

REFORMS

After the Woulfe controversy, judicial appointments reform once again took centre stage. Heads of a new Judicial Appointments Commission Bill were published, and early in 2022 the Bill itself was published. Rather than trying to salvage the 2017 Bill, the new Bill started fresh, and differs from the previous version in a number of key areas. Crucially, given the controversy over the previous proposals, it increases the number of judges on the new Judicial Appointments Commission (JAC) and names the Chief Justice as chair of the body, rather than having a lay chair. The equally controversial issue of a lay majority on the commission was also dropped. These changes are sensible given the controversy and opposition to the 2017 Bill, and it is fitting that the most senior judge in the state plays a key role in judicial appointments.⁵³ A lay *majority* is less important than an active and engaged lay membership of the Commission. The workload put on the already-burdened Chief Justice, however, may make this a mixed blessing. There has also been controversy about the lack of direct representations of the legal profession on the Commission, and suggestions that – in a stark contrast to the objections to the 2017 Bill – there is too much power given to the *judicial* members.⁵⁴

There are many positive elements of the Bill, and the final published Bill was a marked improvement on the Heads which had been published a number of months previously. However, there are also key aspects which are not dealt with and which have the potential to limit the effect of this reform.

One of the key important changes is that the new appointments process will apply equally to all candidates applying for a judicial vacancy, whether they are a sitting judge or practitioner. This will end the problematic parallel system which currently exists, the shortcomings of which we highlighted above. The provision of a permanent office for the new Commission, with dedicated director and staff, is also a key development in formalising the appointments process and may allow for more scope for the JAC's activities.

53 This is also in line with determinations from the Council of Europe on Judicial Appointment Bodies: Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe on 'judges: independence, efficiency and responsibilities' calls for at least half of the members of judicial councils to be judges (that includes magistrates) elected by their peers from all levels of the judiciary. Para 51 of the [Explanatory Report to CM/Rec\(2010\)12](#) clarifies that: 'The Recommendation confers an essential role on independent authorities established to decide on the selection and career of judges. At least half of their members should be judges elected by their peers (paragraph 46 of the recommendation).'

54 Michael McDowell, 'Planned change to appointing judges is deeply flawed' *Irish Times* (9 November 2022).

A further novelty is the requirement that a candidate will not be recommended unless they have been interviewed. The 1995 Act provides that the JAAB *may* interview candidates, but it has chosen not to do so; the new legislation, in section 46, makes interviews mandatory before a candidate can be recommended by the Commission. This is a crucial and welcome step. It became clear that there was an attitude amongst some lawyers that it would not be appropriate to interview a sitting judge for a position, despite the fact that this is common practice in most other jurisdictions.⁵⁵ As well as interviews, different selection procedures may also be specified for different types of judges. This is a welcome development, and, like the selection statement required in section 57, discussed below, it recognises that the types of duties carried out and skills required by judges in different courts can vary widely.

The new requirement for judicial candidates to demonstrate that they have undergone continuous professional development or judicial training is also critical in view of the importance now being given to judicial education and training.⁵⁶ Furthermore, the proposed Bill takes seriously the need for diversity in the judiciary, stipulating that, 'to the extent feasible and practical ... membership of the judiciary in each court should – (a) comprise equal numbers of male and female members (b) reflect the diversity of the population of the State as a whole'. It also requires the JAC to publish a diversity statement two years after the commencement of the section and then once every four years, which will outline how this objective is being achieved and how diversity can be improved.

Crucially, the Bill now provides that the JAC will recommend three names to the Government for a judicial vacancy.⁵⁷ In the Heads of the Bill this had been set at five names and while the majority of submissions, both to the 2014 process and during pre-legislative scrutiny of this Bill, recommended a reduction to three names, there was great resistance to this amongst members of the Joint Oireachtas Committee on Justice during the pre-legislative scrutiny hearings. It was argued by Committee members that this would limit governmental discretion to too great a degree and that not only is governmental choice a constitutional prerogative but also, it was argued, necessary

55 For example, see Michael McDowell, 'The ill conceived Judicial Appointments Commission Bill is a solution in search of a problem' (24 April 2019).

56 See further, Laura Cahillane, Rónán Kennedy, Doireann Ansbro and Saoirse Enright, 'Towards best practice: a report on the new Judicial Council in Ireland' (Irish Council for Civil Liberties/Irish Research Council 2022).

57 Three names will be recommended for one vacancy with an additional two names for further vacancies, eg five names for two vacancies and seven names for three.

for democratic and practical reasons.⁵⁸ For this reason, the reduction to three names came as a surprise. More surprising still was the stipulation that Government must choose from these three names only.

Under the current system, it is possible for Government to choose a candidate who does not appear on the JAAB list. This is to ensure conformity with the constitutional principle that it is the role of the executive to appoint members of the judiciary. However, in the statement of appointment published in *Iris Oifigiúil*, it must be indicated whether or not the nominee was on the list provided by the JAAB, thus providing a level of transparency so it is clear if the name had not been received through the official process.⁵⁹ This same procedure had originally been included in the Heads of the Bill and it did not arise for discussion during pre-legislative scrutiny, but, in the press release about the publication of the Bill, a change to the procedure was announced together with a statement that the Attorney General had been consulted and he was happy that this would not cause any problems of unconstitutionality.⁶⁰ It is likely that this change was influenced by developments in European Union law and in particular by a decision of the European Court of Justice which specifies that, in executive appointments systems, recommendations from judicial councils be sufficiently independent of the executive.⁶¹ However, despite the Attorney General's apparent sign-off, constitutional objections are very likely to be raised about this provision, with some suggesting it is an unconstitutional fetter on the discretion given to government.⁶²

The constitutional argument has also been used by the Government as a reason not to include a ranking requirement for the names from the JAC. It is widely agreed that the reason that the JAAB had little effect on the appointments process was the large number of candidates

58 See pre-legislative scrutiny meeting of Joint Oireachtas Committee on Justice for Scrutiny of the Judicial Appointments Commission Bill 2022, 18 May 2021. See also [Report on Pre-Legislative Scrutiny of the General Scheme of the Judicial Appointments Commission Bill 2020](#) (Joint Committee on Justice October 2020).

59 See section 16(8) Court and Court Officers Act 1995.

60 See press release, '[Minister McEntee publishes Bill to implement biggest reform to judicial appointments in decades](#)' (Department of Justice 31 March 2022).

61 Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe, paras 46–47. The European Court of Justice has, in the context of judicial appointments made by the executive branch upon a request from a council for the judiciary, indicated that for such council to contribute to making the process more objective, it should be sufficiently independent of the legislative and executive and of the authority to which it is required to deliver a judicial appointment proposal. Judgment of the Court of Justice of 19 November 2019, *AK*, joined cases C-585/18, C-624/18 and C-625/18, paras 137–138.

62 McDowell (n 54 above).

it recommended, without ranking. This left the Government at large to choose between these candidates for any reason. Thus, conforming to the JAAB recommendations did not shape government decision-making in any real way. Submissions from the judiciary and others had proposed both limiting the names recommended to three and ranking these names. Ranking the candidates makes sense under a system where an interview and assessment procedure is being carried out which may demonstrate that certain candidates are more, or indeed less, suitable for appointment, and it would be appropriate that this would be conveyed to Government so that this can be taken into account with regard to the final selection. However, while the Attorney General may have approved the requirement to choose only from the recommended names, it seems ranking those names was a step too far and this has not been included in the final Bill.

Despite this, there is a requirement in section 50 which could achieve a similar effect to ranking the candidates. It requires that for each person recommended to the Minister by the JAC, there must be a statement setting out the particulars of the person's education and experience, the results of the interview and any other selection process and reasons why the JAC is of the opinion that the person is suitable. While this is not ranking *per se*, it allows the JAC to make it clear to the Government if, in its view, one candidate is more suitable than another and why.

However, while this requirement in section 50 may mitigate the effects of an unranked list, the fact that the Government retains absolute discretion to select any candidate on that list means that the concerns expressed in the most recently published GRECO Compliance Report on Ireland may well be valid.⁶³

Eligibility requirements have been clarified to a certain extent in the Bill. Under section 57, a judicial selection statement is to be drawn up, which will be published by the JAC and will include selection procedures as well as knowledge, skills and attributes required, and a person will not be recommended unless the JAC is satisfied that they possess the requisite knowledge, skills and attributes in the statement and is of sufficient merit. This statement is particularly interesting in that it can specify different types of knowledge and skills for different judicial offices. However, although it is difficult to state in legislation what makes for a good judge, it would have been preferable for the Bill to provide *some* guidance on the skills expected of a judicial candidate and on how merit should be assessed. The advantage in having these issues teased out in a non-legislative statement means it is easy to revise and amend as necessary, but the risk is that, as with the previous

63 'Second Compliance Report Ireland: corruption prevention in respect of members of parliament, judges and prosecutors' GrecoRC4(2022)3, 13 July 2022.

system, vague and imprecise metrics may take hold and we may not get the clarity on this issues that we need and desire.

As noted above, a controversial element of the Bill is the fact that representatives from practice have not been included on the membership of the JAC. The current membership of the JAAB includes a representative from the Bar Council and from the Law Society. Instead, this has been replaced by the requirement in the Bill that one of the judges should previously have practised as a solicitor and one previously as a barrister. This decision has been the subject of stringent criticism from the professions, and the Chief Justice also expressed concern at this omission.⁶⁴

However, one of the principal arguments given during pre-legislative scrutiny for the necessity for representation from the professions⁶⁵ is that practitioners who appear before the courts – barristers in particular – would know what makes a good judge and who amongst their colleagues would make a good judge. The problem with this is that it presupposes that all practitioners know each other, that the skills required to be a good practitioner and judge are the same, and that unconscious bias is not an issue. On the contrary, attitudes such as this lead to ‘mirroring’ or self-perpetuation and inherent unfairness for ‘unknown’ or ‘unfamiliar’ candidates.⁶⁶

One of the most disappointing aspects of the Bill is that the Attorney General remains as a member of the JAC, albeit as a non-voting member. It is unclear why this is thought necessary. Once names recommended by the JAC are received by the Minister, the Attorney General, as the Government's chief legal advisor, will be involved in the final decision on the name to bring to Cabinet. It does not make sense that the Attorney would *also* be involved in influencing the earlier process of recommendation. What exactly the role of a non-voting member should be is not clear – can they be involved in interviews and assessments? Either way, it seems to give the Attorney an overly dominant role in the process which, given the recent controversy, it would seem wise to avoid. Furthermore, this is an issue that was raised in the European Commission's 2021 Rule of Law Report on Ireland

64 O'Donnell (n 26 above); McDowell (n 54 above).

65 Mary Carolan, ‘Major reforms in how judges are to be appointed ruffle feathers in the Four Courts’ *Irish Times* (Dublin 4 June 2022).

66 ‘A self-perpetuating judiciary can ... also concentrate within the senior judiciary, undermining the independence of individual judges and making the bench conservative, unrepresentative, unaccountable and unresponsive to the public.’ Elliot Bulmer, ‘Judicial Appointments’ (International Institute for Democracy and Electoral Assistance 2017) 9–10.

and concern was expressed about the level of independence of the JAC in such circumstances.⁶⁷

Consideration might also have been given to making the outgoing Attorney General ineligible to apply to the Commission for appointment as a judge for a period of at least 12 months after leaving office. This would be worthwhile due to the importance of judicial independence, and the fact that the Attorney will have been involved in advising on policy and legislative measures which may come up for consideration before the court as well as involvement in legal cases on behalf of the state which they may later be expected to adjudicate on. While there is no denying that someone who has acted as Attorney General will have undoubted skills and experience that may be useful on the bench, it also seems sensible that a period of time should elapse before going directly from the Office to the bench.

A further issue linked to eligibility relates to the desire to open up judicial appointment to academics. In a well-meaning move, the Bill proposes, in section 63, to open the eligibility requirements to allow legal academics to apply, but the nature of the requirements means few candidates are likely to be appointed using this mechanism. The Bill requires that an academic have at least 12 years' standing as an academic but also be a qualified barrister or solicitor and have practised as a barrister or solicitor for at least four years. It is unclear what the purpose of this qualification and practice requirement is; if it aims to ensure a level of knowledge of procedure and practice of the courts, this does not achieve it. Four years of practice as a barrister would equate to a relatively junior stage, raising the question of what skills and knowledge this period of practice is supposed to engender. Furthermore, many solicitors at this level may not even engage in court duties and such knowledge as is necessary should be available for all appointees through judicial education. Due to the academic professionalisation of legal academia in the last 20 years, it is unlikely that academics will have engaged in practice before embarking on an academic career.

The practice requirement might be more relevant to appointment to lower courts, and less relevant to appointment to collegiate/appellate courts. It is presumably expected that it is this level where academic appointments would occur (as is common in other jurisdictions). Academics without experience of practice could be found to be unsuitable for trial court appointment if the Commission thought this appropriate, without a blanket practice requirement being necessary. Unfortunately, however, the Bill has retained these restrictions which

67 European Commission 2021 Rule of Law Report, 'Country chapter on the rule of law situation in Ireland'.

means that, in reality, it is unlikely that this reform will have any real impact on diversity in appointments.

The final problem with the Bill, given that these reforms were motivated by the Woulfe controversy, is that there is no guidance provided on the process to be adopted by government once the names from the JAC are forwarded to the Minister. This formed a central part of the controversy over the Woulfe appointment and, as outlined above, it was unclear whether there was a practice to be followed involving the Minister for Justice, Taoiseach, Tánaiste and Attorney General or whether this was a decision which the Minister can make alone. Even apart from a potential argument relating to the constitutionality of a process where the Minister alone chooses the nominee,⁶⁸ it would be worth clarifying the process in order to provide for transparency and prevent further controversy such as occurred during the Woulfe appointment. Perhaps it was thought inappropriate to direct government in legislation on a matter such as this; if so, this problem could be solved with more transparency from government on the general processes used for determinations such as this, without commenting on individual appointments.

At the time of writing, the Bill is almost at the final stage, and it is unlikely that there will be further amendments.⁶⁹ While the Bill is a vast improvement over the Heads initially published, and promises some major reform and improvement, there is a risk that, for the reasons outlined here, the JAC legislation might be looked back on – like the 1995 reforms are – as a missed opportunity to make Ireland's appointment system truly fit for purpose.

CONCLUSION

For a long time there was reluctance to acknowledge the need for judicial appointments reform in Ireland. The Woulfe controversy has had the positive effect of renewing focus on this badly needed reform, which could have fallen off the agenda given other legislative priorities, and the abject failure of the last reform attempt. There is now perhaps a more general realisation that – even though Ireland has excellent judges – the current system for selecting them is not adequate and is potentially unfair. The system is not fair to sitting

68 As mentioned earlier, such an argument relates to the idea of executive power and whether if something is classed as an executive power then it cannot be decided by one member of the executive alone. As noted in n 49 above, this issue arose in the case of *State (C) v Minister for Justice*.

69 The Committee stage of the Bill in the Dáil limited itself to amendments on the Irish language requirements and the addition of Irish titles. See list of [Amendments to Judicial Appointments Commission Bill 2022](#).

judges seeking promotion, who may be overlooked, with no way of knowing whether their application was even properly considered. It is not fair to candidates without political affiliations (or with the wrong affiliations), or others that do not have their qualities well assessed by the strange and slipshod process that have been in place since 1995. Perhaps it is not even fair to members of the Cabinet, who are not given the full picture of the candidates seeking appointment. It is, most of all, not fair to the public, who cannot be assured that the best candidates for judicial office are ultimately being appointed.

Meanwhile, neighbouring jurisdictions have made great strides in appointments reform. For example, the Northern Ireland Judicial Appointments Commission, set up in the wake of the Belfast/Good Friday Agreement, is widely agreed to have been successful in upholding the independence of the judiciary, ensuring that appointments are made on merit, promoting diversity, and commissioning research into the composition and appointment of the judiciary.⁷⁰

Irish judges have themselves acknowledged that the excellent standard of judges in Ireland exists in spite of, and not because of, the appointments system that picks them.⁷¹ Reform is long overdue, and, if the Woulfe episode imparts any lesson, it should be that this reform must be meaningful. The proposed Bill goes a long way towards this goal but, while it does contain many positive changes, there are also issues which have been left to be settled outside of the legislation and further issues involving the Attorney General and the Cabinet nomination procedure which have not been addressed. If we look back at the problems listed in the third part of this article which were highlighted by the Woulfe episode – parallel appointments processes, the use of the JAAB as a justification for the choice, the question of who actually makes the decision, the question of assessing temperament, the lack of transparency, and the role of the Attorney General – only two of these problems will have been rectified by this legislation in its current form. The parallel process will be removed, and the new JAC will recommend three suitable names based on interview and assessment rather than simply presenting qualified candidates to government. It is not yet clear if the issue of assessing aspects such as a candidate's temperament will be dealt with. The section 57 selection statement might contain

70 For an account of this, and the challenges in defining merit in this context, see John Morrison, 'Finding "merit" in judicial appointments: the Northern Ireland Judicial Appointments Commission (NIJAC) and the search for new judiciary in Northern Ireland' in Anne-Marie McAlinden and Clare Dwyer (eds), *Criminal Justice in Transition: The Northern Ireland Context* (Hart 2015) 131. The Scottish and English reforms in the 2000s have also proven successful along many axes.

71 Judges Report (n 14 above).

useful elaboration on the skills and attributes considered desirable, but the Bill itself does not provide any guidance on what constitutes judicial merit and how we know it when we see it. The other issues around transparency, who makes the final decision, and the role of the Attorney General in the process have not been addressed. These, of course, were at the heart of the Woulfe controversy. Failing to consider these issues at all may mean that we will simply have to revisit them again at a later date and possibly after a further controversy.

A quick political fix, like the one in 1995, ultimately creates as many problems as it solves. While this legislation makes great strides towards providing a better system, we must still do more if we do not wish to, once again, repeat the mistakes of our past.