

Judicial Council Bill 2017

Summary of Regulatory Impact Analysis

Department/Office: Department of Justice and Equality	Title of Legislation: Judicial Council Bill 2017
Stage: Publication of Bill	Date: May 2017
Related publications: <ul style="list-style-type: none">• Sixth Report of the Working Group on a Courts Commission (1998)• Fourth Progress Report of the All-Party Oireachtas Committee on the Constitution – the Courts and the Judiciary (1999)• Report of Committee on Judicial Conduct and Ethics (2000)• General Scheme of the Judicial Council Bill (2010)	
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What are the policy objectives being pursued? <p>The key policy objective is to create a structure by way of a Judicial Council and related entities which, while fully respecting the independence of the judiciary, will facilitate:</p> <p>(a) the promotion of excellence in the exercise by judges of their judicial functions, and</p> <p>(b) the institution of a complaints regime for judges to address instances of misconduct which fall below the level necessary to trigger the invocation of Article 35 of the Constitution.</p>	
What policy options have been considered? <ol style="list-style-type: none">1. Do nothing.2. Establish a Judicial Council on a non-statutory basis.3. Establish a Judicial Council on a statutory basis.	
Preferred option: Option 3. This option will allow for the establishment of a Judicial Council which will provide a forum wherein judges can work towards best practice across a range of fields relating both to the performance of their judicial functions and	

to ongoing education needs. The establishment of a Council will also enable formal structures to be put in place to deal with misconduct which falls below the threshold which would warrant the passing of a resolution by both Houses of the Oireachtas calling for the removal of a judge on the grounds of stated misbehaviour or incapacity. The lack of such a Council, which is a common feature in many other jurisdictions, has in the past been the subject of adverse criticism by bodies such as GRECO (Group of States against Corruption).

Policy options			
Option	Costs	Benefits	Impacts
1. Do nothing	While there would be no monetary costs, there would be unquantifiable reputational damage.	None	<p>We would not be in a position to fulfil our compliance obligations towards GRECO.</p> <p>There would be a continued absence of a mechanism to address complaints about judicial misconduct of a less serious nature.</p> <p>The opportunity would be lost to build public confidence in the administration of justice and to provide adequate supports to the judiciary in meeting the challenges presented by an increasingly complex legal environment</p>
2. Establish a Judicial Council on a non-statutory basis	Since such an entity would have limited scope in terms of its capacity for action, the financial costs associated with its establishment would also be limited.	Minimal as, in reality, a non-statutory Judicial Council would add little to the interim Judicial Council regime which exists at present.	<p>The establishment of an independent and statutory Judicial Council is a prerequisite for compliance with outstanding GRECO recommendations.</p> <p>The envisaged complaints mechanism in relation to judicial misconduct requires a</p>

			statutory basis if it is to operate in an effective manner and if it is to gain public trust.
3. Establish a Judicial Council on a statutory basis	Ongoing funding requirements for a statutory Council would amount to just over €1.6 million per annum (€1.3 million net), with additional start-up costs of €1.1m.	This would bring us into line with best international practice in this area.	<p>This would fully satisfy our GRECO obligations.</p> <p>It would fulfil a policy objective entertained by successive governments over a period of just under 20 years.</p> <p>Public confidence in the judiciary would be enhanced through the creation of a robust complaints mechanism and through the adoption of guidelines concerning judicial conduct and ethics.</p> <p>The independence of the judiciary would be affirmed through a clear statutory statement to the effect that the Judicial Council was to be independent in the performance of its functions and that it was a function of the Council to promote and maintain, <i>inter alia</i>, excellence in the exercise by judges of their judicial functions and high standards of conduct in general.</p>

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Regulatory Impact Analysis

Policy Context

Domestic Background

Against the background of what is generally considered to be best practice internationally, successive Governments have committed to the introduction of a Judicial Council Bill. Typically, such Councils are independent bodies that seek to safeguard the independence of the judiciary and of individual judges in order to promote the efficient functioning of the judiciary in dealing with matters such as education and discipline. A key impetus for the development of the legislation relates to the absence within our legal system of a disciplinary regime which will address complaints about judicial misconduct which is not at a level to warrant the invocation of Article 35.4.1 of the Constitution. That Article states that:

“A judge of the Supreme Court, the Court of Appeal, or the High Court shall not be removed from office except for stated misbehaviour or incapacity, and then only upon resolutions passed by Dáil Éireann and by Seanad Éireann calling for his removal.”

This parliamentary process is known as impeachment. It is effected by an order made by the President having been notified by the Taoiseach that the Houses of the Oireachtas have passed a resolution calling for the removal from office of the judge in question. To date no judge of the High Court, the Court of Appeal or the Supreme Court has been impeached.

The Constitutional process has been extended by statute to the question of removal and dismissal of Circuit and District Court Judges by Section 24 of the Courts of Justice Act 1924 and Section 20 of the Courts of Justice (District Court) Act 1946 respectively.

With the exception of statutory provisions dealing with investigating and reprimanding Judges of the District Court there are no other means of investigating and dealing with allegation of less serious breaches of Judicial conduct and ethics. Judges of the District Court are subject to some statutory disciplinary procedures contained in the Courts (Supplemental Provisions) Act 1961. Section 10(4) of that Act provides that, where the Chief Justice forms the opinion that a District Court’s judge’s conduct is “such as to bring the administration of justice into disrepute”, he may interview the judge privately and inform him of such opinion. The Act does not provide any means of ensuring the judge changes the behaviour in question. Section 36(2) provides for the President of the District Court to investigate matters if it appears to him

or her that the behaviour of a judge of that Court is prejudicial to the prompt and efficient discharge of the business of the Court. If the President finds that this is so, having consulted the judge in question, he or she may report their findings to the Minister for Justice and Equality. Section 21 of the Courts of Justice (District Court) Act 1946 also provides for a judicial inquiry into the condition of health or conduct of a District Judge upon the request of the Minister of the day.

These procedures are not replicated for judges of any other court where behaviour can only be investigated in respect of the most serious of breaches of conduct or ethics. There is currently no process for investigating Judges of the other Courts for alleged behaviours which, while serious and worthy of examination, do not warrant impeachment.

In 1999 the Working Group on a Courts Commission, which was responsible for the establishment of the Courts Service, reported to the then Chief Justice, Liam Hamilton on the question of judicial conduct and ethics. Subsequently, the Chief Justice established a committee to examine this general issue and it produced its report in December 2000 (known colloquially as the Keane Report after the successor Chief Justice, who brought the Committee's work to finality). The report found that the existing structures for dealing with concerns as to judicial misconduct were inadequate as they only provided for impeachment for stated misbehaviour or incapacity. The Report concluded that there are circumstances which would justify the invocation of this process but there are also instances of judicial misconduct which may be less serious but nonetheless merit some form of investigation. The Report contained reasonably detailed proposals for legislation which were subsequently (in 2002) fleshed out in the form of a draft Bill prepared by Mrs Justice Denham (now Chief Justice), who had chaired the Working Group on a Courts Commission and had been a member of the Committee that had produced the 2000 Report.

In 2001, in response to the Report of the Committee on Judicial Conduct and Ethics, the Government published the Twenty-Second Amendment to the Constitution Bill which aimed to establish a Judicial Council and amend the impeachment process. The Bill was withdrawn due to a lack of cross-party support in the Dáil. Since then work has been ongoing in the Department of Justice and Equality to develop legislative proposals to establish a Judicial Council. This work has progressed in full consultation with the judiciary.

International Background

Any legislative proposals must be mindful of the requirement of Article 35.2 of Bunreacht na hÉireann, which declares that judges shall be independent in the exercise of their functions. This is reinforced in international best practice, e.g., Article 10 of the Universal Declaration of Human Rights states that

“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”.

The right to a hearing before a competent, independent and impartial tribunal is also acknowledged in Article 6.1 of the European Convention on Human Rights and Article 14 paragraph 1 of the International Covenant on Civil and Political Rights.

In 2000 the United Nations Centre for Crime Prevention invited a group of Chief Justices from common law jurisdictions, known as the Judicial Integrity Group, to address the loss, in many countries, of confidence in judicial systems. The Judicial Integrity Group recognised that the principle of accountability demanded that the national judiciary should assume an active role in strengthening judicial integrity by effecting such systematic reforms as are within the judiciary’s competence and capacity. The Group also recognised the need for a universally acceptable statement of judicial standards which, consistent with the principle of judicial independence, would be capable of being respected and ultimately enforced at the national level without the intervention of either the executive or legislative branches of government. Following extensive consultations with other common and civil law jurisdictions the 'Bangalore Principles of Judicial Conduct' emerged. These principles recognise fundamentals which are widely accepted in regional human rights instruments, in domestic, constitutional, statutory and common law and in judicial conventions and traditions. The core values recognised are –

- independence;
- impartiality;
- integrity;
- propriety;
- equality;
- competence, and
- diligence.

Each value is accompanied by a statement of the principle which relates to it and by more detailed statements as to its application.

The Bangalore Principles of Judicial Conduct use these values to ensure public confidence in the judicial system and in the moral authority and integrity of the judiciary which is of the utmost importance in a modern democratic society. They aim to ensure that judges, individually and collectively, respect and honour judicial office as a public trust and strive to enhance and maintain confidence in the judicial system. They are designed to provide guidance to judges and to afford the judiciary with a framework for regulating judicial conduct.

Within the international framework, it is also widely acknowledged that the primary responsibility for the promotion and maintenance of high standards of judicial conduct lies with the judiciary themselves as this will ensure that the appropriate level of judicial independence is maintained.

In 2006 the draft Commentary on the Bangalore Principles of Judicial Conduct, intended to contribute to a better understanding of the Principles, was agreed by a joint meeting of the Judicial Integrity Group and the United Nations Office on Drugs and Crime. In the same year, a resolution of the United Nations Economic and Social Council invited Member States to encourage their judiciaries to take into consideration, in ways consistent with their domestic legal systems, the Bangalore Principles when reviewing or developing rules with respect to the professional and ethical conduct of members of the judiciary. The United Nations Office on Drugs and Crimes has actively supported the Bangalore Principles, which have also been recognised by bodies such as the American Bar Association and the International Commission of Jurists. The Judges of the member States of the Council of Europe, of which Ireland is a member, have also given the Bangalore Principles their favourable consideration. The draft Commentary and the Bangalore Principles have been given added weight and authority by their adoption by both the Intergovernmental Expert Group on Strengthening Basic Principles of Judicial Conduct and by the Judicial Integrity Group

It is against this domestic and international backdrop that the proposals for a Judicial Council Bill have been drafted.

Statement of Objectives

A key objective of the Bill is to provide a means of investigating allegations of judicial misconduct and to provide options for dealing with misconduct where, owing to the nature of the misconduct in question, the option of impeachment is not warranted. This is to be achieved within the current Constitutional framework. A further objective is to provide a support structure for judges which will facilitate them in the carrying out of their judicial functions in a manner which upholds a high standard of excellence and which respects the essential independence of their office.

The Judicial Council, which will consist of the entire body of the judiciary, will be responsible for promoting:

- excellence in the exercise by judges of their judicial functions;
- high standards of conduct among judges;
- the efficient and effective use of judicial resources;
- continuing education of judges;
- a respect for the independence of the judiciary; and
- public confidence in the judiciary and the administration of justice.

The Bill puts in place a process for investigating complaints of alleged judicial misconduct with the following features:

- lay (i.e. non-judge, non-lawyer) involvement in investigations; and
- a range of sanctions which will apply where complaints are upheld and where impeachment is not in issue.

Insofar as lay involvement in the investigative process is concerned, this will involve participation both in the Judicial Conduct Committee and in any panels of inquiry which may be established as required. Lay participation in any investigations taking place will ensure public confidence in the process and demonstrate the transparent and impartial nature of the proceedings.

In addition to referring a complaint for formal investigation, the Judicial Conduct Committee will be able to refer a complaint for resolution by informal means. In the event that a complaint is upheld, it will be open to the Judicial Conduct Committee to make a determination which may include the following:

- the issuing of advice to the judge concerned;
- the issuing of an admonishment to the judge concerned;
- the issuing of a recommendation to the judge concerned that he or she pursue a specified course of action, including attending a course or training of a specified type.

It will also be open to the Committee to make a general recommendation for procedural or organisational change, practice directions, redistribution of work or the like.

The Bill also envisages the creation of –

- a Judicial Studies Committee to facilitate the continuing education and training of judges with regard to their judicial functions;
- a Sentencing Information Committee to collate and disseminate information on sentencing decisions by the courts;
- Judicial Support Committees to advise and assist the Judicial Council in the performance of its functions insofar as those functions concern matters relevant to the Court to which the Committee relates.

As is common in legislation of this nature, the Bill will also allow for the establishment of other committees from time to time to assist and advise the Judicial Council in the performance of its functions.

Overall, the establishment of a Judicial Council will help to ensure continued public confidence in judicial integrity and provide the judiciary with the supports necessary for them to carry out their functions in an appropriate manner. The establishment of the Judicial Conduct Committee, with the participation of lay persons, will provide an open and transparent means of

investigating complaints that heretofore have had no means of inquiry. The participation of all judges in the Council will give the judiciary a sense of ownership of the work of the Council and will ensure that the independence of the judiciary is not compromised.

Identification of Options

The options identified are:

- Option 1: do nothing.
- Option 2: establish a Judicial Council on a non-statutory basis
- Option 3: establish a Judicial Council on a statutory basis as recommended in the Report of the Committee on Judicial Conduct and Ethics and by GRECO.

Identification of Costs and Benefits

Option 1 - Do Nothing

The “do nothing” option is included for benchmarking purposes. There are no benefits arising from maintaining the status quo and, while adhering to this option would mean that no additional financial costs would be incurred by the exchequer, costs of a non-financial nature, both reputational and otherwise, would undoubtedly arise.

To do nothing at all would mean the continuation of the present unsatisfactory situation, where there is no formal way of dealing with allegations of judicial misconduct other than impeachment for Supreme Court, Court of Appeal and High Court Judges and where there are only limited statutory procedures for dealing with misconduct issues in relation to District Court Judges. Given the importance now placed upon accountability in relation to all sectors of society, such a course of action runs the risk of undermining confidence in the judicial system and would not be in keeping with best international thinking and practice.

Furthermore, taking this option would mean that we would continue to be in breach of our GRECO obligations which recommend that, with due expedition, an independent statutory council be established for the judiciary which will be provided with adequate resources and funding for its organisation and operations. Related recommendations concern the establishment of a code of conduct for judges which will be connected to an accountability mechanism, and the institutionalisation of a dedicated induction and in-service training for judges. The Compliance Report adopted at the Plenary meeting of GRECO, which was held in March 2017, concluded that Ireland’s very low level of compliance with these recommendations was “globally unsatisfactory” and has resulted in a situation whereby Ireland must report again on the progress in implementing the recommendations by 31 March 2018.

Option 2 - Establish a Judicial Council on a non-statutory basis

This option would share many of the disadvantages of the “do nothing” option which is addressed above and, in reality, would only mean the establishment of a body not dissimilar to the interim Judicial Council which has been set up by the judges themselves pending the establishment of the anticipated statutory Council. The interim body does not attract specific exchequer funding. This option would not facilitate our compliance with the GRECO obligations. Furthermore, it would not facilitate the introduction of a system for the investigation of complaints alleging judicial misconduct which falls short of the standard required if impeachment is to be invoked, as such a system requires statutory underpinning if it is to function in an effective and transparent way.

The resourcing of a non-statutory Council would entail some additional costs since such a body would need additional funding if the intention were that it should have added capacity to deliver in relation to matters such as the training of judges and the provisions of sentencing information.

Is it estimated that the funding requirements for a non-statutory Council would amount to around €1 million per annum broken down as follows:

Item	Estimate
Staffing (one PO, one HEO and one CO)	€230,980
Judicial studies	€400,000 (this represents an increase of €90,000 on the amount currently made available for this purpose)
Sentencing information	€200,000
Ongoing ICT costs (including costs related to sentencing information)	€125,000*
Expenses and remuneration of lay members of committees (including Judicial Studies and Sentencing Information Committees)	€25,000
Accommodation	€50,000

* Additional ICT start-up costs of €500,000 should also be budgeted for.

Note: the above costings make no provision for the additional funding which would be required for a complaints regime as, absent a statutory basis, such a regime could not properly be introduced.

Option 3 – establish a Judicial Council on a statutory basis

This option will enable us to be fully compliant with our GRECO obligations and it is the only option available which enables us to achieve the objectives which have been set.

The establishment of an independent Judicial Council, with clear statutory functions, will align our regime in relation to this matter with that prevailing in many other countries, particularly those which are members of the Council of Europe. The establishment of a statutory committee in relation to judicial studies will also provide a structured approach to the continued education and professional training of judges which, consistent with judicial independence, should build public confidence in the administration of justice. The establishment of a statutory committee in relation to sentencing information should be of benefit in promoting consistency in sentencing and, again, build public confidence in the administration of justice.

In relation to judicial conduct, the establishment of a Judicial Conduct Committee will give rise to a statutory body which will have responsibility for investigating and dealing with allegations of judicial misconduct where the initiation of the impeachment process is not warranted. The proposed legislative framework will achieve this without interfering with the existing Constitutional provisions relating to impeachment, while ensuring that the Constitutional independence of the judiciary is maintained. It will provide a mechanism, consistent with the recommendations of the Committee on Judicial Conduct and Ethics and international best practice, for investigating a broad range of complaints in relation to judicial misconduct and provide for remedies outside of the impeachment process where appropriate. It will also facilitate the drawing up and adoption of guidelines in relation to judicial conduct and ethics.

Is it estimated that the ongoing funding requirements for a statutory Council would amount to just over €1.6 million per annum (a net €1.3 million taking account of funding which is already provided for judicial training purposes). That figure may be broken down as follows:

Item	Estimate
Staffing (one Assistant Secretary, one PO, one AP, one HEO and two COs)	€553,514
Judicial studies	€400,000 (this represents an increase of €90,000 on the amount currently made available for this purpose)
Sentencing information	€200,000
Ongoing ICT costs (including costs related to sentencing information)	€250,000

Expenses and remuneration of lay members of committees (including the Judicial Conduct Committee)	€50,000
Accommodation	€90,000
Legal costs	€75,000

Note: additional start-up costs of €1.1m should also be taken into account (€750,000 for ICT, €125,000 for legal costs, €100,000 for judicial studies, €75,000 for expenses and remuneration of lay members and €60,000 for accommodation).

Impacts

The Bill is not expected to have any appreciable impact on north-south and east-west relations, socially excluded or vulnerable groups, the economic market (including an impact on consumers and competition), national competitiveness and the environment. Nor will there be any new significant compliance burden. However, the Bill may have a positive impact upon the rights of citizens in that it should foster increased public confidence in the administration of justice by providing for a mechanism which addresses legitimate complaints in relation to judicial conduct and ethics.

Consultation

Consultations on the details of the Bill have taken place with the Office of the Attorney General. Given the nature of the Bill, extensive consultations were also undertaken with the judiciary. In addition the Department has had the benefit of the extensive consultative work undertaken by the Committee on Judicial Conduct and Ethics which studied 8 modern systems of judicial accountability, held an international conference and received many submissions in response to a public invitation for submissions from interested groups and individuals.

Enforcement and Compliance

The proposed Judicial Council will be responsible for ensuring compliance with the procedures contained in the proposed legislation. The Judicial Council will be comprised of all judges and will be chaired by the Chief Justice.

The Council will be required to produce an annual report to the Minister which will be laid before the Houses and will be required to produce end of year accounts for audit. The Judicial Conduct Committee will prepare an annual report on its activities which will be laid before the Houses of the Oireachtas. The Secretary to the Council shall, when requested by the Public Accounts Committee give evidence to that Committee on the accounts and accounting of the Council, and shall, on request, give account to any other Oireachtas Committee for the general administration of the Council.

Review

The system of annual reports which is foreseen in the Bill will provide a useful tool in relation to assessing how the Judicial Council is carrying out its functions. As with all legislation under its remit, the operation of the Bill will be kept under review by the Department of Justice and Equality.