

# Appendix 3 – International Standards and Recommendations relating to the Selection, Appointment and Tenure of the Judiciary and Prosecutors

Department for Community and Constitutional Affairs

## Introduction

1. Whilst many universal and European human rights instruments provide for the entitlement to a fair and public hearing by a competent, independent and impartial tribunal established by law, this Appendix focusses on those principles of most direct relevance to this paper, such as the independence, selection, appointment and tenure of the judiciary and prosecutors.

## International Standards and Recommendations relating to the Selection, Appointment and Tenure of the Judiciary

2. The following international standards, recommendations and guidance relate to the independence of the judiciary:

### **The 1985 UN Basic Principles on the Independence of the Judiciary (the 1985 UN Principles)<sup>1</sup>**

3. The 1985 UN Principles were adopted by the United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan in September 1985 and endorsed subsequently by the UN General Assembly in November and December 1985.

### **The 1998 European Charter on the Statute for Judges (1998 Charter)<sup>2</sup>**

4. The European Charter on the Statute for Judges arose from a multilateral meeting held in July 1997 in Strasbourg and was subsequently drafted by experts from France, Poland and the United Kingdom. The Charter was adopted unanimously by the participants at a further multilateral meeting organized by the Council of Europe in July 1998.

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<sup>1</sup> <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>

<sup>2</sup> <https://wcd.coe.int/ViewDoc.jsp?p=&id=1766485&direct=true>

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### **The 1998 Commonwealth Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence (the 1998 CLHG)<sup>3</sup> and 2003 Commonwealth Latimer House Principles (the 2003 CLHP)<sup>4</sup>**

5. In June 1998, representatives of four Commonwealth organisations meeting at Latimer House in England produced the Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence. The Guidelines were subsequently considered by various bodies within the Commonwealth and were adopted in an amended form as the Commonwealth (Latimer House) Principles on the Three Branches of Government by Commonwealth Heads of Government at Abuja in 2003. Jersey's compliance with the principles and the guidelines was considered in a speech by the previous Bailiff, Sir Michael Birt, to the Commonwealth Magistrates' and Judges' Association in 2013.

### **The 2010 Council of Europe Recommendation on Judges: independence, efficiency and responsibilities (2010 CoE Recommendation)<sup>5</sup>**

6. An initial recommendation and accompanying explanatory memorandum was prepared by the Project Group on Efficiency and Fairness of Civil Justice<sup>6</sup>. The Council of Europe Committee of Ministers<sup>7</sup> adopted Recommendation R(94)12 on the Independence, Efficiency and Role of Judges in October 1994. This recommendation was updated subsequently in order to reinforce measures felt necessary to promote judges' independence and efficiency, and was replaced by Recommendation CM/Rec (2010) 12 on *Judges: independence, efficiency and responsibilities*, adopted by the Council of Europe Committee of Ministers in November 2010.

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<sup>5</sup> <https://wcd.coe.int/ViewDoc.jsp?id=1707137>

<sup>6</sup> In addition to representatives of the member states of the Council of Europe and the Commission of the European Community, observers attending the project group which prepared the texts included the European Association of Judges Sitting in Commercial Courts and the International Association of Judges.

<sup>7</sup> The Committee of Ministers is the Council of Europe's decision-making body. It comprises the Foreign Affairs Ministers of all the member states, or their permanent diplomatic representatives in Strasbourg.

### **The European Convention on Human Rights (ECHR)**

7. The recommendations in the Jowell Report are based on international best practice and jurisprudence from the European Court of Human Rights ('ECtHR'). As the Jowell Report recognises, Article 6 of the ECHR requires a judge to be impartial and independent. Jurisprudence of the ECtHR makes it clear that when determining whether a sufficient, objective appearance of independence and impartiality is maintained, regard must be had to a number of matters. These matters include the manner of appointing and removing judicial office holders; the duration of appointments, the terms on which they are made and any other guarantees against outside pressure.
8. Although custom and practice will be relevant when considering whether an objective observer would think there is a risk of impartiality the existence of powers to arbitrarily terminate a judicial appointment or to reduce a judge's remuneration have been found, in some particular circumstances, to prejudice the objective appearance of independence even absent a specific threat to use them to influence judicial decision making.

### **Independence of the Judiciary**

9. The following international standards, recommendations and guidance relate to the need for judicial independence and the relationship between the judiciary, the legislature and the executive.
10. The 2010 Council of Europe Recommendation provides:

*"This recommendation is applicable to all persons exercising judicial functions, including those dealing with constitutional matters."*<sup>8</sup>

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<sup>8</sup> Para 1. 2010 Council of Europe Recommendation

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*“The provisions laid down in this recommendation also apply to non-professional judges, except where it is clear from the context that they only apply to professional judges.”<sup>9</sup>*

*“The purpose of independence, as laid down in Article 6 of the Convention, is to guarantee every person the fundamental right to have their case decided in a fair trial, on legal grounds only and without any improper influence.”<sup>10</sup>*

*“The independence of individual judges is safeguarded by the independence of the judiciary as a whole. As such, it is a fundamental aspect of the rule of law.”<sup>11</sup>*

*“The external independence of judges is not a prerogative or privilege granted in judges’ own interest but in the interest of the rule of law and of persons seeking and expecting impartial justice. The independence of judges should be regarded as a guarantee of freedom, respect for human rights and impartial application of the law. Judges’ impartiality and independence are essential to guarantee the equality of parties before the courts.”<sup>12</sup>*

*“Without prejudice to their independence, judges and the judiciary should maintain constructive working relations with institutions and public authorities involved in the management and administration of the courts, as well as professionals whose tasks are related to the work of judges in order to facilitate an effective and efficient administration of justice.”<sup>13</sup>*

11. The 2003 Commonwealth Latimer House Principles provide:

*“Each Commonwealth country’s Parliaments, Executives and Judiciaries are the guarantors in their respective spheres of the rule of law, the promotion and protection of fundamental human rights and the entrenchment of good governance based on the highest standards of honesty, probity and accountability.”<sup>14</sup>*

<sup>9</sup> Para. 2. 2010 Council of Europe Recommendation

<sup>10</sup> Para. 3. 2010 Council of Europe Recommendation

<sup>11</sup> Para. 4. 2010 Council of Europe Recommendation

<sup>12</sup> Para. 11. 2010 Council of Europe Recommendation

<sup>13</sup> Para. 12 2010 Council of Europe Recommendation

<sup>14</sup> I) 2003 Commonwealth Latimer House Principles

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*“Relations between parliament and the judiciary should be governed by respect for parliament’s primary responsibility for law making on the one hand and for the judiciary’s responsibility for the interpretation and application of the law on the other hand.”<sup>15</sup>*

*“Judiciaries and parliaments should fulfill their respective but critical roles in the promotion of the rule of law in a complementary and constructive manner.”<sup>16</sup>*

*“Parliamentarians must be able to carry out their legislative and constitutional functions in accordance with the Constitution, free from unlawful interference.”<sup>17</sup>*

*“An independent, effective and competent legal profession is fundamental to the upholding of the rule of law and the independence of the judiciary.”<sup>18</sup>*

*“An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice. The function of the judiciary is to interpret and apply national constitutions and legislation, consistent with international human rights conventions and international law, to the extent permitted by the domestic law of each Commonwealth country.”<sup>19</sup>*

*“Interaction, if any, between the executive and the judiciary should not compromise judicial independence.”<sup>20</sup>*

*“Judicial Accountability – Judges are accountable to the Constitution and to the law which they must apply honestly, independently and with integrity. The principles of judicial accountability and independence underpin public confidence in the judicial system and the importance of the judiciary as one of the three pillars upon which a responsible government relies.”<sup>21</sup>*

*“Judicial review - Best democratic principles require that the actions of governments are open to scrutiny by the courts, to ensure that decisions*

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<sup>15</sup> II(a) 2003 Commonwealth Latimer House Principles

<sup>16</sup> II(b) 2003 Commonwealth Latimer House Principles

<sup>17</sup> III(a) 2003 Commonwealth Latimer House Principles

<sup>18</sup> IV) 2003 Commonwealth Latimer House Principles

<sup>19</sup> IV) 2003 Commonwealth Latimer House Principles

<sup>20</sup> IV)(d) 2003 Commonwealth Latimer House Principles

<sup>21</sup> VII)(b) 2003 Commonwealth Latimer House Principles

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*taken comply with the Constitution, with relevant statutes and other law, including the law relating to the principles of natural justice.”<sup>22</sup>*

12. The 1998 Latimer House Guidelines for the Commonwealth provide:

*“The legislative function is the primary responsibility of parliament as the elected body representing the people. Judges may be constructive and purposive in the interpretation of legislation, but must not usurp Parliament’s legislative function. Courts should have the power to declare legislation to be unconstitutional and of no legal effect. However, there may be circumstances where the appropriate remedy would be for the court to declare the incompatibility of a statute with the Constitution, leaving it to the legislature to take remedial legislative measures.”<sup>23</sup>*

*“While dialogue between the judiciary and the government may be desirable or appropriate, in no circumstances should such dialogue compromise judicial independence.”<sup>24</sup>*

13. The 1985 UN Principles provide:

*“It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary”<sup>25</sup>*

### **Guarantees of Judicial Independence**

14. The following international standards, recommendations and guidance relate to guarantees of judicial independence.

15. The 2010 Council of Europe Recommendation provides:

*“The independence of the judge and of the judiciary should be enshrined in the constitution or at the highest possible legal level in member states, with more specific rules provided at the legislative level.”<sup>26</sup>*

*“All necessary measures should be taken to respect, protect and promote the independence and impartiality of judges.”<sup>27</sup>*

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<sup>22</sup> VII)(c) 2003 Commonwealth Latimer House Principles

<sup>23</sup> I) 1. 1998 Latimer House Guidelines for the Commonwealth

<sup>24</sup> I) 5. 1998 Latimer House Guidelines

<sup>25</sup> Art. 1 1985 UN Principles:

<sup>26</sup> Para. 7. 2010 Council of Europe Recommendation

<sup>27</sup> Para. 13. 2010 Council of Europe Recommendation

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*“The law should provide for sanctions against persons seeking to influence judges in an improper manner.”<sup>28</sup>*

*“Decisions of judges should not be subject to any revision other than appellate or re-opening proceedings, as provided for by law.”<sup>29</sup>*

*“With the exception of decisions on amnesty, pardon or similar measures, the executive and legislative powers should not take decisions which invalidate judicial decisions.”<sup>30</sup>*

*“If commenting on judges’ decisions, the executive and legislative powers should avoid criticism that would undermine the independence of or public confidence in the judiciary. They should also avoid actions which may call into question their willingness to abide by judges’ decisions, other than stating their intention to appeal.”<sup>31</sup>*

16. The 2003 Commonwealth Latimer House Principles provide:

*“The criminal law and contempt proceedings should not be used to restrict legitimate criticism of the performance of judicial functions.”<sup>32</sup>*

17. The 1998 Latimer House Guidelines provide:

*“Legitimate public criticism of judicial performance is a means of ensuring accountability;”<sup>33</sup>*

*“The criminal law and contempt proceedings are not appropriate mechanisms for restricting legitimate criticism of the courts.”<sup>34</sup>*

18. The 1998 Charter provides:

*“In each European State, the fundamental principles of the statute for judges are set out in internal norms at the highest level, and its rules in norms at least at the legislative level.”<sup>35</sup>*

19. The 1985 UN Principles provide:

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<sup>28</sup> Para. 14. 2010 Council of Europe Recommendation

<sup>29</sup> Para. 16. 2010 Council of Europe Recommendation

<sup>30</sup> Para. 17. 2010 Council of Europe Recommendation

<sup>31</sup> Para. 18. 2010 Council of Europe Recommendation

<sup>32</sup> VII) 2003 Commonwealth Latimer House Principles

<sup>33</sup> VI) 1.(b)(i) 1998 Latimer House Guidelines

<sup>34</sup> VI) 1.(b)(ii) 1998 Latimer House Guidelines

<sup>35</sup> Art. 1.2 1998 Charter

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*“The independence of the judiciary should be guaranteed by the State and enshrined in the Constitution or the law of the country”<sup>36</sup>*

*“There should not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.”<sup>37</sup>*

### Provision of Resources to the Judiciary

20. The following international standards, recommendations and guidance relate to the provision of resources to the judiciary.

21. The 2010 Council of Europe Recommendation provides:

*“Each state should allocate adequate resources, facilities and equipment to the courts to enable them to function in accordance with the standards laid down in Article 6 of the Convention and to enable judges to work efficiently.”<sup>38</sup>*

*“A sufficient number of judges and appropriately qualified support staff should be allocated to the courts.”<sup>39</sup>*

*“States should provide courts with the appropriate means to enable judges to fulfil their functions efficiently in cases involving foreign or international elements and to support international co-operation and relations between judges.”<sup>40</sup>*

22. The 2003 Commonwealth Latimer House Principles provide:

*“Adequate resources should be provided for the judicial system to operate effectively without any undue constraints which may hamper the independence sought;”<sup>41</sup>*

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<sup>36</sup> Art.1 1985 UN Principles

<sup>37</sup> Art. 4 1985 UN Principles

<sup>38</sup> Para. 33. 2010 Council of Europe Recommendation

<sup>39</sup> Para. 35. 2010 Council of Europe Recommendation

<sup>40</sup> Para. 43. 2010 Council of Europe Recommendation

<sup>41</sup> IV)(c) 2003 Commonwealth Latimer House Principles

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23. The 1998 Charter provides:

*“The State has the duty of ensuring that judges have the means necessary to accomplish their tasks properly, and in particular to deal with cases within a reasonable period.”<sup>42</sup>*

24. The 1998 Latimer House Guidelines provide:

*“Sufficient and sustainable funding should be provided to enable the judiciary to perform its functions to the highest standards. Such funds, once voted for the judiciary by the legislature, should be protected from alienation or misuse. The allocation or withholding of funding should not be used as a means of exercising improper control over the judiciary.”<sup>43</sup>*

*“Appropriate salaries and benefits, supporting staff, resources and equipment are essential to the proper functioning of the judiciary.”<sup>44</sup>*

25. The 1985 UN Principles provide:

*“It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.”<sup>45</sup>*

### **Judicial Selection and Appointment**

#### **Selection and Appointment Criteria**

26. The following relate to selection and appointment criteria.

27. The 2010 Council of Europe Recommendation provides:

*“Decisions concerning the selection and career of judges should be based on objective criteria pre-established by law or by the competent authorities. Such decisions should be based on merit, having regard to the*

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<sup>42</sup> Art. 1.6 1998 Charter

<sup>43</sup> II) 2. 1998 Latimer House Guidelines

<sup>44</sup> II) 2. 1998 Latimer House Guidelines

<sup>45</sup> Art. 7 1985 UN Principles

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*qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity.”<sup>46</sup>*

*“There should be no discrimination against judges or candidates for judicial office on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, disability, birth, sexual orientation or other status. A requirement that a judge or a candidate for judicial office must be a national of the state concerned should not be considered discriminatory.”<sup>47</sup>*

28. The 2003 Commonwealth Latimer House Principles provide:

*“Judicial appointments should be made on the basis of clearly defined criteria and by a publicly declared process. The process should ensure: equality of opportunity for all who are eligible for judicial office; appointment on merit; and that appropriate consideration is given to the need for the progressive attainment of gender equity and the removal of other historic factors of discrimination;”<sup>48</sup>*

*“Merit and proven integrity, should be the criteria of eligibility for appointment to public office;”<sup>49</sup>*

*“Subject to (a), measures may be taken, where possible and appropriate, to ensure that the holders of all public offices generally reflect the composition of the community in terms of gender, ethnicity, social and religious groups and regional balance.”<sup>50</sup>*

29. The 1998 Charter provides:

*“The rules of the statute relating to the selection and recruitment of judges by an independent body or panel, base the choice of candidates on their ability to assess freely and impartially the legal matters which will be referred to them, and to apply the law to them with respect for individual dignity. The statute excludes any candidate being ruled out by reason only*

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<sup>46</sup> Para. 44 2010 Council of Europe Recommendation

<sup>47</sup> Para. 45 2010 Council of Europe Recommendation

<sup>48</sup> IV(a) 2003 Commonwealth Latimer House Principles

<sup>49</sup> V(a) 2003 Commonwealth Latimer House Principles

<sup>50</sup> V(b) 2003 Commonwealth Latimer House Principles

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*of their sex, or ethnic or social origin, or by reason of their philosophical and political opinions or religious convictions.”<sup>51</sup>*

*“The statute makes provision for the conditions which guarantee, by requirements linked to educational qualifications or previous experience, the ability specifically to discharge judicial duties.”<sup>52</sup>*

*“The statute establishes the circumstances in which a candidate's previous activities, or those engaged in by his or her close relations, may, by reason of the legitimate and objective doubts to which they give rise as to the impartiality and independence of the candidate concerned, constitute an impediment to his or her appointment to a court.”<sup>53</sup>*

*“When it is not based on seniority, a system of promotion is based exclusively on the qualities and merits observed in the performance of duties entrusted to the judge, by means of objective appraisals performed by one or several judges and discussed with the judge concerned. Decisions as to promotion are then pronounced by the authority referred to at paragraph 1.3 hereof or on its proposal, or with its agreement. Judges who are not proposed with a view to promotion must be entitled to lodge a complaint before this authority.”<sup>54</sup>*

### 30. The 1998 Latimer House Guidelines:

*“The appointment process, whether or not involving an appropriately constituted and representative judicial services commission, should be designed to guarantee the quality and independence of mind of those selected for appointment at all levels of the judiciary.”<sup>55</sup>*

*“Judicial appointments to all levels of the judiciary should be made on merit with appropriate provision for the progressive removal of gender imbalance and of other historic factors of discrimination.”<sup>56</sup>*

### 31. The 1985 UN Principles provide:

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<sup>51</sup> Art. 2.1 1998 Charter

<sup>52</sup> Art. 2.2 1998 Charter

<sup>53</sup> Art. 3.2 1998 Charter

<sup>54</sup> Art. 4.1 1998 Charter

<sup>55</sup> II) 1. 1998 Latimer House Guidelines

<sup>56</sup> II) 1. 1998 Latimer House Guidelines

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*“Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.”<sup>57</sup>*

*“Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.”<sup>58</sup>*

### **Selection and Appointment Governance and Process**

32. The following relate to selection and appointment governance and process.

33. The 2010 Council of Europe Recommendation provides:

*“The authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers. With a view to guaranteeing its independence, at least half of the members of the authority should be judges chosen by their peers.”<sup>59</sup>*

*“However, where the constitutional or other legal provisions prescribe that the head of state, the government or the legislative power take decisions concerning the selection and career of judges, an independent and competent authority drawn in substantial part from the judiciary (without prejudice to the rules applicable to councils for the judiciary contained in Chapter IV) should be authorised to make recommendations or express opinions which the relevant appointing authority follows in practice.”<sup>60</sup>*

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<sup>57</sup> Art. 10 1985 UN Principles

<sup>58</sup> Art. 13 1985 UN Principles

<sup>59</sup> Para. 46. 2010 Council of Europe Recommendation

<sup>60</sup> Para. 47. 2010 Council of Europe Recommendation

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*“The membership of the independent authorities referred to in paragraphs 46 and 47 should ensure the widest possible representation. Their procedures should be transparent with reasons for decisions being made available to applicants on request. An unsuccessful candidate should have the right to challenge the decision, or at least the procedure under which the decision was made.”<sup>61</sup>*

34. The 1998 Charter provides:

*“In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.”<sup>62</sup>*

*“The decision to appoint a selected candidate as a judge, and to assign him or her to a tribunal, are taken by the independent authority referred to at paragraph 1.3 hereof or on its proposal, or its recommendation or with its agreement or following its opinion.”<sup>63</sup>*

35. The 1998 Latimer House Guidelines provide:

*“Jurisdictions should have an appropriate independent process in place for judicial appointments .Where no independent system already exists, appointments should be made by a judicial services commission (established by the Constitution or by statute) or by an appropriate officer of state acting on the recommendation of such a commission.”<sup>64</sup>*

*“The appointment process, whether or not involving an appropriately constituted and representative judicial services commission, should be designed to guarantee the quality and independence of mind of those selected for appointment at all levels of the judiciary.”<sup>65</sup>*

*“Judicial vacancies should be advertised.”<sup>66</sup>*

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<sup>61</sup> Para. 48. 2010 Council of Europe Recommendation

<sup>62</sup> Art. 1.3 1998 Charter

<sup>63</sup> Art. 3.1 1998 Charter

<sup>64</sup> II) 1. 1998 Latimer House Guidelines

<sup>65</sup> II) 1. 1998 Latimer House Guidelines

<sup>66</sup> II) 1. 1998 Latimer House Guidelines

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36. The 1985 UN Principles provide:

*“... Any method of judicial selection shall safeguard against judicial appointments for improper motives...”*<sup>67</sup>

### **Judicial Complaints and Discipline**

#### **Judicial Standards and Ethics**

37. The following relate to judicial standards and ethics.

38. The 2010 Council of Europe Recommendation provides:

*“With a view to contributing to the efficiency of the administration of justice and continuing improvement of its quality, member states may introduce systems for the assessment of judges by judicial authorities, in accordance with paragraph 58.”*<sup>68</sup>

*“Where judicial authorities establish systems for the assessment of judges, such systems should be based on objective criteria. These should be published by the competent judicial authority. The procedure should enable judges to express their view on their own activities and on the assessment of these activities, as well as to challenge assessments before an independent authority or a court.”*<sup>69</sup>

*“Judges should be guided in their activities by ethical principles of professional conduct. These principles not only include duties that may be sanctioned by disciplinary measures, but offer guidance to judges on how to conduct themselves.”*<sup>70</sup>

*“These principles should be laid down in codes of judicial ethics which should inspire public confidence in judges and the judiciary. Judges should play a leading role in the development of such codes.”*<sup>71</sup>

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<sup>67</sup> Art. 10 1985 UN Principles

<sup>68</sup> Para. 42. 2010 Council of Europe Recommendation

<sup>69</sup> Para. 58. 2010 Council of Europe Recommendation

<sup>70</sup> Para. 72. 2010 Council of Europe Recommendation

<sup>71</sup> Para. 73. 2010 Council of Europe Recommendation

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*“Judges should be able to seek advice on ethics from a body within the judiciary.”<sup>72</sup>*

39. The 2003 Commonwealth Latimer House Principles provide:

*“Judges should be subject to suspension or removal only for reasons of incapacity or misbehaviour that clearly renders them unfit to discharge their duties.”<sup>73</sup>*

*“Ministers, Members of Parliament, judicial officers and public office holders in each jurisdiction should respectively develop, adopt and periodically review appropriate guidelines for ethical conduct. These should address the issue of conflict of interest, whether actual or perceived, with a view to enhancing transparency, accountability and public confidence.”<sup>74</sup>*

*“Judges are accountable to the Constitution and to the law which they must apply honestly, independently and with integrity...”<sup>75</sup>*

40. The 1998 Latimer House Guidelines provide:

*“Grounds for removal of a judge should be limited to: (A) inability to perform judicial duties and (B) serious misconduct.”<sup>76</sup>*

41. The 1985 UN Principles provide:

*“Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.”<sup>77</sup>*

*“All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.”<sup>78</sup>*

### **Complaints, Discipline and Removal Process**

42. The 2010 Council of Europe Recommendation provides:

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<sup>72</sup> Para. 74. 2010 Council of Europe Recommendation

<sup>73</sup> IV) 2003 Commonwealth Latimer House Principles

<sup>74</sup> VI) 2003 Commonwealth Latimer House Principles

<sup>75</sup> VII)(b) 2003 Commonwealth Latimer House Principles

<sup>76</sup> VI) 1.(a)(i) 1998 Latimer House Guidelines

<sup>77</sup> Art. 18 1985 UN Principles

<sup>78</sup> Art. 19 1985 UN Principles

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*“Disciplinary proceedings may follow where judges fail to carry out their duties in an efficient and proper manner. Such proceedings should be conducted by an independent authority or a court with all the guarantees of a fair trial and provide the judge with the right to challenge the decision and sanction. Disciplinary sanctions should be proportionate.”<sup>79</sup>*

43. The 2003 Commonwealth Latimer House Principles provide:

*“In addition to providing proper procedures for the removal of judges on grounds of incapacity or misbehaviour that are required to support the principle of independence of the judiciary, any disciplinary procedures should be fairly and objectively administered. Disciplinary proceedings which might lead to the removal of a judicial officer should include appropriate safeguards to ensure fairness.”<sup>80</sup>*

44. The 1998 Latimer House Guidelines provide:

*“In cases where a judge is at risk of removal, the judge must have the right to be fully informed of the charges, to be represented at a hearing, to make a full defence and to be judged by an independent and impartial tribunal.”<sup>81</sup>*

*“In all other matters, the process should be conducted by the chief judge of the courts;”<sup>82</sup>*

*“Disciplinary procedures should not include the public admonition of judges. Any admonitions should be delivered in private, by the chief judge.”<sup>83</sup>*

45. The 1998 Charter provides:

*“In respect of every decision affecting the ... termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.”<sup>84</sup>*

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<sup>79</sup> Para. 69. 2010 Council of Europe Recommendation

<sup>80</sup> VII) 2003 Commonwealth Latimer House Principles

<sup>81</sup> VI) 1.(a)(i) 1998 Latimer House Guidelines

<sup>82</sup> VI) 1.(a)(ii) 1998 Latimer House Guidelines

<sup>83</sup> VI) 1.(a)(iii) 1998 Latimer House Guidelines

<sup>84</sup> Art. 1.3 1998 Charter

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*“The statute gives to every judge who considers that his or her rights under the statute, or more generally his or her independence, or that of the legal process, are threatened or ignored in any way whatsoever, the possibility of making a reference to such an independent authority, with effective means available to it of remedying or proposing a remedy.”<sup>85</sup>*

*“The dereliction by a judge of one of the duties expressly defined by the statute, may only give rise to a sanction upon the decision, following the proposal, the recommendation, or with the agreement of a tribunal or authority composed at least as to one half of elected judges, within the framework of proceedings of a character involving the full hearing of the parties, in which the judge proceeded against must be entitled to representation. The scale of sanctions which may be imposed is set out in the statute, and their imposition is subject to the principle of proportionality. The decision of an executive authority, of a tribunal, or of an authority pronouncing a sanction, as envisaged herein, is open to an appeal to a higher judicial authority.”<sup>86</sup>*

*“Each individual must have the possibility of submitting without specific formality a complaint relating to the miscarriage of justice in a given case to an independent body. This body has the power, if a careful and close examination makes a dereliction on the part of a judge indisputably appear, such as envisaged at paragraph 5.1 hereof, to refer the matter to the disciplinary authority, or at the very least to recommend such referral to an authority normally competent in accordance with the statute, to make such a reference.”<sup>87</sup>*

*“A judge permanently ceases to exercise office through resignation, medical certification of physical unfitness, reaching the age limit, the expiry of a fixed legal term, or dismissal pronounced within the framework of a procedure such as envisaged at paragraph 5.1 hereof.”<sup>88</sup>*

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<sup>85</sup> Art. 1.4 1998 Charter

<sup>86</sup> Art. 5.1 1998 Charter

<sup>87</sup> Art. 5.3 1998 Charter

<sup>88</sup> Art. 7.1 1998 Charter

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*“The occurrence of one of the causes envisaged at paragraph 7.1 hereof, other than reaching the age limit or the expiry of a fixed term of office, must be verified by the authority referred to at paragraph 1.3 hereof.”<sup>89</sup>*

46. The 1985 UN Principles provide:

*“A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.”<sup>90</sup>*

*“Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.”<sup>91</sup>*

47. The basic principles and relevant cases are considered within the *Manual on Human Rights for Judges, Prosecutors and Lawyers* published by the UN Office of the High Commissioner for Human Rights<sup>92</sup>, which concludes: *“the general assertion can be made that, under international law, judges subjected to disciplinary proceedings must be granted due process before a competent, independent and impartial organ which must be – or must be controlled by – an authority independent of the Executive.”*

### **Judicial Tenure and Remuneration**

#### **Security of Tenure**

48. The following relate to security of tenure.

49. The 2010 Council of Europe Recommendation provides:

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<sup>89</sup> Art. 7.2 1998 Charter

<sup>90</sup> Art. 17 1985 UN Principles

<sup>91</sup> Art. 20 1985 UN Principles

<sup>92</sup> <http://www.ohchr.org/Documents/Publications/training9Titleen.pdf>

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*“Security of tenure and irremovability are key elements of the independence of judges. Accordingly, judges should have guaranteed tenure until a mandatory retirement age, where such exists.”<sup>93</sup>*

*“The terms of office of judges should be established by law. A permanent appointment should only be terminated in cases of serious breaches of disciplinary or criminal provisions established by law, or where the judge can no longer perform judicial functions. Early retirement should be possible only at the request of the judge concerned or on medical grounds.”<sup>94</sup>*

*“Where recruitment is made for a probationary period or fixed term, the decision on whether to confirm or renew such an appointment should only be taken in accordance with paragraph 44 so as to ensure that the independence of the judiciary is fully respected.”<sup>95</sup>*

*“A judge should not receive a new appointment or be moved to another judicial office without consenting to it, except in cases of disciplinary sanctions or reform of the organisation of the judicial system.”<sup>96</sup>*

50. The 2003 Commonwealth Latimer House Principles provide:

*“Arrangements for appropriate security of tenure and protection of levels of remuneration must be in place;”<sup>97</sup>*

51. The 1998 Latimer House Guidelines provide:

*“Judicial appointments should normally be permanent; whilst in some jurisdictions, contract appointments may be inevitable, such appointments should be subject to appropriate security of tenure.”<sup>98</sup>*

52. The 1998 Charter provides:

*“Where the recruitment procedure provides for a trial period, necessarily short, after nomination to the position of judge but before confirmation on a permanent basis, or where recruitment is made for a limited period*

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<sup>93</sup> Para. 49 2010 Council of Europe Recommendation

<sup>94</sup> Para. 50. 2010 Council of Europe Recommendation

<sup>95</sup> Para. 51. 2010 Council of Europe Recommendation

<sup>96</sup> Para. 52. 2010 Council of Europe Recommendation

<sup>97</sup> IV(b) 2003 Commonwealth Latimer House Principles

<sup>98</sup> II) 1. 1998 Latimer House Guidelines

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*capable of renewal, the decision not to make a permanent appointment or not to renew, may only be taken by the independent authority referred to at paragraph 1.3 hereof, or on its proposal, or its recommendation or with its agreement or following its opinion. The provisions at point 1.4 hereof are also applicable to an individual subject to a trial period.”<sup>99</sup>*

*“A judge holding office at a court may not in principle be appointed to another judicial office or assigned elsewhere, even by way of promotion, without having freely consented thereto. An exception to this principle is permitted only in the case where transfer is provided for and has been pronounced by way of a disciplinary sanction, in the case of a lawful alteration of the court system, and in the case of a temporary assignment to reinforce a neighbouring court, the maximum duration of such assignment being strictly limited by the statute, without prejudice to the application of the provisions at paragraph 1.4 hereof.”<sup>100</sup>*

*“A judge permanently ceases to exercise office through resignation, medical certification of physical unfitness, reaching the age limit, the expiry of a fixed legal term, or dismissal pronounced within the framework of a procedure such as envisaged at paragraph 5.1 hereof.”<sup>101</sup>*

53. The 1985 UN Principles provide:

*“The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.”<sup>102</sup>*

*“Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.”<sup>103</sup>*

### Remuneration

54. The following relate to remuneration.

55. The 2010 Council of Europe Recommendation provides:

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<sup>99</sup> Art. 3.3 1998 Charter

<sup>100</sup> Art. 3.4 1998 Charter

<sup>101</sup> Art. 7.1 1998 Charter

<sup>102</sup> Art. 11 1985 UN Principles

<sup>103</sup> Art. 12 1985 UN Principles

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*“The principal rules of the system of remuneration for professional judges should be laid down by law.”<sup>104</sup>*

*“Judges’ remuneration should be commensurate with their profession and responsibilities, and be sufficient to shield them from inducements aimed at influencing their decisions. Guarantees should exist for maintaining a reasonable remuneration in case of illness, maternity or paternity leave, as well as for the payment of a retirement pension, which should be in a reasonable relationship to their level of remuneration when working. Specific legal provisions should be introduced as a safeguard against a reduction in remuneration aimed specifically at judges.”<sup>105</sup>*

*“Systems making judges’ core remuneration dependent on performance should be avoided as they could create difficulties for the independence of judges.”<sup>106</sup>*

56. The 2003 Commonwealth Latimer House Principles provide:

*“Arrangements for appropriate security of tenure and protection of levels of remuneration must be in place;”<sup>107</sup>*

57. The 1998 Latimer House Guidelines provide:

*“As a matter of principle, judicial salaries and benefits should be set by an independent body and their value should be maintained.”<sup>108</sup>*

58. The 1998 Charter provides:

*“Judges exercising judicial functions in a professional capacity are entitled to remuneration, the level of which is fixed so as to shield them from pressures aimed at influencing their decisions and more generally their behaviour within their jurisdiction, thereby impairing their independence and impartiality.”<sup>109</sup>*

*“Remuneration may vary depending on length of service, the nature of the duties which judges are assigned to discharge in a professional capacity,*

<sup>104</sup> Para. 53 2010 Council of Europe Recommendation

<sup>105</sup> Para. 54. 2010 Council of Europe Recommendation

<sup>106</sup> Para. 55. 2010 Council of Europe Recommendation

<sup>107</sup> IV(b) 2003 Commonwealth Latimer House Principles

<sup>108</sup> II) 2. 1998 Latimer House Guidelines

<sup>109</sup> Art. 6.1 1998 Charter

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*and the importance of the tasks which are imposed on them, assessed under transparent conditions.”<sup>110</sup>*

*“The statute provides a guarantee for judges acting in a professional capacity against social risks linked with illness, maternity, invalidity, old age and death.”<sup>111</sup>*

*“In particular the statute ensures that judges who have reached the legal age of judicial retirement, having performed their judicial duties for a fixed period, are paid a retirement pension, the level of which must be as close as possible to the level of their final salary as a judge.”<sup>112</sup>*

### **International Standards and Recommendations relating to the Selection, Appointment and Tenure of Prosecutors**

59. International standards and recommendations are relevant to the Attorney General and Solicitor in respect of their responsibility for criminal prosecutions.

60. The independence of prosecutors is recognised in the following international standards:

#### **The UN Guidelines on the Role of Prosecutors<sup>113</sup>**

61. The UN *Guidelines on the Role of Prosecutors* were adopted by the UN Congress on the Prevention of Crime and the Treatment of Offenders held in September 1990 in Havana. The guidelines provide a set of principles intended to ensure that prosecutors can carry out their professional functions effectively, impartially and fairly. Unlike with judges, international law does not contain a provision that guarantees the institutional independence of prosecutors.

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<sup>110</sup> Art. 6.2 1998 Charter

<sup>111</sup> Art. 6.3 1998 Charter

<sup>112</sup> Art. 6.4 1998 Charter

<sup>113</sup> <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx>

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62. The principles are intended to be applicable to all jurisdictions, irrespective of the nature of their prosecuting authority, and so are neutral on matters such as method of appointment. However, the guidelines are similar to those for judges in specifying that:

*“States shall ensure that:*

*(a) Selection criteria for prosecutors embody safeguards against appointments based on partiality or prejudice, excluding any discrimination against a person on the grounds of race, colour, sex, language, religion, political or other opinion, national, social or ethnic origin, property, birth, economic or other status, except that it shall not be considered discriminatory to require a candidate for prosecutorial office to be a national of the country concerned.”*

63. In relation to conditions of service, the guidelines state:

*“Reasonable conditions of service of prosecutors, adequate remuneration and, where applicable, tenure, pension and age of retirement shall be set out by law or published rules or regulations.”*

64. The guidelines contain principles that apply to disciplinary proceedings, including:

*“Disciplinary offences of prosecutors shall be based on law or lawful regulations. Complaints against prosecutors which allege that they acted in a manner clearly out of the range of professional standards shall be processed expeditiously and fairly under appropriate procedures. Prosecutors shall have the right to a fair hearing. The decision shall be subject to independent review.*

*Disciplinary proceedings against prosecutors shall guarantee an objective evaluation and decision. They shall be determined in accordance with the law, the code of professional conduct and other established standards and ethics and in the light of the present Guidelines.”*

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### The 2000 Council of Europe Recommendation on the role of Public Prosecution in the Criminal Justice System<sup>114</sup>

65. The Council of Europe Committee of Ministers adopted Recommendation R(2000)19 regarding the *Role of Public Prosecution in the Criminal Justice System* in October 2000. The recommendation includes a provision on independence of prosecutors:

*“In countries where the public prosecution is independent of the government, the state should take effective measures to guarantee that the nature and the scope of the independence of the public prosecution is established by law.”*

66. The explanatory memorandum for the recommendation explains the rationale for this provision:

*“Where the public prosecutor is independent of the executive authority, the nature and extent of that independence must be fixed by law so as to rule out (a) informal practices that could undermine that principle and (b) any risk of drift towards self-interest by public prosecutors themselves.”*

67. As with the UN Guidelines (see above) the recommendation remains at a relatively high level. The recommendation includes some broad guidelines on recruitment and disciplinary matters:

*“States should take measures to ensure that:*

*a. the recruitment, the promotion and the transfer of public prosecutors are carried out according to fair and impartial procedures embodying safeguards against any approach which favours the interests of specific groups, and excluding discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status*

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<sup>114</sup> <https://wcd.coe.int/ViewDoc.jsp?id=376859&Site=CM>

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*d. public prosecutors have reasonable conditions of service such as remuneration, tenure and pension commensurate with their crucial role as well as an appropriate age of retirement and that these conditions are governed by law;*

*e. disciplinary proceedings against public prosecutors are governed by law and should guarantee a fair and objective evaluation and decision which should be subject to independent and impartial review.”*

68. The explanatory memorandum for the recommendation notes that impartiality must govern the recruitment of public prosecutors and that:

*“arrangements for a competitive system of entry to the profession and the establishment of Service Commissions for the judiciary, or exclusively for prosecutors, are among the means of achieving impartiality.”*

69. The memorandum also notes that there must be provision for public prosecutors to be:

*“made liable at disciplinary, administrative, civil and criminal level”*

and

*“unlike judges, public prosecutors must not be guaranteed tenure in a particular position or post”.*