



**Ministry of Justice consultation:
Appointments and Diversity
*'A judiciary for the 21st Century'***

**A JUSTICE RESPONSE
February 2012**

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Our answers to the questions in the consultation paper are set out below. As a matter of principle, we think that the Lord Chancellor should not be involved in the selection process until it has been completed by the Judicial Appointments Commission. The Lord Chancellor may then be presented with up to three names regarded as suitable for appointment by the commission. We agree with the proposal that the Lord Chancellor transfer decision-making in relation to appointments below High Court level.

Question 1: Should the Lord Chancellor transfer his decision-making role and power to appoint to the Lord Chief Justice in relation to appointments below the Court of Appeal or High Court? (S67, 70 - 76, 79-85, 88 – 93 of CRA)

Yes. The Lord Chancellor should transfer his role in relation to all appointments below the High Court.

We argued in November 2003 in our response to the paper *Constitutional Reform: a new way of appointing judges* that the body that became the Judicial Appointments Commission (JAC) should make appointments up to High Court level. We wanted, in the jargon of the time, a 'hybrid' system of judicial appointment. High Court judiciary may have duties that include sitting in the Administrative Court and have, as a result, responsibilities at a high level of public law. They also are engaged generally in cases of sufficient weight to merit the confidence in their abilities of the Lord Chancellor – at least at a supervisory level over their method of appointment.

Question 2: Do you agree that the JAC should have more involvement in the appointment of deputy High Court judges? (Part 4, Chapter 2 of the CRA, s.9 Senior Courts Act 1981)

Yes. There has been widespread unease at the present arrangements which do not involve the JAC. It is alleged, rightly or wrongly, that this has led to less diversity in the appointments of deputy High Court judges than would otherwise be the case. If only for the avoidance of any doubt, the JAC should make all appointments.

Question 3: Should the Lord Chancellor be consulted prior to the start of the selection process for the most senior judicial roles (Court of Appeal and above)? (s70, 75B and 79 CRA)

No. The present legislation imposes a logical division of powers. The Lord Chancellor is excluded from the selection process until the point when the JAC presents names at the end of the process. This keeps the Lord Chancellor, currently an elected member of the House of

Commons, clear of the appointment process until approval. This is a clear and – above all – a transparent division of responsibilities.

For the position in relation to the Supreme Court, see below.

Question 4: Should selection panels for the most senior judicial appointments be comprised of an odd number of members? (S71, 75C and 80, of the CRA)

Yes. For the obvious administrative reasons about majorities.

Question 5: Should the Lord Chief Justice chair selection panels for Heads of Division appointments in England and Wales? (S71 CRA)

Yes. The Lord Chief Justice is responsible for the management of the courts and needs to build a management team around him or her in which s/he has confidence and with whom s/he can work.

Question 6: Should only one serving Justice of the Supreme Court be present on selection commissions, with the second Justice replaced with a judge from Scotland, Northern Ireland or England and Wales? (Schedule 8, pt1 to the CRA)

No. The balance between jurisdictions would appear to be managed relatively well and is relatively clear. The problem is the diversity of the Supreme Court in other ways. The presence of two judges on the selection committee may operate to limit an openness to other types of diversity. If it was felt that a senior judge should be on the commission to bring personal knowledge of the role, then one could be sought from among the court of appeal judiciary who were not candidates. The commissions could be chaired in rotation by the chairs of the judicial appointment commissions.

Question 7: Do you agree that the Lord Chancellor should participate on the selection panel for the appointment of the Lord Chief Justice as the fifth member and in so doing, lose the right to a veto? (S 71, 73 and 74 of CRA)

No. The current division of responsibilities should be maintained. The Lord Chancellor's role should come into play only after the independent process of assessment has been completed. It is not evident that the current arrangements lessen the credibility of the Lord Chief Justice with the public, ministers or Parliament. However, if ministers are to be accorded a greater role, then the selection panel could be required to present up to three names of those it considers suitable for appointment to the Lord Chancellor (with, if appropriate) an indication of preference. The Lord Chancellor could then choose.

Question 8: Do you agree that as someone who is independent from the executive and the judiciary, the Chair of the JAC should chair the selection panel for the appointment of the Lord Chief Justice? (S71 of CRA)

Yes.

Question 9: Do you agree that the Lord Chancellor should participate in the selection commission for the appointment of the President of the UK Supreme Court and in so doing, lose the right to a veto? (S26, 27, 29, 30 of, and Schedule 8 to, the CRA)

No. The current division of responsibilities should be maintained for the same reasons as set out above (in the answers to question 7).

Question 10: What are your views on the proposed make-up of the selection panel for the appointment of the President of the UK Supreme Court? (S26, 27 of, and Schedule 8 to, the CRA)

The Lord Chancellor should not be a member of the panel for the same reasons as above. If the case for more discretion over the appointment was accepted then it could be provided, as again above, by the presentation in the same way as above of a choice of names of those deemed suitable by the selection panel.

Question 11: Do you agree with the proposal that the Chair of the selection panel to identify the President of the UK Supreme Court, should be a lay member from either the Judicial Appointments Commission for England and Wales, the Judicial Appointment Board for Scotland or the Northern Ireland Judicial Appointments Commission?

Yes or the chairs of the judicial appointment committees in rotation.

Question 12: Should the Lord Chancellor make recommendations directly to HM the Queen instead of the Prime Minister? (S26 and 29 CRA and convention)

Yes. It is difficult to see what the Prime Minister would add to the recommendation of the Lord Chancellor.

Question 13: Do you believe that the principle of salaried part-time working should be extended to the High Court and above? If so, do you agree that the statutory limits on numbers of judges should be removed in order to facilitate this? (Sections 2 and 4 of the Senior Courts Act 1981)

Yes, in principle. The restriction on maximum numbers should be removed. However, there are potentially problems with someone combining sitting part-time over an extended period with other employment. Diversity might be enhanced by a requirement that you could sit part-time but not combine that with practice or other paid employment: such a situation could encourage parents and care-givers. It is difficult to see the advantage in terms of increasing diversity of encouraging a long-term combination of judicial appointment and other employment.

Question 14: Should the appointments process operated by the JAC be amended to enable the JAC to apply the positive action provisions when two candidates are essentially indistinguishable? (S63 of the CRA)

Yes. It would be helpful to consider the idea of merit as reaching a plateau of eligibility for a post rather than as necessarily involving arriving at the summit as the top candidate. The JAC should be able to choose from those who, in their view, are suitable for appointment on positive action grounds. However, if this view was to prove unacceptable, too radical then the somewhat artificial provisions quoted in the question should be applicable.

Question 15: Do you agree that all fee-paid appointments should ordinarily be limited to three renewable 5 year terms, with options to extend tenure in exceptional cases where there is a clear business need?

The idea of these appointments should be to give experience of the judicial role. There seems little justification beyond going further than one five year term. Beyond that, appointment should either be made on a permanent part-time (and subject to the employment restrictions above) or full-time basis.

Question 16: How many Judicial Appointments Commissioners should there be? (Schedule 12 to CRA)

There should be sufficient commissioners to carry out the work properly. The proposed reduction from 14 to 8 is estimated to save only £50,000 (para 94). That seems a remarkably small savings for a potential large cull of commissioners. The purported advantages of a smaller commission in para 97 are somewhat unconvincing. A smaller commission would, perforce, lead to more specialisation by commissioners: it also puts somewhat of a burden on the remaining numbers. No doubt, the JAC, like all government bodies, is under pressure of funding. If cuts are needed, it might be better to reduce the number to 12 and eliminate the magistrate as suggested. We, however, originally called for a membership of 15.

*Question 17: Should the membership of the Commission be amended as proposed above?
(Schedule 12 pt1 to CRA)*

No. See above.

Question 18: Should the CRA be amended to provide for selection exercises (such as judicial offices not requiring a legal qualification) to be moved out of the JAC's remit, where there is agreement and where it would be appropriate to do so? (S85 CRA)

There seems little point in this. The function would have to be carried out elsewhere.

Question 19: Do you agree with the proposed approach to delivering these changes?

Not entirely. Greater dependence on secondary legislation improves the flexibility of response by ministers but it also decreases Parliamentary scrutiny even when subject to affirmative procedure. A requirement for consent to ministerial proposals from senior members of judiciary provides a degree of protection. However, it would be desirable for primary legislation to state the principles on which secondary legislation then fills out the detail. For example, if it is accepted that the Lord Chancellor's role in senior judicial appointment should only be when presented with the recommendations of a selection panel then that point must be included in primary legislation.

Question 20: Are there any other issues/proposals relating to the process for appointing the judiciary or for improving the diversity of the judiciary that you believe the MoJ should pursue?

First, s64 Constitutional Reform Act should be amended so that the subsection one is amended to

'(1)The Commission, in performing its functions under this Part, must have regard to the need to encourage diversity in the range of persons appointed.'

This would preserve the requirement of appointment of merit but within a stronger diversity context.

Second, in the longer term, it is important that there is an acknowledged route into the judiciary which takes someone from appointment as a tribunal judge in, say, their early 30s through to the Supreme Court. There needs to be an express policy to encourage this so that we develop a domestic version of a continental career judicial route where someone can join after a shortish period in practice (retaining the current domestic pattern) and proceeding through to the highest level (in the continental way).

Question 21: We welcome your views on the EIA in terms of likely equality impacts. Are there other ways in which these proposals are likely to impact on race, sex, disability, sexual orientation, religion and belief, age, marriage and civil partnership, gender reassignment, pregnancy and maternity?.

We have no comment.

Question 22: We are particularly interested in understanding more about the barriers faced by people with protected characteristics. Are there any further sources of evidence of equality impact that you are aware of that would help better understand the impacts of the proposals?

We have no comment

Thank you for participating in this consultation exercise.

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