

JUDICIAL INDEPENDENCE PROJECT

BRIEFING PAPER: Changes to Judicial Appointments in the Crime and Courts Bill 2012

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SUMMARY

- The stated philosophy behind Part 2 of the Bill – of leaving statements of principle on the face of the Bill and moving detailed technical provisions into statutory instrument – is welcome. However, as the Bill currently stands this intent is not realised and the distinction between matters that should remain in the Constitutional Reform Act and matters that should be left to statutory instrument is erratic.
- The provisions governing the Lord Chancellor's role in the appointment of the President of the UK Supreme Court and of the Lord Chief Justice of England and Wales are ambiguous as key points of principle are left for regulations to be made by the Lord Chancellor.
- It appears that the Lord Chancellor may choose to sit on the selection bodies or may choose not to do so. Only in the former case will he lose his veto over an appointment but in either case it appears that he retains the right to compel the selecting body to reconsider its chosen candidate. In circumstances where the Lord Chancellor sits on the selecting body, his retention of a power to compel that body to reconsider its decision is inappropriate.
- The rule prohibiting the President and Deputy President of the UK Supreme Court from sitting on selection commissions to appoint their successors is welcome. However, as it is currently expressed it appears to leave open the possibility that other office holders (for example the Lord Chief Justice) may be involved in the selection of their successors. It would be better to enshrine in the Bill a general prohibition against an incumbent or retiring judge sitting on a panel to select his or her successor.
- The Bill as it stands has the potential to add further complexity to an already extremely confusing piece of legislation by adding new actors (the Lord Chief Justice and Senior President of Tribunals) and a new layer of rules (in the form of statutory instruments) to the appointments process. In a piece of legislation with constitutional significance this is unwelcome and measures should be taken to express the changes envisaged in a manner that leaves them reasonably accessible to the layperson.

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1. Introduction

The Crime and Courts Bill is a piece of general legislation jointly sponsored by the Home Office and the Ministry of Justice and announced in the Queen's Speech in May. It contains a large number of policy measures and organisational changes that, at least to the outsider, do not appear to bear much relationship to each other apart from falling within the general category of 'crime and the courts'. Parts 1 and 3 contains Home Office measures and court and judiciary-related matters are contained in Part 2. My focus in this comment is on the provisions on changes to the judicial appointments provisions of the Constitutional Reform Act 2005 (CRA) so I will outline the other court and judiciary-related measures in Part 2 only very briefly here.

Section 22 of the Bill creates a very limited and *ad hoc* power to permit television broadcasting of court proceedings which will allow the courts to dip a toe into court-based broadcasting but ensures that trial judges retain control over proceedings by giving them an essentially absolute power to ban television cameras from their courts (in subsections 22(3) and (4)). Schedules 9 and 10 of the Bill create a single County Court and a new single Family Court in England and Wales. The objective is efficiency: judges will no longer be confined to geographical jurisdictions and it will become possible to deploy judges of these courts anywhere within England and Wales. In the case of the Family Court there is the additional objective of simplifying the current rather complex jurisdictional structure which sees some matters being confined to the High Court, others to the county court, and so on. The new Family Court will be able to deal with all family matters. Section 20 of the Bill also provides for the collection of fines to be outsourced and for the cost of pursuing fines to be fixed to an individual who is in default.

Schedule 13 of the Bill makes provision for the deployment of judges across the courts and tribunals service, so that court-based judiciary can sit on tribunals and tribunal judges can sit on courts. This is a logical consequence of the unification of courts and tribunals into a single organisation – HM Courts and Tribunals Service (HMCTS) – in April 2011 and should, as in the case of the new single court systems, allow for the more efficient deployment of judicial resources.

2. Appointments and Diversity

There are two measures in the Bill that are intended to assist in increasing the diversity of the judiciary. The first concerns part-time working, which is intended to increase the number of women in the judiciary (the operating assumption being that women retain a greater share of childcare responsibilities than do men). Schedule 12 of the Bill replaces the current statutory limits on the number of judges in the High Court, Court of Appeal and UKSC and replaces them with references to 'full-time equivalents'. The full-time equivalent

number of judges is calculated by taking the number of full-time judges and adding, for each judge who is not full-time 'such fraction as is reasonable'. Thus the new total for the UKSC is 12 judges or full-time equivalent.

This approach is very sensible, although one wonders whether it is likely to have any real impact in the short to medium term. Fractional posts may be as attractive to male candidates as to female candidates and there is anecdotal evidence that the option of moving to a fractional post, which has been made available to district judges, has generally been taken up by male judges approaching retirement and wishing to cut down on their work commitments. One would also have to assume that practising female lawyers who have progressed far enough in their careers to be considered for the most senior judicial appointments would already have successful childcare arrangements (or indeed would already have raised their children). However, the change will be of immediate benefit to serving judges in lower courts who in some cases already benefit from fractional work arrangements and will now find it easier to progress in their judicial careers.

The second measure on diversity concerns the use of the merit criterion in appointment. Paragraph 9 of Schedule 12 inserts a new section 63(4) into the CRA. This provides that the requirement that judges be appointed solely on merit does not prevent the application of the 'tipping-point' provisions of the Equality Act 2010 (section 159). Where two candidates are of equal merit section 159 allows the selecting body to prefer one for the purpose of increasing diversity.

The issue of diversity in appointments is perhaps the most controversial in this area. The proposed use section 159 reflects the conclusions of the Ministry of Justice's consultation on *Appointments and Diversity: A Judiciary for the 21st Century* (hereafter *Appointments and Diversity*) and also those of the Lords Constitution Committee in its recent inquiry into judicial appointments.² This is, however, about the most conservative implementation of a positive action policy that could be imagined. Given that many judges and lawyers are firmly of the opinion that it is logically impossible for two candidates to be of equal merit the tiebreaker provision could easily end up as a dead letter. Section 63(4) preserves the principle of selection 'solely on merit' on the face of the CRA and is not framed as a positive *instruction* to use diversity as a tiebreaker but rather as a negative statement that the act does not preclude it. The quality of the judiciary and the integrity of the principle of appointment on merit would not be imperilled by the very modest change entailed by a positive *requirement* to apply the tiebreaker rule.

² House of Lords Selection Committee on the Constitution, 'Judicial Appointments', 25th Report of Session 2010-12 (hereafter *Judicial Appointments*).

3. Changes to the JAC and to the role of the Lord Chancellor

Appointments and Diversity explains that the Ministry has adopted an approach that could be summarised as ‘principle in, detail out’ to the changes to the appointments provisions of CRA.

[W]hilst there is a broad consensus around the framework set out by the Constitutional Reform Act 2005 there is also a widely held view that the Act is too prescriptive, which reduces flexibility. ... It is intended that important matters of principle relating to the appointment process should, rightly, remain on the face of the Act and require detailed legislation to make changes.³

The rules governing the Judicial Appointments Commission (JAC) are amended in accordance with this general approach. Principles are left on the face of the Bill and the Lord Chancellor is given power to make more specific regulations by paragraphs 15-21 of Schedule 12. Whereas the CRA currently specifies the number of JAC commissioners, the Bill merely requires that the JAC consist of a lay chairman and a number of additional Commissioners as specified by regulations made by the Lord Chancellor with the agreement of the Lord Chief Justice (paragraph 1 of Schedule 12 CRA, as amended). The number of Commissioners holding judicial office must not be greater than the number of lay Commissioners (new paragraph 3A of Schedule 12). The Lord Chancellor’s regulations must ensure that the Commission includes holders of judicial office, lawyers and laypersons. The regulations may also make further provisions about the Commissioners (there is, for example, specific reference to the possibility of a Commissioner with special knowledge for Wales), rules about their remuneration, terms of office, etc.

The role of the JAC remains essentially the same, but it is given a new role in the selection of deputy High Court judges (new section 9(2CA) Senior Courts Act 1981, as inserted by paragraph 49). Although this involves the deployment of already appointed judges to the High Court, the exclusion of these decisions from the purview of the JAC had been criticised as an anomaly because experience in the High Court is an advantage to those who wish to apply for a permanent position. Appointment decisions made in relation to deputy High Court judges therefore have a significant impact on the ultimate make up of the High Court bench (and by extension the appellate courts). There is also provision for non-legal positions to be removed from the scope of the JAC. Section 85 CRA is amended (by paragraph 60) to provide that this may be done by order of the Lord Chancellor, with agreement of the Lord Chief Justice.

Currently the JAC reports to the Lord Chancellor, who is given the option to accept, reject or refer back its proposed appointees. Part 4 of Schedule 12 of the Bill removes this responsibility from the Lord Chancellor for appointments below the level of the High Court. For the appointment of judges below High Court level the JAC will report to the Lord Chief

³ *Appointments and Diversity*, 32.

Justice (amending Schedule 14 of the CRA). The Senior President of Tribunals assumes this role in respect of appointments to the First-Tier Tribunal and the Upper Tribunal (amending section 7(7) of the Tribunals, Courts and Enforcement Act 2007 and Schedule 14 of the CRA). Where an appointment is confirmed by the Queen, the Lord Chancellor retains responsibility for formally writing to the Queen and so will effectively become a post box once the Lord Chief Justice or Senior President of Tribunals have completed their parts in the process.

The transfer of some of the Lord Chancellor's role to the Lord Chief Justice had been anticipated, and current Lord Chancellor Ken Clarke has argued in evidence to the Lords Constitution Committee inquiry on judicial appointments that his lack of knowledge of the candidates for these positions has made his role 'largely ceremonial and ritualistic'.⁴ The allocation of role to the Senior President is, however, unexpected. *Appointments and Diversity* explains that it had been assumed that courts and tribunals judiciary would be unified under a single head – the Lord Chief Justice – but that this change will not now take place. As a result the role as it applies to tribunal appointments is being transferred to the Senior President instead.

The Bill empowers the Lord Chancellor to make further regulations about the selection process, including powers for the Lord Chief Justice or Senior President to delegate their roles. However, in all cases the power to *dismiss* judges will remain with the Lord Chancellor (with the concurrence of the Lord Chief Justice or the Senior President as appropriate).

⁴ *Judicial Appointments*, 15.

3. Changes to Senior Judicial Selection Processes

Under the CRA, selection exercises for senior judicial positions (above High Court level) are not conducted by the JAC but rather by *ad hoc* selection commissions and panels.⁵ The Bill modifies the rules governing these bodies, establishing two primary formats. The first is what I will call the *2+2+2=5 Format*. This rule will apply to selection panels for England and Wales. These panels must have an odd number of members (no less than five), including two lay members, two judicial members and two JAC members (but one person may satisfy more than one of these requirements – e.g. a lay JAC member counts under both of those headings). Additional rules apply to the appointment of the Lord Chief Justice.

For UK Supreme Court (UKSC) appointment commissions the 2+2+2=5 rule also applies, but there are additional requirements. Because of the unusual position of the Supreme Court as the apex court over England and Wales, Scotland and Northern Ireland members from each of these jurisdictions must be included. The *UKSC Format* requires an odd number of members (no less than five), including at least one serving Supreme Court judge, at least one lay member and at least one member each from the JAC, the Judicial Appointments Board for Scotland and the Northern Ireland Judicial Appointments Commission. Additional rules apply to the appointment of the President and Deputy President.

The Bill also deletes large parts of the existing CRA provisions on appointments. If the Bill is passed as it currently stands the mechanisms for senior appointments will be as outlined in the table below.

⁵ The CRA draws a distinction between ‘commissions’ and ‘panels’. In the case of the Supreme Court, selection commissions are convened by the Lord Chancellor and operate entirely independent of the JAC (section 26 and Schedule 8, CRA 2005). In the case of senior positions in England and Wales, selection panels are independent but are formally convened by the JAC and constitute panels of that body (see e.g. sections 70-71 CRA 2005).

Role	Format	Special Rules	Role of Lord Chancellor	Statutory Provision
President of UKSC	UKSC	Incumbent UKSC President may not sit Lord Chancellor may sit Must be chaired by layperson other than Lord Chancellor	Lord Chancellor may make regulations permitting him to reject a selection if he is not a member of the commission. He retains the power to make regulations permitting him to compel the commission to reconsider even if he does sit.	Sections 27 and 27A CRA 2005, as amended/inserted by paragraphs 4 & 5 of Schedule 12 of the Bill.
Deputy President of UKSC	UKSC	Incumbent Deputy UKSC President may not sit	Lord Chancellor may make regulations permitting him to compel the commission to reconsider its selection or permitting him to reject a selection.	Sections 27 and 27A CRA 2005, as amended/inserted by paragraphs 4 & 5 of Schedule 12 of the Bill.
Ordinary UKSC Justice	UKSC		Lord Chancellor may make regulations permitting him to compel the selection commission to reconsider its selection or permitting him to reject a selection.	Sections 27 and 27A CRA 2005, as amended/inserted by paragraphs 4 & 5 of Schedule 12 of the Bill.
Lord Chief Justice	2+2+2=5	Lord Chancellor may sit Must be chaired by layperson other than Lord Chancellor	Lord Chancellor may make regulations permitting him to reject a selection if he is not a member of the panel. He retains the power to make regulations permitting him to compel the panel to reconsider even if he does sit.	Section 70 CRA 2005 as amended by paragraphs 54 and section 94C as amended by paragraph 50 of the Bill.
Head of Division Senior President of Tribunals Ordinary Court of Appeal Judge	2+2+2=5		Lord Chancellor may make regulations permitting him to compel the selection panel to reconsider its selection or permitting him to reject a selection.	Sections 70, 75B and 79 CRA 2005 as amended by paragraphs 54, 56 and 59 of the Bill and section 94C CRA 2005 as amended by paragraph 50 of Schedule 12 of the Bill.

Appointments and Diversity explains that the selection commission for UKSC judges will include a judge from Scotland, Northern Ireland or England Wales in addition to the serving UKSC judge on the panel. The Bill does not directly provide for this, but leaves it open for the Lord Chancellor to create regulations that would have this effect (he could, for example, specify that a second judge be added as a sixth member). The same applies to some of the other policies that the *Appointments and Diversity* paper announced; for example that a commission to select the President of the UKSC should have seven members and that the Lord Chief Justice should chair the selection commissions for Heads of Division.

The Bill empowers the Lord Chancellor to make a wide range of regulations about the appointments process. Where these regulations concern the UKSC the Lord Chancellor is obliged to seek the agreement of the 'senior judge' of the UKSC and must also consult the Scottish First Minister, the Welsh First Minister, the Lord Chief Justice of England and Wales, the Lord President of Scotland and the Lord Chief Justice of Northern Ireland. UKSC regulations must secure Parliamentary approval through the affirmative resolution procedure (new section 27A CRA, as inserted by paragraph 5, Schedule 12). In the case of regulations applying to appointments in England and Wales no consultees are specified and no requirement for Parliamentary approval applies, but the Lord Chief Justice must consent to the regulations.

4. Comment

Broadly speaking, the changes achieved by the Bill move judicial appointments in the right direction. The statutory rules governing the JAC are relaxed so that that organisation can operate more flexibly. The measures on diversity send out an important symbolic message, even if their efficacy remains to be seen. The philosophy behind the changes – to make the CRA a document that enshrines principles rather than a body of rather arcane rules, leaving administrative minutiae for statutory instruments – is exactly right. The problem is that this philosophy is not realised in the Bill as it currently stands.

The balance between material that has been left on the face of the Bill and what should be settled by statutory instrument is erratic. The distinction between the requirement that a UKSC judge sit on UKSC appointment commissions (required by the Bill) and the separate requirement that a non-UKSC judge must also sit (a policy declared in *Appointments and Diversity* but which is not in the Bill itself) is surely not one of principle. This confusion is at its most pronounced when it comes to the role of the Lord Chancellor in the selection process.

New section 27(1C)(c) CRA 2005 provides that the commission to select the President of the Supreme Court 'may include the Lord Chancellor' (my emphasis). On the face of the Bill it would therefore appear that the Lord Chancellor is permitted, but not compelled, to sit on a commission to select the President. New section 27A empowers the Lord Chancellor to make regulations about membership and procedures so it is presumably possible for the Lord Chancellor to make rules giving himself the option to sit or compelling him to sit (but the regulations could not prohibit him from sitting). The regulations may, further, permit him to reject a recommendation *but only if he does not sit* out of the understandable concern that the Lord Chancellor he not have two bites of the cherry. So we arrive at a rather odd situation whereby the Lord Chancellor might choose to sit and lose his veto or choose not to sit in order to preserve his veto. A Lord Chancellor who did not like the

obvious candidate for the job of President and wished to prevent him or her getting the job might choose to do the latter.

If the provisions on the veto are odd, the provisions concerning the power to require that a commission reconsider its decision appear to be contradictory. The Bill prohibits the Lord Chancellor from chairing a commission he sits on. Yet he may (by regulations) give himself the power to require a commission to reconsider a recommendation, apparently irrespective of whether or not he has been a member of the commission. The 'reconsideration rule' will place the Lord Chancellor in a pre-eminent position within any commission. The other members will in practice be required to seek his agreement to any decision they wish to make. These anomalies are replicated for appointment panels for the Lord Chief Justice (new section 94C). The apparent confusion here may be mere oversight. The rules governing appointment regulations are general, whereas the rules about appointment of the President of the Supreme Court and the Lord Chief Justice are specific. If, however, it is intended that the Lord Chancellor should have these overlapping powers this point is sufficiently important that it should be settled in the Bill, not by regulations that the Lord Chancellor himself makes.

There is a further anomaly. At present the President and Deputy President are obliged to sit on commissions to select all UKSC justices, including their successors. This requirement is generally considered to be inappropriate and Lord Phillips argued for its removal in his evidence to the Lords Constitution Committee.⁶ The Bill specifies that President and Deputy President of the Supreme Court cannot sit on selection panels to choose their successors. So far, so good. However, in specifying this in addition to the general rules on UKSC commissions (rather than simply deleting the reference to the role of the President and Deputy President) the Bill implicitly suggests that it is permissible for other judges to sit on panels to choose their successors. There is no good reason to limit the 'no incumbents' rule only to the Supreme Court. As the Constitution Committee report puts it, '[i]t is contrary to well-recognised principles of appointments for an individual to select his or her successor.'⁷ It would be better to enshrine as a general principle in the Bill that no incumbent or retiring judge may sit on a panel to select his or her successor.

In making these changes to the rules governing appointments, one gets the impression that the Ministry of Justice has taken to heart the complaint that the CRA provisions on judicial appointments are too detailed and too prescriptive when in reality it would have been better to address directly the sheer complexity of the appointments architecture from which these complaints flow. Some of these difficulties appear to arise from failure to fully articulate the core principles. The Bill succeeds in cutting out much of the detail from the CRA but because of the inconsistent treatment of core principles (some remaining in the CRA, some left for regulations to resolve) this detail will merely be replicated in the

⁶ *Judicial Appointments*, 45.

⁷ *ibid.*

anticipated regulations and combined with some unwelcome uncertainty. The resulting system in its entirety will, if anything, be even more complex than the present arrangements. It will be a hydra with three heads – the Lord Chancellor, Lord Chief Justice and the Senior President of Tribunals (and indeed five heads if you include the formal roles of the Prime Minister and the Queen) – and at least five variants of appointment commissions/panels in addition to the JAC. There is the potential for further variations on these commissions/panels through the use of regulations.

The complexity of the new arrangements is mirrored in the complex drafting methodology of the Bill itself. At some point this must be inevitable given the Bill's wide-ranging subject matter, but the draftsman's choice to amend the CRA provisions on appointments section by section (and sometimes line by line) rather than simply rewriting the provisions in their entirety is, given that almost all of the existing provisions are to be deleted anyway, disappointing. It does not bode well for the operation and future understanding of an already excessively complex piece of legislation. (As one colleague put it, 'I need to wrap a wet towel around my head every time I try to unpick the details of the CRA.') Complexity and impenetrability are inevitable in some areas of legislation, such as tax codes, but there is nothing about judicial appointments that should require it. As things stand, the use of regulations in the Bill adds complexity and uncertainty to the CRA rather than removing it.

The appointments system described in the new Bill will no doubt operate reasonably well and may be more difficult in theory than it will be in practice. There is, however, a point of principle at stake in simplicity. The CRA is not just addressed to civil servants and those with an interest in the appointment process. It has constitutional significance and there are sound democratic reasons for it to be comprehensible to the general public. Judges occupy a position of power and authority and their appointment is a small but important aspect of the way we are governed (one that is increasingly questioned in the context of human rights law in particular). An appointments system that cannot easily be explained – and if we are honest is difficult even for lawyers to understand – will remain closed to the public. It should be possible to achieve the changes envisaged in the Courts and Crime Bill in a way that satisfies the 'Dinner Party Test'.