

MINISTRY OF JUSTICE
JUDICIAL APPOINTMENTS COMMISSION: TRIENNIAL REVIEW 2014

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We recently completed a three-year, AHRC-funded project on *The Politics of Judicial Independence in Britain's Changing Constitution*. The judicial appointments process formed an important limb to our project. We conducted around 160 interviews with judges, politicians, civil servants and practitioners across the UK, including many of those most closely involved in appointments in England and Wales. In the responses below we draw on those interviews as well as other research that we have conducted.

1. THE FUNCTION OF THE JAC

1.1 Is there a continuing need for the function of the JAC?

Yes. The JAC is charged with a number of functions critical to the effective working of the justice system. These include: identifying and recommending for judicial office well-qualified candidates of good character via more rigorous and inclusive processes than existed prior to the Constitutional Reform Act 2005; and by promoting judicial diversity. There are a number of ways in which the JAC can discharge these functions more effectively, and we set these out in our responses below. Overall, however, our interviews suggest that after a series of teething troubles between 2006-2010, the JAC now occupies a secure place on the institutional landscape and enjoys the confidence of key stakeholders. Indeed, most judges and lawyers now regard the JAC's role as a vital way in which the independence of the judiciary is secured in England and Wales. The JAC's role is in line with developments in Scotland and Northern Ireland and is increasingly viewed as an important model for the rest of the common law world.

2. HOW SHOULD THIS FUNCTION BE DELIVERED?

2.1 Should the function continue to be delivered by a non-departmental public body?

Yes. The JAC's status as a NDPB requires an effective, constructive relationship with the Ministry built on mutual confidence. Relations with the Ministry were so strained during the JAC's early years that consideration was given to either abolishing the JAC and bringing appointments back in-house or to delegating most of the responsibility for appointments to the senior judges. At that time, there was some debate inside the JAC about whether it should be reconstituted as a parliamentary body, which would have severed the link with the department. Relations are today much improved, and the JAC commands the confidence of the key stakeholders. None of our interviewees suggested that there was any need to reconsider the JAC's NDPB status.

How well is the JAC currently delivering its function?

Since its creation in 2006, the JAC inter alia has: devised robust processes that have for the most part identified suitably qualified candidates of good character; addressed problems that were an early feature of those processes (e.g. delays); and over time has fostered the confidence of ministers, judges and practitioners. It has done this whilst cutting costs, especially since 2010. These are all important accomplishments. We are concerned, however, by the relatively slow progress in increasing diversity. It is true that women constitute around 40% of the nearly 3,500 recommendations that the JAC made between 2006-2013, with BME candidates around 10%. It is also true that some recent selection exercises have seen women appointed to senior roles: in 2013, for example, five of 14 candidates recommended for the High Court were women, while three women filled 10 vacancies on the Court of Appeal. Given the relatively small number of women in the senior judiciary, this might be deemed slow but steady progress. But change in the make-up of the judiciary has been slower than expected and has largely been in the lower ranks, with the upper ranks remaining substantially untouched. We trace this relatively slow progress in part to the combined effect of excessive judicial influence under JAC-run processes together with the limited scope for ministerial leadership on the diversity agenda.

Does the JAC's function need to be (and seen to be) delivered with absolute political impartiality?

We agree that identifying and recommending candidates is best undertaken by a body comprised of a mix of judges, practitioners and lay people operating at arm's length from ministers. In line with this, the JAC was created as a recommending body, not an appointing body; i.e. its role was to identify and recommend candidates for judicial office, with the ultimate decision to be taken by another decision-maker, initially the Lord Chancellor, and now either the Lord Chancellor, Lord Chief Justice or Senior President of Tribunals, depending on the level of the vacancy. However, in practice, the JAC is a de facto appointing body. The power to reject or request reconsideration of the JAC's recommendations has been used only five times out of around 3,500 recommendations between 2006-13; i.e. 99.85% of the JAC's recommendations have been accepted. It is unsurprising that some Lord Chancellors feel that their power to refuse a JAC recommendation is in effect unusable.

We are concerned by the exceptionally limited role for the Lord Chancellor under the current system. Ministerial involvement injects an important measure of democratic legitimacy into judicial selection, most obviously at the highest levels of the judiciary. Improving diversity also requires continued ministerial involvement. Experience in the UK and elsewhere suggests that increased diversity on the bench will not happen automatically as the make-up of the legal profession changes. It takes political will to drive forward change, including changes that might not be supported by judges. Our concern is that the limited role for the Lord Chancellor in individual appointments removes an opportunity for the exercise of political will to drive forward diversity.

We favour greater scope for ministerial discretion over those appointments in JAC-run processes for which the Lord Chancellor retains the final say (i.e. High Court, the Court of Appeal, Heads of Division and the Lord Chief Justice). We believe that the JAC should present the Lord Chancellor with a shortlist of three names, from which the Lord Chancellor is then free to select. The JAC can summarize and comment on the respective strengths of each candidate, so that the Lord Chancellor has the full

benefit for their advice; but the Lord Chancellor should remain free to make the final choice. So far as we are aware, no other common law country which has a selection commission restrict ministerial choice by submitting just a single name.

2.2 Should the JAC be merged with another body to deliver its function?

No.

2.3 Should the JAC's function be delivered in-house by the Ministry?

No.

2.4 Should the function of the JAC move out of Central Government

No—and, indeed as we argue above, there is a strong argument for greater ministerial discretion in individual appointment decisions, especially at the highest levels of the judiciary.

2.5 Are there other possible delivery options?

There is no other way of selecting judges that would today command the confidence of key stakeholders, and judges and practitioners in particular.

3. OTHER

3.1 Do you have any additional comments you would like to submit?

We believe that the 2005 reforms have led to excessive judicial influence over judicial appointments. This is true of the regular JAC-run exercises for vacancies up the High Court. Of particular significance is the involvement of senior judges at the beginning and very end of the process. The Lord Chief Justice exercises real influence on the experience of the candidates ultimately appointed by shaping the Lord Chancellor's additional selection criteria at the very outset of a selection exercise. At the end of the process, the final say now lies with the Lord Chief Justice or the Senior President of Tribunals, depending on the vacancy in question. Judicial influence is especially high in the process of selecting senior judges (i.e. the Court of Appeal, Heads of Division, Senior President of Tribunals and Lord Chief Justice). Whilst we recognize that there have been important improvements in recent years to the process for selecting these senior judges, our concern is that the judicial members on selection panels for senior posts have a predominating influence.

We realize that our argument about excessive judicial influence will not be welcomed and will likely be challenged by senior judges or those involved with the JAC. It bears emphasis, however, that a similar argument has been made in respect of appointments to the Supreme Court (e.g. by Alan Paterson and Chris Paterson). Similar arguments were also anticipated prior to the 2005 reforms by some of those most familiar with the judicial appointment system in England and Wales (e.g. Sir Tom Legg, the former Permanent Secretary in the Lord Chancellor's Department).

We recognize that there is an important and legitimate role for judges in the selection process. We also recognize that relatively high levels of such influence are envisaged by statute. However, insofar as judges might tend to favour, whether conscious or otherwise, candidates with conventional backgrounds from the bar and commercial practice, there is a very real risk in a system with high levels of judicial influence that appointments will continue to clone the existing judiciary, with progress on diversity continuing to be relatively slow.

Our interviews also suggest that while senior judges acknowledge the lack of judicial diversity, and appear genuinely keen to see change, they have resisted initiatives that might bring about a much faster transformation (e.g. they have advocated the use of additional selection criteria in ways that narrow the pool of eligible candidates; the JAC has adopted, in the words of its chair, a “very minimalist”—or as we would put it, a weak—policy on the equal merit provision in part because of judicial concerns).

We believe that the following proposals would address our concerns about excessive levels of judicial influence:

- In terms of composition, the Judicial Appointments Board for Scotland offers the most attractive model, where the lay members must equal the number of judicial and practitioner members, with one of the lay members serving as the chair. On the JAC, the requirement is a weaker one: the non-judicial members must outnumber their judicial counterparts. This means in practice is that the number of judicial and legal members will likely outnumber the lay people. As of late 2013, there were 15 commissioners, 7 with judicial office, 6 lay people and 2 legal practitioners. This is too heavy on judicial/legal representation. The judicial and legal commissioners will have been similarly socialized and may share similar impulses. [On a 15-member commission, there should be a majority of lay people].
- Non-judicial commissioners on the JAC are typically appointed for renewable terms of 2 or 3 years. However, the judicial commissioners are appointed for longer terms (e.g. 5 years). This has the potential to confer excessive influence on judicial commissioners. Longer terms for the judicial commissioners may also discourage judges from applying to serve on the JAC. There should be a general practice of appointing all commissioners—whether judicial, legal or lay—for the same length of term.
- The Lord Chancellor should be more sparing in the use of additional selection criteria that narrows the pool of eligible candidates.
- The JAC recently adopted a disappointingly weak and overly narrow policy on the equal merit provision. It should instead adopt a wider, stronger policy (e.g. apply it to short-listing as well as the final recommendation stage; apply to a wider range of under-represented groups).

- The Lord Chief Justice and the Senior President of Tribunals should provide details in their annual reports on the number of occasions where they used the power to reject or request reconsideration of a JAC recommendation.
- As per our response to 2.1 above, we believe that the Lord Chancellor should be presented with a short-list for senior appointments to the High Court and above. This would help to compensate for the high levels of judicial influence in senior judicial selections. We also believe that greater ministerial say would help drive forward the diversity agenda.
- The Senior Presiding Judge is currently chosen by the Lord Chief Justice, with the concurrence of the Lord Chancellor. The appointment falls outside any of the processes managed by the JAC. Yet, the Senior Presiding Judge is one of the most important leadership roles in the judiciary. Appointment to this role should be through the same JAC-run process as that for Heads of Division, with the final say lying with the Lord Chancellor.