MINISTRY OF JUSTICE CONSULTATION PAPER:
Appointments and Diversity: 'A Judiciary for the 21st Century'

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Introduction

1. We have recently begun the second year of a three-year, AHRC-funded project on *The Politics of Judicial Independence*. Studying the judicial appointment process is a crucial limb to our project. We have conducted around 50 interviews with judges, politicians, officials and practitioners, including many of those who are most closely involved in the appointment process. Our research remains work in progress, but our interviews have already begun to suggest a number of consistent concerns about the process. In our responses to the questions below, we draw on those interviews as well as other prior research that we have conducted.

Summary

2. There is a legitimate role for the executive in the appointment of judges. Not only does executive involvement provide a check on the decision-making of the JAC, and the selection commissions responsible for the most senior appointments, it also supplies an important mechanism of political accountability. Above all, executive involvement is critical for fostering the executive's trust and confidence in the judges. Similar considerations apply to Parliament. If the executive and Parliament are wholly or largely excluded from the appointment process, they might be less inclined to respect the role and independence of the judiciary.

3. The Consultation Paper envisages the reduced involvement of the Lord Chancellor in appointments at the lower ranks of the judiciary, but increased involvement at the higher ranks, through participating in the ad hoc selection panels for the most senior judicial appointments.

4. On appointments to the lower levels of the judiciary, our view is that the goal of increasing diversity requires the continued involvement of the Lord Chancellor. The experience in a number of overseas jurisdictions, as well as in the UK, demonstrates that improving diversity does not happen automatically as a result of changes in the composition of the legal profession. There is no convincing evidence of a "trickle up" effect. Rather, increasing judicial diversity requires political will to push for reforms, some of which might not be supported by the judiciary or legal profession. Removing the Lord Chancellor from the process of selection to the lower ranks of the judiciary removes the opportunity for the exercise of this political will.

5. On senior appointments, we welcome the impetus to give the Lord Chancellor a greater role. We disagree, however, with the suggested way of doing so. Rather than the Lord Chancellor participating in the ad hoc selection commissions, we favour the commissions providing the Lord Chancellor a short-list of three candidates to choose from, each candidate having been identified by the commission as well qualified and suitable for appointment. This allows for an appropriate degree of executive input by providing greater scope for the Lord Chancellor to promote judicial diversity, whilst also maintaining merit-based selection. It also maintains the Lord Chancellor's role as a "back-stop" in case of error or malpractice.

6. There should be no serving Justices of the Supreme Court on the panel that selects any of the Justices (including the President and Deputy President). It is inappropriate for any members of the court to be directly involved in the selection of the other members.

7. A consistent theme in our interviews is that the Constitutional Reform Act is rigid and overly prescriptive. Several interviewees have cited the stipulation of the number of Commissioners in Schedule 12 as an example of this, and hence we welcome the proposal for greater flexibility in determining the composition of the JAC. We agree with the suggested approached to delivering changes to the appointment process.

8. As indicated at paragraph 2, we believe that there are good reasons for involving Parliament in the appointment of senior judges (e.g. the Justices of the UK Supreme Court, the Lord Chief Justice and the Heads of Division). Statements of our views on the scope for parliamentary involvement in judicial appointments and on the dubious strength of some of the arguments made against such involvement can be found in the written evidence we supplied to the House of Lords Constitution Committee as part of its inquiry into the judicial appointment process.[1]

Responses to Questions

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 CRA)

No. Though there are legitimate arguments for saying that at the lower levels of the judiciary the involvement of the Lord Chancellor is not required on the grounds of political accountability, the goal of improving the diversity of the judiciary, which is central to this consultation paper, necessitates the continued involvement of the Lord Chancellor.

[1] http://www.parliament.uk/documents/lords-committees/constitution/JAP/Compiled%20written%20evidence131011.doc.pdf (For the evidence submitted by Graham Gee, see pp97-10; for the evidence submitted jointly by Robert Hazell and Kate Malleson, see pp108-112).

Experience in other jurisdictions, as well as the UK, shows that improving diversity does not happen automatically as the composition of the legal profession changes. It requires political will to drive forward proactive changes, some of which might not be supported by the judiciary or the legal profession.

The removal of the Lord Chancellor from the process of selection to the lower ranks of the judiciary removes the opportunity for the exercise of political will to promote greater diversity in the judiciary at all levels.

<u>Question 2:</u> 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 is no justification for the position of Deputy High Court judge to fall outside the scope of theJAC. However, the Lord Chancellor should remain in the decision-making process for the reasons given above relating to diversity, and also for the reasons set out below relating to the importance of political accountability in the system. The position of Deputy High Court judge is a key promotions stepping stone for those who later go on to be appointed to the Court of Appeal and the Supreme Court. Improving diversity at this critical rank is therefore a key to transforming the make-up of the upper ranks of the judiciary.

<u>Question 4:</u> Should selection panels for the most senior judicial appointments be comprised of an odd number of members? (s71, 75C and 80 CRA)

Yes, for the reasons given in the paper to ensure that there is an appropriate balance in the decision-making roles of the lay members and the judicial members.

<u>Question 5:</u> Should the Lord Chief Justice chair selection panels for Heads of Division appointments in England and Wales? (s71 CRA)

Yes, the appointment of the Heads of Division falls clearly within the Lord Chief Justice's remit given that these roles involve a significant element of judicial management and judicial policy-making. However, three of the five members should be lay members in order to ensure an appropriate balance in the decision-making role of the lay members and the judicial members.

<u>Question 6:</u> 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? (Sch 8, pt1, CRA)?

There should be no serving Justices of the UK Supreme Court on the panel. It is inappropriate for members of the Court to be directly involved in the selection of the other members.

As part of our research project, we have interviewed a number of people who have been very closely involved in the appointment of Justices of the Supreme Court. One of our interviewees suggested that lay members found it useful having Justices on the selection commission, as the Justices were able to cast light on the distinct role of and challenges confronting those who serve on our top court. This may be so. However, there are other, more appropriate ways of ensuring that the lay members have a good grasp of the role of the Justices (e.g. a briefing on the role by serving Justices).

<u>Question 3:</u> 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 Lord Chancellor should retain his or her current role in the appointments process, including a power of veto. A number of our interviewees have noted that the statutory consultation process is time-consuming. Any further round of consultations would further lengthen an already lengthy appointment process.

<u>Question 7:</u> 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? (s71, 73 and 74 CRA)

No. The impetus to give the Lord Chancellor a greater role in the process is a sound one, given the increasing role of the senior judiciary and the democratic deficit which has been created under the CRA. However, the inclusion of the Lord Chancellor in the panel itself would be a mistake. The role of the executive in the appointments process is to provide a check on the decision-making of the independent JAC in the event of something going wrong in the process (whether the error was committed in good faith or bad) and to ensure a degree of political accountability in a manner that also helps foster the executive's trust in the judiciary. It was for this reason that the JACwas set up as a recommending and not an appointing body. The first of these functions would be lost under the proposals and the second would be weakened. To fulfil the Lord Chancellor's proper role requires a degree of distance from the JAC.

It also bears emphasis that the political input of the Lord Chancellor should occur at a stage where there is a degree of transparency (e.g. exercises of the Lord Chancellor's veto are reported in the JAC's Annual Report). It would be regrettable if the political input into the new system of appointments occurred out-of-sight and behind-closed-doors.

A better option would be for the JAC to provide the Lord Chancellor with a short-list of three names of candidates that the Commission considers to be well-qualified and fully 'appointable' to choose from. This would allow for an appropriate degree of political input, for example by opening greater space for the Lord Chancellor to use his role to promote judicial diversity while maintaining selection on merit. It would also maintain the role as a back-stop in case of error or malpractice.

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 CRA)

Yes, for the reasons given in the consultation paper.

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 and Sch 8 CRA)

No, for the same reasons set out above in relation to the appointment of senior posts by the JAC.

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, Sch 8 CRA)

See answers to Q.9 and Q.11.

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, the Chair of the selection panel should be a lay member from one of the territorial appointment bodies for the reasons given in the consultation paper.

Question 12: Should the Lord Chancellor make recommendations directly to HM the Queen instead of the PM? (ss26 and 29 CRA and convention)

Yes. The role of the PM is redundant provided the Lord Chancellor retains a veto. If the Lord Chancellor's veto is removed, then the role should remain since this would provide at least the potential for a vestigial political input and an opportunity to intervene in the case of error or malpractice in the original appointment decision-making.

<u>Question 13:</u> 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? (ss2 and 4 of the Senior Courts Act 1981)

Yes. This would potentially increase diversity although it is likely that it would be used as much by male judges to combine judicial sitting with other forms of work as it would by women judges with caring responsibilities.

<u>Question 14:</u> 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 CRA)

Yes

<u>Question 15:</u> 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?

No. It is unlikely that this change would have any significant impact on the composition of the judiciary.

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

See answer to Q.17

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

As part of our research project, we have interviewed a large number of people whose work is shaped in part by the Constitutional Reform Act 2005. A consistent theme to emerge from those interviews is that the Act is rigid and overly prescriptive. Several interviewees cited the stipulation of the number of Commissioners in Schedule 12 as an example of this. We welcome the proposal for greater flexibility in determining the composition of the JAC.

The precise number of Commissioners should be determined on the basis of the practical needs of the appointments process in terms of workload. Whatever number is selected, the Commission should be made up of equal numbers of women and men and must include at least one Commissioner from a BME background and one with a disability. Any decision to reduce the number of Commissioners should be careful to ensure that there is a pro rata reduction in the number of *judicial* as well as *non-judicial* Commissioners.

<u>Question 18:</u> 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)

Yes.

<u>Question 19:</u> Do you agree with the proposed approach to delivering these changes?

Yes.

<u>Question 20:</u> 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?

(1) There should be a statutory duty on both the Lord Chancellor and the Lord Chief Justice to have regard, when exercising their functions under the relevant legislation, to the need to encourage diversity. This language mirrors the language in the s63 duty placed on the JAC, and it recognizes that promoting judicial diversity is the joint responsibility of, inter alia, the JAC, the Lord Chancellor and the judiciary as a whole.

(2) The power to issue guidance under s65 has not been used and should be repealed, since use of this provision might jeopardize the independence of the JAC.

(3) Use of non-statutory criteria placing weight on "relevant judicial experience" can significantly narrow the pool from which candidates are drawn. This in turn renders it more difficult for the JAC to discharge its statutory duty to promote judicial diversity. The Lord Chancellor should make much more sparing use of non-statutory criteria.

(4) Data on the breakdown of Deputy High Court judges should be made public. We understand that this is currently not been made available on the grounds that to do so would breach the Data Protection Act. This reasoning is flawed and the provision of such data is important in order to monitor the effects of efforts to improve diversity amongst this group of judges who often constitute the pool of those appointed to the High Court on a permanent basis.

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