

RESPONSE TO THE REVIEW OF THE PROCESS FOR APPOINTING JUSTICES OF THE SUPREME COURT OF THE UK

Graham Gee
Robert Hazell
Kate Malleon
Patrick O'Brien

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

1. How far have we properly identified the scope and nature of the job?

There is something to be said for a short, focused description of the role of the Justices. But the description on page 1 of the Information Pack is anodyne: e.g. no explicit mention is made, for example, of the Court's constitutional role. It is also wholly focused on the *judicial* functions of Justices: no mention is made of the important role that each Justice should make to the life of the Court by fulfilling certain administrative roles or the ambassadorial functions within the larger legal community and public at large through giving speeches.

2. Are the criteria sufficiently comprehensive/too full, and are they properly expressed?

The criteria are relatively comprehensive and clearly expressed.

3. What is your view on whether the Supreme Court should aim to have specialists in certain subject areas, or generalists capable of dealing with any cases which might come before them?

The Court's leadership should strive to ensure that there is a range of expertise reflected on the Court broadly in line with the range of cases that come before it. Plainly, there are very real limits on the ability to do so in a twelve-member court, but these are largely offset by the ability to draw on ad hoc judges where the Court's President feels that it is especially important that a panel hearing an appeal has the relevant expertise.

4. Should selection commissions try and ensure there is not too great a concentration of expertise in any one area?

Yes.

5. Should there be a Justice with specific knowledge of Wales and the law of Wales?

We strongly believe that over time a convention will develop that at least one of the Justices must have specific knowledge of Wales and the law of Wales if and when Wales develops into a more formally separate jurisdiction. The emerging devolution case law from Wales suggests that there may be a steady stream of cases before the Court with a distinctively Welsh dimension. But it is less clear to us whether this is immediately necessary given that Wales is still quite some distance away from being a more formally separate jurisdiction and especially given that the President can draw on ad hoc judges in any given panel (such as when Lord Thomas sat on the Agricultural Sector (Wales) Bill reference). As we see it, the devolution cases from Wales to date raised questions of institutional competence that should be within the skill-set of any Justices rather than much if any requirement for specific knowledge of the law of Wales.

In sum, even though we recognize that there are problems associated with the use of ad hoc judges, the Court should continue with its current practice of drawing on judges with knowledge of Wales as and when required. However, we would encourage the Court's leadership to keep this issue under close and careful review.

*** See our unrelated note at the end of this document about ad hoc judges***

6. Should a selection commission try and define merit/set out the components of merit it needs to consider?

Each selection commission's deliberations should focus on the selection criteria, with these criteria an expression of merit.

7. How does a selection commission ensure applications from the widest range of eligible candidates, for example, should there be a more proactive outreach/encouragement/mentoring/arranging of observation days at the Court?

As an ad hoc body, there is a limited amount that each commission can do in terms of outreach work. However, there is good evidence to suggest that under the pre-2005 process the use of a 'tap on the under-represented shoulder' by the Lord Chancellor was very important in encouraging candidates with non-traditional careers or backgrounds to put themselves forward. Now that the Lord Chancellor has such a limited role in the process, it falls to the members of the ad hoc commissions and the Justices to fulfill the role of actively seeking out highly qualified candidates from non-traditional careers and backgrounds and encouraging them to apply.

During confidential interviews, some commission members, judges and Justices indicated to us that they were concerned that such approaches were no longer appropriate in the more formalised appointments system. This misconception must be

actively countered by the commission (and, in particular, the Court's leadership has a vital role on this front). Given that candidates from traditional backgrounds are still being informally encouraged to apply by colleagues and friends in the judiciary and the legal profession it is vital that efforts are made to extend this encouragement to a wider candidate pool.

8. Is there anything in the advertisements or other written material that needs revising?

No.

9. Should each selection commission routinely have refresher training on best practice, especially in relation to diversity?

Yes. The Secretary to the selection commission (a role performed to date by the Court's Chief Executive) has a crucial role in promoting best practice. It would seem sensible for the Secretary to brief commission members on best practice at the start of each selection round, and in particular on the options available to the commission where two or more candidates are of equal merit.

Under para 9 of Schedule 13 of the Crime and Courts Act 2013, it is now clear that selection commissions are able to prefer one candidate over the other for the purpose of increasing diversity within the group of persons who are Justices of the Court. In other words, a commission can apply what is often called a 'tipping point' or 'tie-break' policy. Deciding how and when to apply such a policy requires thought (e.g. should it only apply at the point that commissions make their recommendation or should it also apply at short-listing?). We would encourage the secretary to brief commissions that they are able to apply such a policy and encourage them to give thought before the start of a selection round as to when and how they might apply it.

We recognise that, within the broad statutory framework, each commission is free to devise its own approach to making its recommendation within the limits imposed by the relevant statutes. It thus follows that each commission could adopt its own approach to equal merit: e.g. one year one commission could decide not to apply any tipping point, but in the next year a commission could decide to apply it at both short-listing and interview). However, this is an area where transparency and consultation are important: we would encourage the Court to consult on the content and application of an equal merit policy. The Court should then devise some guidance for commissions on how and when to apply the equal merit policy. This guidance should be published on the Court's website and a summary of it included in the Information Pack.

10. What more can a selection commission do to encourage proper evidence based comments?

It is not clear to us whether this question is directed to comments by members of the selection commissions or ones made by statutory consultees. Either way, we echo our

answer to question 9: the Secretary to each commission has a key role to play in promoting best practice. This encompasses briefing commission members on the sort of comments are appropriately evidence-based and those that are not. The Secretary should take particular care to brief the chair of the commission (usually but not always the President) about this, offering advice to the chair on how to handle situations where comments are made that are not evidence-based.

Similarly, in the letter seeking views from the statutory consultees, the Secretary should explain that comments must be evidence-based. From time to time, it may be appropriate at the end of a selection round for the Secretary to advise statutory consultees where a selection commission felt that the comments were not evidence-based. In this, the Secretary's role in promoting best practice can be seen to extend to educating statutory consultees on what sort of comments are appropriate.

11. In addition to statutory consultees, are there other a selection commission should routinely consult?

An argument could be made that a selection commission should consult with the main professional bodies, but this risks giving too much weight to the views about individual candidates of the officeholders in those bodies, with absolutely no guarantee that their views were shared more widely by the membership of those bodies. A better approach would be for the Court's leadership (President, Deputy and Chief Executive) to make concerted effort to seek views from the professional bodies about the skills, expertise, experiences and perspectives that are lacking on the Court.

12. Is there an alternative to a selection commission interviewing short-listed candidates? If not, should there be more than one interview?

Interviews should form an important part of each selection round. There is no need to require multiple interviews in every round. That said, there might be occasions where it is appropriate to have more than one interview. A selection commission should consider itself as having discretion to require more than one interview, although plainly factors such as the need to avoid delay must be kept in mind.

13. Should there be a written test? If so, what should it comprise?

No. A written test is unlikely to identify the sort of skills and expertise required in a Supreme Court Justice.

14. Should selection commissions continue to ask shortlisted candidates to make a presentation at the outset of their interviews? If yes, what kind of presentation might provide the best evidence?

Yes: requiring a candidate to make a presentation on some topic exploring the role of law in the real world or the challenges facing the judiciary in a diverse and changing

world provides a good opportunity to test ‘social awareness and understanding of the contemporary world’ (i.e. one of the qualities listed on p4 of the Information Pack).

15. Should a selection commission ask for references? What alternatives might there be, particularly for applicants who are not serving Judges?

Yes: references are an important part of most recruitment processes and can be useful evidence for a selection commission to consider. Applicants who are not serving judges should still be asked to provide references. Whilst there would be an expectation that at least one reference was from a senior judge familiar with their work (e.g. the candidate’s legal practice if a practitioner or legal writings if a legal academic), others could provide a reference (e.g. leading members of the legal profession or expert legal academics).

16. Insofar as you have not already dealt with it, what views do you have on how selection commissions might achieve greater diversity in appointments to the Supreme Court?

Selection commissions must be appropriately gendered balanced. It is entirely unacceptable for a commission to consist solely of men, as was the case in 2011 for the commission that recommended the appointment of Lords Carnworth and Reed. It is equally unacceptable that so few women have sat on selection commissions. Since 2009, there have been only five commissions convened to make recommendations to appoint new Justices to the Court. Only 6 of the 26 on those four commissions were women. There was also only one woman on the commission that selected Baroness Hale from amongst the serving Justices to replace Lord Hope as Deputy President. No commission has had more than one woman on it since 2009, and only one has had a majority of women on it (i.e. the commission in 2009 that recommended Lord Dyson’s appointment).

There should be a convention that there must be at least two women on each selection commission. We strongly encourage the Court’s leadership to make public statements articulating that such a convention must develop.

17. To what extent should a selection commission be looking to appoint outside the senior judiciary? If you believe they should, then what specific categories of people do you think would be most appropriate?

Every selection commission should welcome, actively encourage and give serious consideration to applications from suitably qualified candidates from outside the senior judiciary such as eminent and senior solicitors and barristers and senior academics who are leaders in their field.

18. Are there any special points you would want to make in relation to the appointment of the President and Deputy President?

The job description should emphasise the need for high-level leadership skills including (small 'p') political judgment, diplomatic skills and a willingness to engage with the political branches (e.g. by giving evidence to parliamentary select committees).

19. Are there other matters on which you would like to comment?

We recognize that this review is primarily concerned with the process by which the commissions make recommendations to the Lord Chancellor. We would nevertheless like to take this opportunity to encourage the Court's leadership to reflect on the process more generally, and the following points in particular:

(A) Democratic Accountability

- The process for appointing Justices to the Supreme Court is much more transparent than the pre-Constitutional Reform Act regime: e.g. there is now a much more formal selection process with clear selection criteria. But there is also now a serious accountability deficit in the appointment process.
- The Lord Chancellor's power to reject or request reconsideration of the recommendations made by the selection commissions has not been used. Comments from senior judges come close to suggesting that the power might be unusable (e.g. when Lord Phillips, as President, suggested that the Lord Chancellor's use of the power might signal that the commission was recommending for appointment 'a judge in whom the government had no confidence'. It is difficult to imagine the basis on which the Lord Chancellor might make such a claim of someone who would, in all likelihood already be a very senior serving judge. What this means, then, is that the stakes have been raised so high that the Lord Chancellor's power may have become unusable other than in wholly exceptional circumstances. If this turns out to be so, these commissions will become de facto appointing bodies, with the Lord Chancellor offering a veneer of accountability, but little in reality.
- We are concerned that there should be greater political involvement in the appointment of senior judges such as Justices of the Supreme Court. Political involvement serves multiple purposes, including:
 - injecting an essential democratic nexus into the process of appointing top judges who, as most today recognize, perform an important policy function;
 - creating scope for political leadership on the diversity agenda, which as the experience of other countries suggests (e.g. the US and Canada) is often a critical ingredient for making fast and visible progress on judicial diversity;
 - ensuring that politicians retain a stake and appreciate the importance of an independent judiciary.

- There are a number of ways of enhancing political involvement in the process of appointing Supreme Court Justices, including:
 - (a) the selection commissions could present the Lord Chancellor with a short-list of three names from which to appoint;
 - (b) some form of parliamentary hearing, which could be either pre- or post-appointment; and
 - (c) an expanded selection commission that includes politicians (e.g. the chairs of the House of Commons Justice Committee and the House of Lords Constitution Committee).

We acknowledge that there is only limited support for these suggestions within the political class, let alone amongst senior judges. However, to paraphrase Sir Thomas Legg, we believe that political involvement ‘will not bring the [Supreme Court] into the political arena any more than it will be anyway, and may help to keep it out’ (2004 Legal Studies, 45 at 46). It is also our view that experience in jurisdictions such as Canada suggests that over time public and political interest in options such as these will grow and the Court must be prepared to consider them.

- We acknowledge that the selection process is today more inclusive than the pre-2005 regime, not only via the involvement of lay people but also the statutory consultation requirements. However, we are very keen to stress that the process remains a closed shop. By our count, there have been six commissions since 2009 that have made ten recommendations (i.e. recommending nine individuals for appointment to the Court and one selection from among the serving Justices to fill a vacancy of Deputy President). Only ten different people have sat on those commissions. We believe that this is another reason why serious consideration should be given to expanding the size of the selection commissions.
- We also strongly encourage the JAC, JABS and NIJAC not simply to nominate their chairs to sit on the commissions. The chairs of the JAC and JABS (Christopher Stephens and Sir Muir Russell) have sat on the last 4 and 5 commissions respectively. We would encourage the various appointments bodies in the UK to adopt a practice of rotating the people who are nominated to sit on the ad hoc selection commissions for the Court.

A Note on the Use of Ad Hoc Judges

We believe that there should be an indication on the face of a judgment where an ad hoc judge has sat on the panel. At present it is not clear to member of the public reading a judgment that one of the panel members was not a Supreme Court Justice].