

Litigation Committee response to the Ministry of Justice's consultation on Appointments and Diversity: A Judiciary for the 21st Century (CP19/2011)

The City of London Law Society (“CLLS”) represents approximately 14,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 18 specialist committees. This response to the Ministry of Justice's consultation paper entitled *Appointments and Diversity: A Judiciary for the 21st Century* has been prepared by the CLLS Litigation Committee.

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?

The Committee does not have a strong view on whether there should be transfer of this role.

Question 2: Do you agree that the JAC should have more involvement in the appointment of deputy High Court judges?

The Consultation Paper records that there are currently three routes to appointment as a deputy High Court judge. The JAC is involved to different degrees in these three routes.

Given the aim of achieving greater transparency in appointments, and for consistency of the process, the Committee agrees with the proposal that the JAC should become more involved in the appointment of deputy High Court judges. This would also be consistent with the current system for appointments to the High Court and the Court of Appeal. However, we note that the Consultation Paper does not set out how the JAC would become more involved, and precisely what its role would be in relation to appointment of deputy High Court judges.

We see no reason why a greater involvement of the JAC (whatever that may be) should affect the routes through which candidates for the position arrive at the selection process.

Question 3: Should the Lord Chancellor be consulted prior to the start of the selection process for the most senior judicial roles?

In order to promote confidence that the process is as impartial and objective as possible, we agree with the proposal that the Lord Chancellor should not comment on candidates prior to the start of the selection process. However, the Lord Chancellor should continue to have a right of veto.

Question 4: Should selection panels for the most senior judicial appointments be comprised of an odd number of members?

The Committee agrees that to avoid the necessity of a chair having to make a casting vote in the event of a tie, as happens with a four member panel, selection panels should be comprised of an odd number of members. The Committee has no objection to five members as proposed.

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?

The Committee considers that the provision for two Justices of the Supreme Court to sit on the selection commissions should be maintained. This does not, in our view, impair the appearance of impartiality and transparency but, on the other hand, does ensure that individuals with the unique understanding of the requirements of the role of a Justice of the Supreme Court have a significant say in selection of candidates.

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 doing so, lose the right of veto?

The Committee does not have any strong view on whether the Lord Chancellor should participate on the selection panel for the appointment of the Lord Chief Justice and thereby lose his right of veto. If he does not participate, his right of veto should remain.

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

The Committee considers that the panel for selection of the Lord Chief Justice should be chaired by an individual with judicial experience. In our view, such a person is better placed than a lay person, or even someone with legal (but not judicial) experience, to undertake this task. An individual with judicial experience is likely to have a better understanding of the rigours of the role and the qualities and competencies required to fill that role. Such a person is likely to be in a more informed position than a lay person to make judgements on the suitability of an individual who is to head the judiciary.

Further, it is essential that the appointee can command the trust and respect of the body of which he will head.

The Committee considers that the judiciary should play a significant role in appointment of the Lord Chief Justice and should represent the majority on the panel for selection. Lay members on the panel have an important role but the views of the judicial members should prevail. This could be achieved by the chair being a

member of the judiciary (assuming that the other four members are equally lay and judicial).

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 of a veto?

The Committee has no strong view on whether the Lord Chancellor should participate in the selection commission of the appointment of the President of the Supreme Court.

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?

Question 11: Do you agree with the proposal that the Chair of the selection panel should be a lay member from either the Judicial Appointments Board for Scotland or the Northern Ireland Judicial Appointments Commission?

The Committee refers to its answer to question 8 above. Again, we consider that the selection panel should comprise a majority of members of the judiciary and should be chaired a member of the judiciary.

Question 12: Should the Lord Chancellor make recommendations directly to HM the Queen instead of the Prime Minister?

The Committee has no strong views on this question.

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 the number of judges should be removed in order to facilitate this?

The Committee considers that the principle of salaried part-time working should be extended to the High Court and above in order to broaden the pool from which members of the judiciary are selected and to encourage diversity. However, this should not be at the expense of the judicial time which is available to the courts. Accordingly we agree that the statutory limits on numbers of judges should be removed to facilitate part-time working.

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?

Provided that the two candidates are equally suitable and are equally qualified and, as a result, the JAC cannot decide on grounds of individual merit, the Committee does not object to the proposal of applying the positive action provision.

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 circumstances where there is a clear business need?

The Committee has no strong views on this question.

Question 16: How many Judicial Appointments Commissioners should there be?

The Committee is of the view that the UK has a strong and well qualified judiciary at present. We believe that this strength and quality is recognised in most other

jurisdictions, and is envied by many. It is a judiciary of which we can be proud. In broad terms, the current system operates effectively to achieve this. We therefore see no reason to change the number of members of the judicial appointments commissioners.

Question 17: Should membership of the Commission be amended as proposed above?

See our answer to 16. The Committee is unpersuaded that the composition should be changed unless there is some more substantial reason as to why this should occur.

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?

As we have indicated above, the Committee considers that the current selection process is effective and has been instrumental in achieving the high quality of judiciary which we have in the UK. We consider that any movement out of the JAC's remit risks that downgrading the quality of the current selection process and we are opposed to that.

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

The Committee does not agree with the proposal that the appointments process should be subject to future change through secondary legislation. Whilst any secondary legislation would be subject Parliament's affirmative procedure, this would still mean that approval would take place without proper debate or any room to change the text. The process for appointment of the judiciary can have a profound impact on the identity of appointees to the judiciary. As such, the process is hugely important and it should not be changed without the opportunity for debate in Parliament.

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

The MoJ could consider ways of encouraging solicitors to put themselves forward as candidates for the judiciary. Although research would need to be undertaken, we believe that this could result in a more diverse pool of candidates.

The individual quality of the candidates should always be the prime determining factor for judicial selection.

**THE CITY OF LONDON LAW SOCIETY
LITIGATION COMMITTEE**

Individuals and firms represented on this Committee are as follows:

Simon James (Chairman)	Clifford Chance LLP
Duncan Black	Field Fisher Waterhouse LLP
Richard Clark	Slaughter & May LLP
Tom Coates	Lewis Silkin LLP
Andrew Denny	Allen & Overy LLP
Angela Dimsdale Gill	Hogan Lovells International LLP
Geraldine Elliott	Reynolds Porter Chamberlain LLP
Gavin Foggo	Fox Williams LLP
Richard Foss	Kingsley Napley LLP
Tim Hardy	CMS Cameron McKenna LLP
Willy Manners	Macfarlanes LLP
Rory McAlpine	Skadden, Arps, Slate, Meagher & Flom (UK) LLP
Arundel McDougall	Ashurst LLP
Gary Milner Moore	Herbert Smith LLP
Hardeep Nahal	McGuireWoods London LLP
Stefan Paciorek	Pinsent Masons LLP
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Patrick Swain	Freshfields Bruckhaus Deringer LLP
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