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Response

'The Governance of Britain: Judicial Appointments'

October 2007 – consultation paper

The City of London Law Society (CLLS) represents over 13,000 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 17 specialist committees. This response to 'The Governance of Britain: Judicial Appointments' has been prepared by the CLLS Litigation Committee. The Committee is made up of a number of solicitors from City of London firms who specialise in commercial litigation and dispute resolution. The Committee's purpose is to represent the interests of those members of the CLLS involved in commercial litigation and dispute resolution.

Overall comment

1. The CLLS is concerned that a further consultation has been initiated so soon after the introduction of the current system in 2006. This does not allow enough time to measure the impact of the changes which have so recently occurred.
2. The purpose of the consultation is set out in the Foreword by Jack Straw. While the theory of reducing Government's role in the appointment of judges so as to improve the perception of independence is understandable, it is important that any changes also bring about an improvement in the appointment process, and a visible one.
3. The description of the current system (see especially paragraph 3.10) is difficult to follow in the sense that it was not clear exactly how the process works at the moment. The explanation that the Judicial Appointments Committee ("JAC") or the selection panel that it appoints "*decides upon the selection process to be applied and proceeds to apply it*" does not throw much light on what actually happens.
4. One of the key benefits that reform should be designed to effect is more transparency. The process of judicial appointments has to be clearly prescribed and ascertainable. And the process must be transparent to everybody – including the judicial candidates who are going through the selection process themselves and, most importantly, members of the public.

5. The process, and indeed the judiciary itself, are there to serve the public. It is essential that any reform of the appointment process must take as its foundation the need to inspire public confidence. There is a need for the process therefore not only to be set to the highest standards of impartiality and independence, but to be seen to be so. Only with full transparency can a satisfactory accountability be achieved.

Q1: Do you consider these principles for judicial appointments to be broadly right?

6. The CLLS believes there should be more objectives listed in 4.7, for example the list omits the following (which are included in 2.21):
 - Integrity
 - Legal certainty of conditions of service and security of tenure
 - Arrangements for discipline, suspension or removal to be subject to established standards of judicial conduct and with a right of independent review
 - Impartiality
 - Propriety
 - Competence and diligence

Q2: Are there other fundamental principles that should underpin the process for judicial appointments?

7. See the additional principles in the answer to Q1 above.

Q3: Do you consider the existing arrangements for making judicial appointments properly take account of these principles?

8. The CLLS is of the view that there is an inherent benefit in moving the power of appointment of judges away from Ministers, and the Executive more generally. However, it believes that this depends on the design and effectiveness of any replacement system. It does not follow automatically that any replacement system (to take an extreme example, the system of electing judges as found in the United States) would serve any better in practice.

Q4: Should the current role of the executive in judicial appointments be altered? If so, how?

9. The key question is why there should be a continuing role for the Lord Chancellor. The Committee notes the arguments made in favour of his having a role at paragraphs 4.13 – 4.18, however, on balance it believes it preferable to move away from the current position.
10. In any event, the CLLS believes that there must be a check and balance on any system of appointment, whatever it might be, and that such safeguards ought also to apply to disciplinary matters and ultimately the removal of judges. Any check or balance must be seen to be fair and accountable in and of itself. The Committee acknowledged that one possibility is the use of a parliamentary select committee to meet such a need.

Q5: Should the current role of the judiciary in the process be altered, and if so how?

11. The CLLS believes that there should be greater reliance on non-judicial involvement. Currently, the role of the judiciary is especially noticeable in the High Court; CLLS Committee members were less familiar with regard to judicial influence in the lower tribunals.
12. In the selection of High Court judges the CLLS suggests that the judiciary currently has too influential a role. This leads to an in-built bias in favour of advocates (almost always barristers). The CLLS believes this is neither appropriate nor beneficial either on the grounds of ability or experience. Judges need to understand the wider aspects of the legal process, including those at the "solicitor end" where, for example, there is much more exposure to, and therefore familiarity with, the feelings and concerns of the litigants themselves.
13. It is also important, from the point of view of public perception, that the judiciary encompass a wider cross-section of the general population. The risk with maintaining such a strong influence on the part of the existing judges is that they will as a matter of human nature, inevitably appoint people in their own likeness. There is a genuine concern on the part of many members of the general public that judges are often drawn from the more privileged echelons of society and therefore "out of touch" with the lives of the majority.

Q6: Whether or not there is a change in the role of the executive or the judiciary, should the legislature be involved in the process in some way, for example by holding post-appointment hearings? If so, how?

14. The CLLS believes that it might be appropriate for the legislature to have an involvement in the process, if it can do so in a speedy and efficient manner. It is however concerned that a process of post-appointment hearings might be too time consuming and lead to the system grinding to a halt.

Q7: Should any change to the arrangements for judicial appointments be across the board, or should it apply to a group of appointments, for example by removing the Lord Chancellor from the process of appointment for all but the senior judiciary?

15. The CLLS believes the regime for the High Court should be different from the lower tribunals. In the lower tribunals there is no need for a separate check. For the High Court, the JAC should take the lead but with some extra form of check and balance, albeit not involving the Lord Chancellor.

Q8: Should there continue to be some check (currently exercised by the Lord Chancellor) on recommendations from the JAC? And if so, who is best placed to perform that role?

16. The CLLS believes there should be some check, although not in the form of the Lord Chancellor.
17. The CLLS acknowledges that one possibility is a parliamentary Select Committee.

Q9: Should the need for consultation or concurrence be removed for decisions on authorisation, nomination, assignment and extensions of service?

18. The CLLS believes the need for concurrence should be removed.

Q10, 11, 12

Given the CLLS's views about the future role of the Lord Chancellor, the answer in each case is 'no'.

Q13: Do you agree that the Lord Chancellor should ultimately have the responsibility for determining eligibility criteria for specific judicial posts?

19. The CLLS believes the JAC should have this responsibility, subject to the appropriate check/balance.

Q14: Should medical checks be carried out earlier in the selection process

20. No comment.

Q15: Should the CRA be amended to allow the JAC to take the preliminary steps in a selection process before a formal Vacancy Notice is received?

21. The CLLS agrees that it should.

Q16: Are there, in your view, any additional changes that should be made to the judicial appointments process?

22. In general the system needs to reflect the fact that judges are servants of the public and a greater sense of public service with corresponding behavioural characteristics should be included in the guidelines for appointment and indeed training.

23. In relation to the criteria to be applied to selection, certain characteristics should be ruled out, for example membership of any organisations seen to have extreme views, or secret societies (such as the Free Masons). This should be not only as a matter of principle but also an important measure to secure public confidence.

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