



# The Governance of Britain

## Judicial Appointments

Presented to Parliament by the Lord Chancellor and Secretary  
of State for Justice by Command of Her Majesty The Queen

October 2007

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## Foreword

**The Rt Hon Jack Straw MP  
Lord Chancellor  
and Secretary of State for Justice**



*"For centuries, they [the Executive] have exercised authority in the name of the monarchy without the people and their elected representatives being consulted. So I now propose that in 12 important areas of our national life, the Prime Minister and the Executive should surrender or limit their powers, the exclusive exercise of which by the Government of the day should have no place in a modern democracy... And I propose that the Government should consider relinquishing its residual role in the appointment of judges."*

***The Prime Minister, the Rt Hon Gordon Brown MP, 3 July 2007***

The Government wants to forge a new relationship with the citizen: a relationship that will better reflect the modern democratic society in which we all live. To mark the start of this process, we published *The Governance of Britain* Green Paper, which set out plans for a new far-reaching constitutional settlement that would lead to the executive handing over more power to Parliament and the people. At the heart of this package are plans to surrender or limit a range of historic Prime Ministerial and executive powers. The reforms also include proposals to actively consult the public on developing a British Statement of Values and a Bill of Rights and Duties. This would provide a clearer articulation of the values, principles and ideas that bind our nation together, and the mutual obligations that we owe to one another. The proposals are not a finished blueprint, but instead constitute a route-map towards a new constitutional settlement. This consultation document represents another step on that journey and considers whether the current system for appointing judges provides the right degree of independence.

The judiciary are a cornerstone of our constitution, playing a vital role in upholding the rule of law. Government must be conducted in accordance with the law and, for there to be confidence that this happens in practice, the law must be administered by a judiciary that is independent of Government. The process by which judges are appointed is therefore key to both the reality and the perception of independence.

A handwritten signature in black ink, appearing to read 'Jack Straw', written in a cursive style.

The Constitutional Reform Act 2005 enshrined in law the independence of the judiciary and radically changed the way in which judges are appointed. We now have a system where the whole process of selection is in the hands of the independent Judicial Appointments Commission. However, although those appointed must be recommended by the Commission, formal appointments are still made by the Lord Chancellor. This consultation is intended to address ways in which we might reduce the current level of executive involvement, if that is appropriate. We are also seeking views on whether Parliament should be involved in the appointment process, and if so what form that could take.

The Government will look very carefully at the results of the consultation. We will do nothing that jeopardises the outstanding quality of our judiciary. We are keen to consider policy proposals which sustain public confidence in the system, enhance the independence of the judiciary, and keep the executive involved only in those decisions that it needs to be involved in.

## Executive Summary

This consultation considers the arrangements for making judicial appointments. The Prime Minister said on 3 July 2007 that *“the Government should consider relinquishing its residual role in the appointment of judges”*, and the Green Paper added that *“the Government is willing to look at the future of its role in judicial appointments: to consider going further than the present arrangement, including conceivably a role for Parliament itself, after consultation with the judiciary, Parliament and the public, if it is felt that there is a need.”*<sup>1</sup>

The judiciary forms one of the three arms of state – the others being the executive and the legislature. There are fundamental constitutional issues associated with these relationships which need to be understood and respected. The proper functioning of the judiciary is vital to the proper functioning of our society – as to any stable democracy. It is therefore vital that issues which have the potential to alter the balance between these various arms of state are given the most careful consideration.

The arrangements for making judicial appointments have been the subject of recent change following the Constitutional Reform Act 2005 (CRA). However, the Government’s Green Paper *The Governance of Britain*, provides an opportunity to consider those arrangements in a wider constitutional context. This is consistent with the Government’s intention to carry out post-legislative scrutiny of legislation, where an opportunity to do so exists.

The **first chapter** of this consultation paper considers the role of the three arms of state, the complex relationship between them, and discusses the doctrine of separation of powers, which is a fundamental principle of constitutional theory. It also looks specifically at the British system of governance and considers the extent to which the principle of separation of powers applies in practice.

The **second chapter** of the consultation paper considers each of a number of fundamental principles that should govern judicial appointments, such as the need to maintain the independence and integrity of the judiciary. This provides a basis on which to consider later in the consultation paper whether there is need for any further change.

The **third chapter** considers current practice. The first section describes the current process for judicial appointments in this country, and outlines the reforms that have taken place. The second section considers the way in which judicial appointments are currently made in other jurisdictions, in the context of the separation of powers.

<sup>1</sup> Constitutional Reform statement, 3 July 2007 <http://www.number10.gov.uk/output/Page12274.asp>

The **fourth chapter** poses a number of questions about whether and how the existing arrangements could be improved.

The paper focuses on the system for appointing judges in England and Wales. While the issues discussed do not directly affect the administrations in Scotland and Northern Ireland, possible implications for the devolved administrations are discussed in Chapter 4.



## Introduction

This paper sets out for consultation the role of the executive, legislature and judiciary in making judicial appointments, following on from *The Governance of Britain* Green Paper. The consultation is aimed at as wide a range of people as possible.

This consultation is being conducted in line with the Code of Practice on Consultation issued by the Cabinet Office and falls within the scope of the Code. The Consultation Criteria, which are set out on page 56, have been followed.

Initial consideration of the regulatory impact of the proposals in this paper does not indicate that any groups are likely to be particularly affected. The proposals are unlikely to lead to additional costs and savings for businesses, charities or the voluntary sector, or the public sector. Consequently, this paper does not contain an Impact Assessment. If you disagree with this conclusion you are invited to send your reasons as part of your overall response to this paper.

Copies of the consultation paper are being widely distributed, including to:

- the senior judiciary, the Council of HM Circuit Judges, the Association of District Judges, the Magistrates' Association
- the Judicial Appointments Commission, Judicial Appointments and Conduct Ombudsman, and the Commissioner for Public Appointments
- the legal professions, including the Bar Council and the Law Society
- Parliament, the Constitutional Affairs Select Committee, the House of Lords Select Committee on the Constitution
- Other Government Departments
- representative groups and academics

However, this list is not meant to be exhaustive or exclusive and responses are welcomed from anyone with an interest in, or views on, the subject covered by this paper.

# 1. The Executive, Legislature, Judiciary, and the Separation of Powers

## Executive, Legislature, and Judiciary

- 1.1 Within democratic systems of Government operating under the rule of law, the principal functions of the state can be separated into legislative, executive, and judicial functions. In very broad terms, the legislative function involves making laws, the executive function implementing the law, and the judicial function interpreting the law.
- 1.2 This Chapter considers the roles of the legislature, executive and judiciary in Britain. It considers the doctrine of separation of powers, which sets out a well-established theory for how the three branches should be organised and how they might interact with one another. It then considers the application of that theory to our constitutional framework, and discusses the significant changes made under the CRA to clarify the relationships between the three arms.

## Executive

- 1.3 The executive – the Government – has a very wide-ranging role, from the initiation of policy through to the management and delivery of public services. While the legislature makes laws, the executive introduces laws into Parliament, and once they are passed, implements those laws, putting the legislation into effect. Legislation frequently gives the executive the power, subject to Parliamentary scrutiny, to enact secondary legislation to govern more detailed aspects of policy, within the framework created by primary legislation.
- 1.4 Both the legislature and the judiciary act as a check on the actions of the executive. For example, the legislature scrutinises the actions of the executive and holds it to account for its use of public money. The judiciary ensures that the executive does not exceed its powers, through judicial review.

## Legislature

- 1.5 Parliament is the supreme legislative body in Britain, although since devolution, the Scottish Parliament and the Welsh and Northern Ireland Assemblies also have legislative power of varying degrees.
- 1.6 One of the main functions of Parliament is to enact laws. In many countries with written constitutions, limitations are placed on the legislature's authority to make laws, so that the legislature does not have absolute power to legislate in whatever way it chooses. In such systems, the courts can review legislation and hold it invalid, if it conflicts with the constitution.
- 1.7 In Britain, Parliament is legislatively supreme, in that there are no legal restrictions on its ability to legislate. It can legislate on any matter, including on constitutional matters, and can repeal or amend any legislation, even if that legislation contains constitutional rules or principles. This is widely referred to by commentators, most famously Dicey, as the sovereignty of Parliament.<sup>2</sup> The doctrine has profound implications for the relationship between the legislature and the judiciary, because it means that judges cannot hold an Act of Parliament to be unconstitutional or invalid: even if legislation is found by the courts to be incompatible with the Human Rights Act, it is for Parliament – not the judges – to decide how to remedy the incompatibility.
- 1.8 Where the Government has accepted international obligations by treaty then those obligations may in practice constrain Parliament's ability to legislate, so long as those obligations continue. The most notable example stems from the UK's membership of the European Union (EU), by which (under the European Communities Act 1972 – as amended) Parliament accepted that EU law in areas of its competence would have primacy over UK law, with final determination of these obligations resting not with British courts but with the European Court of Justice. This point of EU primacy does not, however, render the concept of the sovereignty of the UK Parliament invalid, nor undermine it, since it is open to Parliament by primary legislation to repeal the 1972 Act, and to the Government to denounce its EU treaty obligations and withdraw from the EU.
- 1.9 And while the EU obligations are perhaps the most well-known example of international obligations constraining Parliament, it is not the only one. Other important examples are mandatory decisions of the UN Security Council taken under Chapter VII of the UN Charter, which are binding on all member states. The European Convention on Human Rights (ECHR) is another international treaty, binding on all 47 members of the Council of Europe, with a duty on states party to the convention to accept and

<sup>2</sup> A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*.

implement judgments of the European Court of Human Rights in Strasbourg. There are many other examples of bilateral and multilateral treaties under which the UK has accepted obligations under international law. The general position of principle is the same: the Government will implement its obligations, and Parliament should not legislate in any way which would be inconsistent with those obligations, while they remain in force.

## Judiciary

- 1.10 While the legislature passes laws and the executive implements them, the judiciary interprets them in cases of dispute. The judiciary's primary role is to interpret and apply the law that Parliament has laid down.
- 1.11 The judges also have a crucial role in developing the common law. However, because Parliament is sovereign, Parliament may always legislate to change or override the common law position.
- 1.12 One important way in which judges must interpret and apply the law is in ensuring that the executive does not exceed its powers in law, through judicial review of executive decisions or action. Resort to judicial review of executive decisions has increased dramatically over the years; this has resulted in an increased and more important constitutional role for the judiciary. It is also potentially a source of tension between the executive and the judiciary, and is one reason why judges must be independent of Government. The principle of judicial independence is discussed further in Chapter 2.
- 1.13 A further dimension is provided by the Human Rights Act 1998, which gave further effect in UK domestic law to a number of Articles of the ECHR. Under the Act, judges must interpret legislation, so far as possible, in a way that is compatible with the Convention Rights. If it is not possible to give effect to an Act of Parliament in a way that is compatible with the Convention, the superior courts may issue a Declaration of Incompatibility. The legislation concerned remains valid, thereby preserving Parliamentary sovereignty, though the Government has so far respected such declarations, and has in all cases taken, or said that it intends to take, appropriate steps to amend or replace the relevant legislation, so as to restore compatibility with the Convention Rights. The Review of the Implementation of the Human Rights Act in July 2006 concluded that the Act had not significantly altered the constitutional balance between Parliament, the executive and the judiciary.

## The Doctrine of the Separation of Powers

- 1.14 The doctrine of the separation of powers dates back to John Locke. Writing in 1690, he recognised that if the same person has the power to make laws and to execute them, they may exempt themselves from the laws they make and use the law to their own private advantage.<sup>3</sup> He therefore argued that there should be a separate legislature and executive.
- 1.15 Montesquieu (1689–1755) developed the doctrine further. As well as recognising the dangers of overlapping legislative and executive functions, he warned of the dangers of failing properly to separate the judicial function from the others.<sup>4</sup>
- 1.16 Interestingly, Montesquieu based his analysis on his understanding of the English Constitution. However, the 18<sup>th</sup> century British constitution did not (and does not now) observe a pure separation of powers, for instance because of the overlaps in personnel between the executive and legislature. Known as the fusion of powers, this overlap has been described as the “efficient secret” of our constitution, and distinguishes parliamentary from presidential systems.<sup>5</sup>
- 1.17 There has been much debate over the years over the nature of separation of powers. In practice pure separation, ensuring no overlap in the personnel and functions in each of the three branches of state and no interference in the functions of the other branches, is impossible to achieve. All political systems exhibit greater or lesser degrees of partial separation, with checks and balances in place ensuring that power is not overly concentrated in one branch.
- 1.18 Separation of powers is linked to the concept of the Rule of Law, which among other things aims to ensure that the judiciary can constrain the executive to working within the boundaries of its lawful authority (through judicial review). It is also linked to the principle of judicial independence.

## Separation of Powers in the British context

- 1.19 So, while the separation of powers remains an important concept in Britain, it is arguably more accurate to describe the system, because of the existence of Parliamentary sovereignty, as being based on a partial *fusion* of powers. This is particularly so because of the overlap between the executive and legislature, with the Government formed from, and accountable to, Parliament. The Prime Minister, for example, must by

<sup>3</sup> John Locke, *Two Treatises of Government*.

<sup>4</sup> Montesquieu, *L'Esprit des Lois*.

<sup>5</sup> Walter Bagehot, *The English Constitution*.

convention be a Member of the House of Commons and can effectively be removed from office by a simple majority vote of Parliament.

1.20 The Monarch also has a formal role in the fusion of the various arms of state:

- **Legislature** – it is with the Crown in Parliament that both legal and political sovereignty lies, with Parliament being both summoned and dissolved by The Queen. The Monarch must give her Royal Assent to all Bills so that they become Acts.
- **Executive** – on the recommendation of the Prime Minister, The Queen appoints all Ministers of Her Majesty's Government, who govern in the name of the Crown.
- **Judiciary** – on the recommendation of the Prime Minister or the Lord Chancellor, The Queen appoints all senior judges, and all public prosecutions are brought in her name.

1.21 There have, historically, been some specific examples of how distant the British system was from a simple version of Montesquieu's separation of powers theory. The first has been the office of Lord Chancellor, who was simultaneously:

- a key member of the Government and a Cabinet Minister
- a senior judge and Head of the Judiciary, and
- Speaker of the House of Lords.

1.22 Another example concerns the dual role of the House of Lords, as second chamber of the legislature, and as the highest appeal court in the UK. The Law Lords (Lords of Appeal in Ordinary), whose primary function is to sit as judges in the Appellate Committee of the House of Lords, are also able to sit in the House of Lords in its legislative capacity.

1.23 The Law Lords adopted a statement of principles in June 2000 restricting their ability to take part in debates.

### Towards greater separation – the Constitutional Reform Act 2005

1.24 The set of reforms contained in the CRA were aimed at increasing the transparency of the system and clarifying the relationship between the three arms of state.

### **Reforming the role of Lord Chancellor**

- 1.25 The CRA reformed the office of the Lord Chancellor, removing his role as Head of the Judiciary and as Speaker of the House of Lords. This was designed to increase the separation of powers and to enhance the independence of the judiciary. The Lord Chief Justice became Head of the Judiciary, and under a Concordat with the Lord Chancellor took over some of the Lord Chancellor's functions relating to the leadership and governance of the judiciary. The Lord Chancellor and all other Government Ministers now also have a specific statutory responsibility to uphold judicial independence, and have an explicit duty not to seek to influence particular judicial decisions through any special access to the judiciary.<sup>6</sup>

### **A new Supreme Court**

- 1.26 The CRA also provided for a new Supreme Court to be established as a final appeal court for the United Kingdom, with judges no longer in the House of Lords.<sup>7</sup> The Supreme Court is due to come into being in 2009. Having separated out the judicial function of the House of Lords from its Parliamentary function, there will be a much clearer separation of powers between legislature and judiciary, again helping to clarify the judiciary's independence from the other arms of state.

### **Reform of the system for judicial appointments**

- 1.27 The CRA also reformed the system of appointing judges. While the Lord Chancellor retains an important role, the Act set up a new, independent body, the Judicial Appointments Commission, which now has key responsibility for selecting judges, and ensures that there is a system of checks and balances in place aimed at ensuring that we have a high quality, independent judiciary appointed solely on merit.

<sup>6</sup> Constitutional Reform Act s3

<sup>7</sup> Except for Scottish criminal cases.

## 2. Judicial appointments: principles

### Fundamental principles

- 2.1 Chapter 1 of this consultation paper focused on Britain's wider constitutional framework, the importance of separation of powers, and the steps this Government has taken to clarify the delineation of power between the three arms of the state. Within that context, the remainder of this paper considers the process for appointing the judiciary, which has clear implications for the separation of powers and for the independence of the judiciary from both the executive and the legislature.
- 2.2 This chapter of the consultation paper seeks to set out some fundamental principles that the Government considers should form the basis of any judicial appointments process. Chapter 3 then considers current practice.

### An independent judiciary

- 2.3 Chapter 1 highlighted the importance of the separation of powers in respect of the three arms of state. This is pivotal to ensuring the independence of the judiciary as a whole. However, it is also important to ensure the independence of the judiciary at an individual level, and this section considers how that is achieved through the appointments process.
- 2.4 Judicial independence is vitally important to the rule of law, and in particular to public confidence in judges as a means of upholding the law. This in turn brings social and economic benefits. It enables people to be assured that when their rights are infringed, or when others' duties need to be enforced, the appropriate action will be taken. It assures people that justice will be done when a criminal allegation is made. It also helps to sustain international confidence in Britain as a stable country in which, and with which, it is safe to do business.
- 2.5 The need to secure judicial independence must therefore be one of the fundamental principles underpinning any system of judicial appointments. It is important to be clear about the meaning of judicial independence – from whom or from what judges need to be independent.

#### **The Executive**

- 2.6 In a country operating under the rule of law, judges need to be independent of the executive. It must not be possible for the executive to require or improperly influence judges to decide cases in a particular way. Otherwise, there is an inevitable danger that the law could be used (or would be



perceived as being used) to service the interests of the executive. Just as important, it is essential that the public has confidence that judges will interpret the law impartially and, where appropriate, stand up for the rights of individuals irrespective of the wishes or interests of the state.

### **The Legislature**

- 2.7 The judiciary also needs to be independent of Parliament. Parliament (in particular the House of Commons) is the national body where the interests and views of the public are represented and with the ultimate power to make law. It is the duty of judges to decide cases within the limits of the law Parliament lays down. However, within those limits, it is in the interests of justice that the judiciary should be left free to decide cases, protected from political pressure to reach particular decisions in individual cases.

### **Parties to a case**

- 2.8 It is also vital that judges be independent of the parties in a case. Most obviously, it means that no party to a case – including the Government, directly as a party in civil cases, and indirectly through the Crown as prosecutor in criminal cases – should be able to procure a favourable result by means of exerting improper influence. Further, it is a fundamental feature of the justice system that judges should be free from bias, and from perceptions of bias.

### **Securing independence**

- 2.9 One of the most important ways of securing judicial independence is to ensure that the appointments process does not result in politically biased judges, or judges who are, or feel, beholden to the appointing body or person, or to any individual or organisation. This in turn helps to ensure that the judges who are appointed are able to act independently, free from political or other improper pressure, in office.
- 2.10 There are a range of other factors – beyond the appointments process itself – that are vital to securing independence while a judge is in post. The first among these is security of tenure, ensuring that judges cannot be dismissed because they make unfavourable decisions against, or are unpopular with, Government. Judges are protected against threats of cuts to their salaries; against political pressure in relation to their judgments, for example by clear practices restricting what may be said publicly by the legislature or executive during ongoing legal proceedings; from intimidation; and may not generally be sued for the manner in which they discharge their responsibilities of office.

### Appointment on merit

- 2.11 Linked to independence is the principle that judges should be appointed on merit. This aims to ensure that the appointments process results in the selection of high quality individuals. This is another fundamental principle that should underpin an appointments process designed to produce a judiciary which is highly competent, politically impartial, has high standards of integrity and which avoids any form of unfair discrimination.
- 2.12 Selection on merit has essentially two objectives: no one should be appointed to a position unless they are competent to do it; and if two or more people meet the criteria for appointment, the position should be offered to the person who would do it best.
- 2.13 This is more likely to put appointments above suspicion of patronage, and ensure that recruitment procedures reinforce the political impartiality of the judiciary.

### Equality

- 2.14 Equality is another fundamental principle that should underpin any judicial appointments system. Our judiciary is respected throughout the world for its values of probity, fairness and judgement. It is a highly visible institution with a very public focus. It represents and upholds many of the values that we as a society hold in high esteem: our freedoms, respect for each other, and for the rule of law.
- 2.15 It is vital that all members of society can look to the judiciary to uphold those values. The communities of Britain are ever changing and our institutions need to adapt to ensure that they continue to reflect those changes.
- 2.16 Part of this means ensuring that our judges have an effective understanding of the communities they serve. This can be achieved in a number of ways. For example, through ensuring that judges are drawn from the diverse communities that make up modern Britain; or through ensuring that judges recognise and understand those communities, and reflect that understanding in the way they carry out their duties.
- 2.17 Equality in the context of judicial appointments needs to have both an inward and an outward focus. The inward focus must look towards the working environment for judges, and the extent to which that environment supports a diverse membership. This will help to support and encourage a more diverse range of individuals to apply for judicial appointment, and to consider that the judiciary, as an institution, is one in which they can play

an active role. The outward focus must look at the level of engagement our judges have with the communities they serve, and the extent to which they understand the complex needs and experiences of the individuals who come into contact with them from a wide spectrum of backgrounds.

### Openness and transparency

- 2.18 Another fundamental principle is openness and transparency. The previous appointments system was criticised for a lack of transparency, and the reforms under the CRA were designed to improve the openness and transparency of the system. Openness and transparency should relate both to judicial appointments themselves and to appointments to the selecting body itself – the Judicial Appointments Commission.
- 2.19 Confidentiality in relation to individual applicants must of course be respected, but the procedures for appointment should be as open and transparent as possible. This supports equality and diversity, by driving up public confidence in the justice system, encouraging applications from a more diverse range of individuals and improving the public perception of the judiciary. This in turn supports appointment on merit and quality, as well as confidence in the independence of the judiciary.

### An efficient and effective system

- 2.20 Finally, the principles of efficiency and effectiveness should be central to the design of any good judicial appointments system, and the system then needs to be judged against efficiency and effectiveness criteria. This is vital to ensuring that the process for appointing judges can deliver high quality judges, in the right numbers, qualified for the particular office they are being selected for, as quickly and efficiently as possible.

### The international perspective

- 2.21 There are a number of international agreements or other instruments which are relevant to judicial appointments in Britain. While these do not for the most part represent binding international obligations, nor have they been incorporated into domestic law, we do nevertheless have regard to them in relation to our judicial system.<sup>8</sup> The main themes which emerge, which generally chime with the fundamental principles set out above are:

<sup>8</sup> For example “Basic Principles on the Independence of the Judiciary”, adopted by the UN in 1985, the European Charter on the Statute for Judges, adopted by the Council of Europe in 1998, the Latimer House Guidelines for the Commonwealth, 1998, and the Bangalore Principles of Judicial Conduct, 2002.

- independence
- 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
- equality
- competence and diligence

2.22 In addition, as Bell has noted, a common thread in these documents “is the emergence of principles that political intervention in the judicial appointment process is undesirable, and that it is desirable that judges should be substantially involved in the process.”<sup>9</sup>

<sup>9</sup> John Bell, 2003 <http://www.law.cam.ac.uk/docs/view.php?doc=865>

## 3. Judicial appointments: practice

- 3.1 This chapter of the consultation paper is in two sections. The first provides background on our system of judicial appointments, outlines the reforms that have been made over the years, and the operation of the current system. The second considers some key aspects of the arrangements for judicial appointments in other jurisdictions (a fuller paper is at Annex A). Chapter 4 then goes on to consider the fundamental principles which should apply and the practice which should follow.

### Our system of judicial appointments

#### Background

- 3.2 The executive has historically been responsible for judicial appointments. Judges are The Queen's judges, appointed by Her Majesty on the advice of her Ministers or by them on her behalf. However, the degree of executive involvement has changed over the years, and the executive's role in judicial appointments is now more limited than ever before.
- 3.3 Formerly, the Lord Chancellor had a decisive role in the process of appointments, making recommendations for appointment to The Queen or on her behalf, or in the case of the most senior appointments to the Prime Minister who in turn advised The Queen. The Lord Chancellor had a high level of autonomy over the recommendations, selecting those to be recommended following confidential, informal discussions with the senior judiciary. This was largely a closed system. There were, from time to time, complaints that this excluded people who did not fit an "establishment mould". Senior judges were often canvassed as to whether a particular person would make a good judge, without the role or the necessary qualities being defined. This produced criticism that judges tended to be selected in the image of the sitting judiciary and that talented people were being excluded without good reason.
- 3.4 Over the years, the judicial appointments process evolved in response to such criticisms. In relation to appointments below the High Court, to both the courts and tribunals, competitive selection processes were introduced, open to all those eligible, and candidates were assessed against published criteria. In 1997, Lord Irvine of Lairg, the then Lord Chancellor, announced that High Court appointments would no longer be by invitation only, and applications would be open to all eligible members of the legal profession. An annual report would also be presented to Parliament on judicial

appointments each year. In 1999, Lord Irvine commissioned Sir Leonard Peach to scrutinise the procedures for judicial appointments.

- 3.5 Sir Leonard gave the system a good report, but made a number of recommendations to improve the arrangements for making judicial appointments.<sup>10</sup> These included greater consistency of process, improved consultation arrangements, the establishment of a Commission for Judicial Appointments to monitor the process, proposals for more effective appraisal arrangements, more emphasis on equality, and proposals to ensure greater efficiency and effectiveness in filling judicial posts. While these changes represented a step forward, the principle that the Lord Chancellor took the final decision – and in doing so relied heavily on the views of the judiciary – remained largely the same.
- 3.6 In March 2001, following the Peach Report, the Commission for Judicial Appointments (CJA) was established. The CJA was responsible for auditing the process of judicial appointments and it investigated complaints about the way those procedures were applied in individual cases. There were, however, limitations. The CJA could not change a decision and so effectively acted as an ombudsman rather than a fully effective check on decision-making. Nonetheless, its investigations and annual reports identified possible flaws in the way the process operated and included recommendations for improvements.
- 3.7 Further improvements were also made to the selection processes over the following years. In particular, appointments to the High Court from 2005 became by application only.

### Current system

- 3.8 The CRA changed the judicial appointments process significantly, defining and constraining the role of the executive in judicial appointments in statute. The Act established the independent Judicial Appointments Commission (JAC), which started work in April 2006. It moved responsibility for the process of selecting judges from the executive to the JAC and made the system more open and transparent.

#### **Role of the Executive**

- 3.9 The role of the executive is now significantly limited following the establishment of the JAC. This independent, Non-Departmental Public Body (NDPB) consists of fifteen Commissioners, with a lay chair, five judicial members, two members from the legal professions, five lay members, a tribunal office holder, and a magistrate. The Commissioners are appointed by The Queen on the advice of the Lord Chancellor in accordance with the

<sup>10</sup> [http://www.dca.gov.uk/judicial/ja\\_arep2000/judapp00c.pdf](http://www.dca.gov.uk/judicial/ja_arep2000/judapp00c.pdf)

procedures set out in Schedule 12 of the Act, which is designed to ensure appointments to the JAC are non-partisan. The appointments process is also regulated by an independent Commissioner for Public Appointments who ensures an open and transparent process and guarantees that appointments are made on merit.

- 3.10 When a vacancy arises in a judicial office to which the Act applies, the Lord Chancellor (having first consulted the Lord Chief Justice) requests the JAC to make a selection to fill each vacancy. The JAC (in the case of High Court judges and below) or a selection panel that it appoints (in the case of the Lord Chief Justice, other Heads of Division or Lord Justices of Appeal) decides upon the selection process to be applied and proceeds to apply it.<sup>11, 12</sup> It selects one person for each vacancy and presents that choice in a report to the Lord Chancellor.<sup>13</sup>
- 3.11 The JAC, or a selection panel, must make selections 'solely on merit', and those selected must be of good character. It also has an obligation to 'have regard to the need to encourage diversity in the range of persons available for selection for appointments'.
- 3.12 Once the Lord Chancellor receives the JAC's report, a three-stage process ensues:

### **Stage 1**

At Stage 1, the Lord Chancellor may (i) accept the selection; (ii) reject it; or (iii) require the JAC or the selection panel to reconsider. He may reject only on the basis that the person is not suitable for the office concerned. He may ask for reconsideration only on the basis that there is not enough evidence that the person is suitable for the office, or there is evidence that the person is not the best candidate on merit. The Lord Chancellor must give reasons in writing for rejecting or requiring a reconsideration of a selection.

<sup>11</sup> Requirements as to membership of the selection panel are set out in section 71 of the CRA 2005.

<sup>12</sup> This is particularly important because it ensures that the independent JAC has sole responsibility for designing the selection process.

<sup>13</sup> In some other jurisdictions, the independent appointments commission presents the executive with a list of names from which to choose.

## Stage 2

This stage only applies if the Lord Chancellor has rejected or required the JAC to reconsider its Stage 1 selection.

If the Lord Chancellor has rejected the selection, the JAC or the selection panel must select a different candidate.

If he has required reconsideration, the JAC or the selection panel has the option to select the same person, or a different candidate.

After the JAC or the selection panel makes a Stage 2 selection, the Lord Chancellor may (i) accept the selection; (ii) reject it, but only if he required a reconsideration at Stage 1; or (iii) require reconsideration, but only if he rejected the selection at Stage 1.

## Stage 3

This stage only applies if the Lord Chancellor has rejected or required the JAC or the selection panel to reconsider its Stage 2 selection.

As in Stage 2, if the Lord Chancellor has rejected the selection, the JAC or the selection panel must select a fresh candidate. However, it cannot select the person whose selection it reconsidered at Stage 1.

If the Lord Chancellor has required reconsideration at Stage 2, the JAC or the selection panel has the option to select the same person, or a different candidate. However, it cannot select a person who has been rejected at Stage 1.

At Stage 3, the Lord Chancellor must accept the person selected by the JAC, although he retains a right to accept a selection which he had asked to be reconsidered at Stage 1 or Stage 2.

- 3.13 The CRA also sets out a distinct process for appointing Justices of the Supreme Court, once the Supreme Court comes into being in 2009,<sup>14</sup> but does not make any new provision for Law Lord appointments in the meantime. For Law Lord appointments, the JAC is not involved in the selection, which is made by the Lord Chancellor in consultation with the senior judiciary. Once the new Supreme Court comes into force, the existing Law Lords will become the first Justices of the Supreme Court, and any subsequent appointments will be made under the new

<sup>14</sup> Supreme Court judges are to be appointed by The Queen on the recommendation of the Prime Minister, after a process of selection carried out by an independent selection panel, convened by the Lord Chancellor in accordance with Schedule 8 of the CRA. The selection procedures are similar to those established for the other judicial appointments described above.



appointments process. The Lord Chancellor has now agreed that for any appointments which need to be made before the CRA provisions implementing the Supreme Court come into force, he will follow selection procedures equivalent to those set out in the CRA for Supreme Court appointments.

- 3.14 Once the Lord Chancellor has approved the selection, the candidate is then formally appointed.<sup>15</sup> The Lord Chancellor makes a considerable number of appointments himself, while The Queen makes certain senior appointments, on the advice of the Lord Chancellor (or in the case of the most senior judiciary the Prime Minister). The Queen plays an important role in the appointments process from a constitutional perspective, because although only the more senior judges, and Recorders, are appointed by The Queen formally rather than by the Lord Chancellor, all judges swear an oath of allegiance to the Crown. Under the British constitution, all jurisdiction derives from the Crown, and the administration of justice is carried out by members of the judiciary acting in The Queen's name, and deriving their authority from the Crown.
- 3.15 The CRA also established the Judicial Appointments and Conduct Ombudsman (JACO). The Ombudsman is independent of the JAC and Government and provides an important scrutiny function. The Ombudsman's functions include the investigation of complaints about the judicial appointments process.<sup>16</sup> The Ombudsman will consider individual complaints from candidates for judicial office who are unhappy with some aspect of the handling of their application. The Ombudsman must also investigate any matter referred to him or her by the Lord Chancellor in relation to the appointments process. This ensures that there is independent scrutiny.

### **Role of the Judiciary**

- 3.16 The judiciary itself plays a big role in the appointments process, and has always done so. Traditionally, when the Lord Chancellor had discretion as to whom to appoint, he privately consulted judges and senior lawyers, and (for some appointments) the legal professional bodies.
- 3.17 Today, under the reformed system, the judiciary's role remains critical. This is both because judges are uniquely placed to provide information on a candidate's ability and integrity, and because the senior judiciary will be involved in managing those appointed.

<sup>15</sup> Unless the candidate declines, does not accept within the specified time, or is not available within a reasonable time, or if the Lord Chancellor is not content, following consultation with the Lord Chief Justice, that, on the basis of a medical report, the individual is appointable for health reasons.

<sup>16</sup> The Ombudsman is also responsible for investigating the handling of matters involving judicial conduct and discipline.

3.18 The Lord Chancellor consults the Lord Chief Justice on the need for new appointments to the courts. The Lord Chief Justice seeks the views of the Presiding Judges for appointments below the High Court. For the High Court, the Heads of Division advise. Judges are a major source of the references provided by applicants, and are consulted by the JAC on applicants before assessment is completed. Before the JAC puts its recommendations to the Lord Chancellor, the Commission is required to consult the Lord Chief Justice and another person who has held the office for which a selection is to be made, or has other relevant experience. Although the JAC is not obliged to follow the consultees' views, this input means that the judiciary does retain a significant degree of influence. The judiciary is also represented on the JAC.

### **Role of the Legislature**

3.19 Parliament has historically had no role in the appointment of judges and this remains the case under the CRA. This is in contrast to the position in some other jurisdictions (see paras 3.24 to 3.28 below), where the power of appointment is in some way shared between the executive and legislature, most notably the United States as part of its system of checks and balances, where appointments by the President to the Supreme Court are subject to the "advice and consent" of the Senate.<sup>17</sup>

3.20 In broader terms, although Parliament does not play any part in the appointments themselves, it nonetheless takes a keen interest in the process as part of its role in holding the executive to account. There has historically been no real Parliamentary scrutiny of the judiciary although increasingly the Lord Chief Justice and other Heads of Division appear before Select Committees to give evidence as representatives of the judiciary. Under the CRA, the Lord Chief Justice has a statutory power to lay written representations before Parliament on matters of importance to the judiciary or to the administration of justice.<sup>18</sup>

3.21 While Parliament does not have a role in the appointment of the judiciary, and the judiciary is not directly accountable to Parliament in the exercise of its functions, Parliament has long played a key role in the removal of senior judges. Under the Supreme Court Act 1981, a High Court judge or Lord Justice of Appeal holds office during good behaviour, subject to a power of removal by Her Majesty on an address presented to her by both Houses of Parliament.<sup>19</sup>

<sup>17</sup> Similarly, in Israel judicial appointments must also be confirmed by the legislature.

<sup>18</sup> CRA s5.

<sup>19</sup> The CRA makes similar provision for Supreme Court judges (s33).

- 3.22 This ensures that any attempt by the executive to remove a senior judge has to take place openly and transparently, and can only take effect with an affirmative vote of both Houses of Parliament. This is essential for judges' security of tenure, which is a key element of their independence, and aims to ensure that judges cannot be dismissed for political reasons. It is noteworthy that the only instance of the removal of a judge under this procedure was in 1830, when a judge of the High Court of Admiralty in Northern Ireland had been found guilty of embezzlement.<sup>20</sup>
- 3.23 The involvement of the executive, legislature and judiciary in judicial appointments in other jurisdictions is discussed below.

### Judicial appointments in other jurisdictions

- 3.24 In considering the key issue of separation of powers in the arrangements for making judicial appointments in England and Wales, a review of the arrangements for making similar appointments in other jurisdictions provides us with an opportunity to consider the extent to which the doctrine of separation of powers applies in those countries. Where it does, we can consider how the machinery of the state operates in making those appointments and whether there are any considerations which may be relevant to the making of judicial appointments in the UK, and in particular the way in which the doctrine of separation of powers is applied.
- 3.25 Annex A contains a summary of the arrangements for making judicial appointments in a number of overseas jurisdictions. The chart below indicates broadly the key aspects of the arrangements. While there are a number of variations, these divide into two principal approaches.
- 3.26 Under the first approach, judicial appointments are generally made by the executive following either a recommendation from, or consultation with, the judiciary, or some form of appointments committee (a broadly European model). This model can be further subdivided into systems in which there is active involvement by the executive, to a greater or lesser extent, and those in which the executive provides merely formal endorsement of an appointment committee's selection.

<sup>20</sup> The effect of s108 of the CRA, when taken together with the Judicial Discipline (Prescribed Procedures) Regulations 2006, is that the Lord Chancellor may exercise any power of removal in respect of offices listed in Schedule 14 to the CRA (or offices that have been brought within the judicial discipline framework by means of an order under section 118 of the CRA) only once an investigation has been carried out in accordance with those Regulations, and only if the Lord Chief Justice agrees to the removal.

3.27 The second model takes the opposite approach and generally involves the making of nominations for judicial appointment by the executive, but with approval of the legislature necessary before the appointment may be made (a broadly US model). There is some debate about the extent to which, under this model, sentencing policy may be influenced by society’s concerns with high crime rates and with expectations of punishment and deterrence.

3.28 Chapter 4 considers the implications of these models for our system.

**Table 1: Analysis of system for judicial appointments in other jurisdictions**

Country	Nomination/recommendation			Appointment		Combined
	Recommendation or screening by a separate appointments committee	Nominations made by the executive	Consultation with the judiciary/ Attorney General	Appointments by the executive	Appointments must be confirmed by the legislature	Selection and appointment by a separate appointments commission
Australia			X	X		
Canada	X			X <sup>21</sup>		
Cyprus			X	X <sup>22</sup>		
Czech Republic				X		
France	X <sup>23</sup>		X	X		
Germany	X		X	X		
Hungary	X			X		
India			X	X		
Ireland	X			X		
Israel		X			X	
Italy						X
Malta	X <sup>24</sup>			X		
New Zealand			X	X		
Poland			X	X		
South Africa	X		X	X		
Spain			X			X
Sweden			X			X
UK	X		X	X		
USA		X			X	

<sup>21</sup> In 2006 the Government took the decision to refer a Supreme Court appointment for the first time to an ad hoc parliamentary select committee for consideration.

<sup>22</sup> The President appoints judges of the Supreme Court. Below that level, all judges are appointed by the Supreme Council of Judicature (a body consisting of judges of the Supreme Court).

<sup>23</sup> The High Council of the Judiciary (Conseil Supérieur de la Magistrature), a constitutional agency, acts as a judicial appointments commission.

<sup>24</sup> The president has the discretion to consult a separate judicial appointments commission but in practice rarely does.

## 4. Options for change

### A need for further change?

- 4.1 Decisions on who becomes a judge are key to both the perception and reality of judicial independence in our country, and to the proper separation of the judicial branch from the other branches of state. While it has been the practice for many years to make appointments purely on merit and without regard to party political considerations, that has – at least until the CRA – been as a result of Lord Chancellors exercising propriety in the discharge of their appointments function, rather than of any formal in-built safeguards in the system.
- 4.2 The Government’s programme of wider constitutional renewal, set out in *The Governance of Britain* Green Paper, provides an opportunity to revisit our system for judicial appointments. Consequently, the Government would welcome views on whether further reform should be considered.

### Appointments by the Executive

- 4.3 Chapter 3 of this consultation outlines a range of methods for appointing judges. Many jurisdictions operate systems whereby the power to appoint rests with the executive. There are no international or EU obligations that require a different model. Appointment by the executive is permissible under Article 6 of the European Convention on Human Rights, provided the appointees are free from influence or pressure when carrying out their adjudicatory role.<sup>25</sup>
- 4.4 Some jurisdictions maintain judicial appointments commissions or provide some other external involvement, such as consultation with the senior judiciary, to balance out the executive’s power in making appointments. These operate varying degrees of control over the process, some putting forward a list of possible candidates for appointment, giving the executive a greater degree of choice. Others, like our own, only put one name forward, which the executive may then accept, or reject, or alternatively ask for reconsideration.

### Appointments by the Legislature

- 4.5 In some jurisdictions the legislature is responsible for decisions on judicial appointments. In the United States for example, the President has the

<sup>25</sup> Article 6 of the European Convention on Human Rights provides for the right to a fair trial.

power to nominate appointees to the Supreme Court, but these are subject to confirmation by the legislature. While it could be argued that this limits the President's ability to make purely political appointments, equally it might be argued that confirmation by the legislature is unlikely to be carried out in the absence of political considerations.

### Which is the right approach?

4.6 As Chapter 3 of this consultation revealed, there is no consensus as to which is the right system. It therefore seems right that any changes to the existing arrangements should be judged against the fundamental principles for making judicial appointments, and against the doctrine of the separation of powers which exists in Britain.

### Fundamental principles

4.7 Chapter 2 considered a number of fundamental principles in relation to judicial appointments. They were:

- an independent judiciary
- appointment on merit
- equality
- openness and transparency
- an efficient and effective system

4.8 For the most part these appear to be well-established principles, which are consistent with our international obligations and international jurisprudential norms. However, this consultation provides an opportunity to consider whether these principles are the right ones, and whether the existing arrangements for making judicial appointments take proper account of them both in terms of the principles themselves and of any weighting.

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

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

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

## Separation of Powers

- 4.9 Part 1 of this paper highlighted the importance of the principle of the separation of powers, and in a Parliamentary system, where the legislative and executive branches are entwined, of the particular importance of the independence of the judiciary from the other arms. Clearly, the extent to which the executive is involved in judicial appointments has implications for this separation of powers.
- 4.10 When considered against the previous arrangements, the creation of the Judicial Appointments Commission – a Non Departmental Public Body – provides more independence, transparency, and accountability through its clear and public appointments processes and its arm’s length relationship with its sponsoring Department, the Ministry of Justice. This is a significant improvement over the position that prevailed during the previous decade, in which the power to select and appoint judges rested solely and directly in the hands of Ministers. The rationale for reform was clear: the power to appoint judges can be seen as a potential source of patronage and has the potential to damage the judiciary’s independence from Government.
- 4.11 However, under the current system the executive remains involved in the process – as explained at paragraph 3.9 to 3.15, the executive continues to have a residual role in the appointment of judges. While the Judicial Appointments Commission recommends to the Lord Chancellor candidates for appointment to judicial office, the Lord Chancellor may then accept, reject, or ask for the selection to be reviewed.<sup>26</sup> The formal power of appointment (as distinct from the selection process and the decision as to who to appoint or recommend for appointment) rests with The Queen for a number of senior judicial posts, but on the advice of the Lord Chancellor or in certain cases the Prime Minister, while the majority of appointments are made by the Lord Chancellor.
- 4.12 Nevertheless, the current system was designed to provide, through a number of checks and balances between the Judicial Appointments Commission, the executive, and judiciary, and with the additional oversight of the Judicial Appointments and Conduct Ombudsman, very little scope for the executive to make political choices when appointing judges or advising The Queen to make such appointments. And the CRA, for the first time, enshrined the principle of judicial independence in legislation.<sup>27</sup>

<sup>26</sup> For any Law Lord appointments, the Judicial Appointments Commission is not involved in the process and decisions are taken by the Lord Chancellor in consultation with senior judiciary (although this will formally cease when the Supreme Court comes into being). The Lord Chancellor has now agreed that for any appointments of Law Lords which need to be made before the CRA provisions implementing the Supreme Court come into force, he will follow selection procedures equivalent to those set out in the CRA for Supreme Court appointments.

<sup>27</sup> CRA s3.

### Why retain a role for the Lord Chancellor?

- 4.13 First and foremost, the Government has responsibility for the justice system overall, including the efficiency and effectiveness with which justice is delivered via the courts, and the level to which they are resourced. As Lord Browne-Wilkinson has pointed out, "However important the system of justice may be, its demands have to be weighed against the competing demands of other public services. The question of how the available national resources are to be divided between the various functions of government is essentially a political question. Therefore, in the last resort, the amount of the total legal budget must be determined politically and controlled by parliament."<sup>28</sup>
- 4.14 Some have argued that a role for the executive in the appointments process, at least in relation to senior appointments, is essential to maintaining the executive's confidence in the senior judiciary.<sup>29</sup> The Lord Chief Justice commented in a recent speech that: "there is a case for a limited power of veto in relation to the most senior appointments. The senior judiciary today have, to some extent, to work in partnership with government. It would, I think, be unfortunate if a Chief Justice were appointed in whose integrity and abilities the Government had no confidence."<sup>30</sup>
- 4.15 If the executive were completely removed from decisions on appointments, this would increase separation between the executive and judiciary. However, a side-effect of this might be that the Lord Chancellor would cease to operate so effectively as a bridge between the judiciary and Government. There would also be a risk that the Lord Chancellor would be seen as less inclined to defend the judiciary against criticism, despite the requirement under CRA for the Lord Chancellor to uphold and defend the continued independence of the judiciary.
- 4.16 Further, reducing or removing the executive's role would reduce or remove the "long-stop" mechanism in the CRA, whereby the JAC's individual recommendations can be challenged. Although this power to reject a selection, or ask the JAC to reconsider, has not been exercised since the CRA came into force, its existence means that the JAC's ability to recommend selections to individual vacancies is capable of being subject to some degree of scrutiny. There is, therefore, a mechanism for at least requiring reconsideration of, and preventing, the appointment of individuals who are either unsuitable, or are not the best on merit for a particular post. It is possible that another body – perhaps the judiciary itself – could

<sup>28</sup> Public Law, 1988.

<sup>29</sup> For example, Professor Robert Hazell, Constitution Unit, evidence to the Select Committee on the Constitutional Reform Bill, 6 April 2004.

<sup>30</sup> Commonwealth Law Conference Speech, Nairobi, 12 September 2007.



perform that function, although there are obvious benefits in having this function operate before the final decision is made, rather than having concerns about individual appointments raised after an appointment has been made.

- 4.17 The executive plays a wider constitutional role in appointments. In our constitution, The Queen directly appoints Ministers, the more senior judges and other public office-holders. It is a constitutional convention that The Queen does so on the advice of the Prime Minister or other Ministers, rather than by exercising her own discretion. This is so that Ministers can be held to account for those decisions. This fact provides a rationale for retaining a role for Ministers in the process. For their advice to be meaningful, it can be argued that a Minister should have at least some say in the recommendation.
- 4.18 Ministers are accountable to Parliament for the decisions they make and for the advice they give to The Queen. Therefore, they need to be able to defend it. To defend it, they must be confident in it, and therefore, arguably, they should be able to question the decision that was made, or at the very least to have some leverage over or ability to question the overall process. If the role of Ministers were further reduced or removed entirely, an alternative mechanism for providing that accountability would need to be found.

### Arguments in favour of further reform

- 4.19 Under the existing arrangements, the final decision in making judicial appointments or recommendations for appointments rests in the hands of the Lord Chancellor, who is a member of the executive and, since the CRA, no longer a judge. While the Lord Chancellor cannot substitute a different name for the one put forward by the JAC or selection panel, and has to give reasons for rejecting a name, there is still scope for him or her to turn down a recommended name. He or she therefore retains a degree of control over who is appointed.
- 4.20 It might be argued that appointments by Ministers can be perceived as a source of patronage. While there is always the danger that any Ministerial involvement in appointments could lead to such a perception, the changes put in place by the CRA are designed to protect against this, by placing limits on the Lord Chancellor's powers and by moving control of the selection process to the Judicial Appointments Commission.

## Options for reducing the executive's role

### Scope

- 4.21 Although the JAC makes recommendations to the Lord Chancellor, the Lord Chancellor nevertheless remains responsible, on the basis of those recommendations, which he or she has the power to question, for the making of appointments – either directly, or by advising The Queen – to all levels of the judiciary. This includes both fee-paid (part-time) and salaried (full-time and part-time) offices. The range of offices to which appointments are made includes Tribunals (which vary greatly in size and nature) and the full range of judges in the courts – appointments to the District and Circuit Benches, the High Court, the Court of Appeal and the Lord Chief Justice and Heads of Division (the Master of the Rolls, President of the Queen's Bench Division, President of the Family Division and the Chancellor of the High Court).
- 4.22 Any options for change could apply to the full range of appointments, or be focussed on appointments other than the more senior appointments (the Lord Chief Justice, Heads of Division and, perhaps, the Court of Appeal and new Supreme Court). This would be on the basis that these posts are the most important for the wider administration of justice and for establishing case law. Given the importance of the High Court, it might also be considered appropriate to include these appointments. Safeguards would continue to be necessary since it is fundamental that the independence of the judiciary and particularly of those in the most senior positions is maintained.

### Executive's ability to reject individual selections

- 4.23 The Government could consider removing or further limiting the Lord Chancellor's ability to reject a selection made by the JAC. Currently, the Lord Chancellor may only reject a selection by the JAC on the grounds that, in his or her opinion, the person selected is not suitable for the office concerned, or, in the case of some appointments, for the particular functions of the office. The Lord Chancellor must give reasons in writing for rejecting a selection. In considering whether the power to reject a selection should be retained, the Government would like to hear views (see Question 4 below) on the circumstances in which it would be legitimate for a Lord Chancellor to reject a selection, rather than merely ask for it to be reconsidered, and whether that power of veto adds value to the system. The Government would also be interested to hear views as to the circumstances in which the exercise of the power to reject a selection would be inappropriate.

**Executive's ability to require reconsideration of individual selections**

- 4.24 The Government could also consider going further, reducing or removing entirely the Lord Chancellor's ability to require the JAC to reconsider a selection. Currently, the Lord Chancellor may only require reconsideration of a selection on the grounds that, in his or her opinion, there is not enough evidence that the person is suitable for the office concerned or that there is evidence that the person is not the best candidate on merit. The Lord Chancellor must give his reasons in writing. The Government would be interested to hear views (see Question 4 below) on whether this function is appropriate, and on the circumstances in which a requirement that a selection be considered again could strengthen rather than undermine the appointments process.

**Process for rejecting or requiring reconsideration**

- 4.25 A further permutation would be to reduce the number of times the Lord Chancellor may reject a selection or require the JAC to reconsider its selection. The current system operates on a "three strikes and you're in" basis, so that the Lord Chancellor must accept the JAC's selection if he or she has already sent it back twice. If the Lord Chancellor rejects the first selection, then he or she may not reject the second, but must accept it, or ask for it to be reconsidered. Similarly, if the Lord Chancellor has asked for the first selection to be reconsidered, he or she may not then ask for it to be reconsidered again, but must either accept or reject it. If the latter, the Lord Chancellor must then accept the next name that is provided, or the original name he asked to be reconsidered. The Government could consider modifying this system, to reduce the number of stages at which the Lord Chancellor may reject a selection or require reconsideration. This would reduce the executive's ability to question the selection, while still providing a means of checking the possibility of an unacceptable appointment.

**Ability to question overall process only**

- 4.26 One option for consideration is to go further by reducing the Lord Chancellor's role to a largely formal one. The Lord Chancellor would be able to question the process operated by the JAC, but would not be able to question individual selections. In relation to individual selections, the Lord Chancellor would act as a formal conduit between the JAC and The Queen for more senior appointments, or simply as the appointing authority for all others. This approach would fit with the existing constitutional convention that The Queen makes appointments on the advice of Ministers, and with the idea that the Lord Chancellor is responsible to Parliament for appointments, as he or she would retain the ability to question the processes used by the JAC.

**Removal of the Prime Minister from the process**

- 4.27 Another option is to look at the role of the Prime Minister in the process. Currently The Queen appoints the most senior judges (the Law Lords,

Lord Chief Justice and Heads of Division, and Court of Appeal judges) on the advice of the Prime Minister or on the recommendation of the Lord Chancellor. In reality, the Prime Minister also acts on the advice of the Lord Chancellor and it is difficult to imagine a situation where the Prime Minister had access to any further information which could lead him to question the advice. The Government would be interested to hear views (see Question 4 below) on whether the Prime Minister should continue to play a limited role in the appointment of senior judges under the current system and under the arrangements for appointments to the new Supreme Court.

### **Complete surrender of executive's role**

- 4.28 This would require the final decision-making on appointments to be taken by someone else.<sup>31</sup> In the case of more senior judicial positions, this would require that person or body to recommend names for appointment directly to The Queen. For the majority of positions, some person or body would need to replace the Lord Chancellor as appointing agent.
- 4.29 Responsibility for final decision-making could be transferred to the Judicial Appointments Commission or to some other body. Since the JAC already proposes a single name rather than list of names for a vacancy, this would not significantly add to the JAC's functions. However, it would arguably concentrate too much responsibility for appointments in one place.

### **Accountability and a check on the process**

- 4.30 Currently, the executive acts as a check on JAC appointments. If the role of the executive is reduced or removed, there is a risk that the accountability to Parliament which exists under the existing arrangements would be reduced as the Lord Chancellor could not be held to answer to Parliament for the process to the same degree. In addition, despite the rigour of the JAC processes and the statutory requirement to select solely on merit, confidence in the appointments system may require that there should be at least the possibility of some other check on the process. Ideally, this would be before appointments are made. An unintended consequence of a change in this direction could be to put the JAC under more pressure from Parliament and over time call its independence into question.
- 4.31 At present, the JAC is required to consult the Lord Chief Justice and other members of the judiciary, although it is not obliged to follow consultees' views. The Judicial Appointments and Conduct Ombudsman is also able to investigate the JAC's processes, but any investigation would usually take place after a decision had been made. The Lord Chancellor can also

<sup>31</sup> If this option is followed, consideration would need to be given to the Executive's role in discipline and removal of judges.

withdraw a request to the JAC if he considers there to have been problems with the selection process.

- 4.32 If a check on the JAC's operation of the selection process is thought to be of value, consideration needs to be given to who would be best placed to act as that check, other than the Lord Chancellor. It might be possible to create a role for the Lord Chief Justice, as head of the judiciary, in acting as a final check on the JAC's decision. On the other hand, the judiciary is already involved in the process at various stages, and it might be argued that further involvement would be perceived as concentrating too much influence in their hands. In addition, an enhanced role for the judiciary would reduce accountability to Parliament, unless the Lord Chief Justice could be held to account in some way for his role in appointments.

#### **A role for Parliament?**

- 4.33 Some have argued that there might be benefits in Parliament exercising a greater role in relation to judicial appointments.<sup>32</sup> Parliament already has the power to call for evidence and witnesses, and is able to question the JAC, including on any issues arising out of the JAC's annual report, and the Judicial Appointments and Conduct Ombudsman (JACO), in relation to the investigation of complaints about the process. In comparison with other countries' appointments systems, however, Parliamentary involvement in our system of judicial appointments is minimal, so arguably we would not want to *reduce* Parliamentary involvement.
- 4.34 As we have seen, the judiciary is not accountable to Parliament in the same way as the executive is, and although the Lord Chief Justice and Heads of Division now sometimes appear before the Constitutional Affairs Select Committee, they do so as representatives of the judiciary as a whole rather than as individuals, accountable for their decisions. Any move towards focusing on the individuals and their individual views would undoubtedly be highly controversial.
- 4.35 This is in contrast to the position in some other jurisdictions, most notably the United States, where appointments by the President to the Supreme Court are subject to the "advice and consent" of the Senate and where the political views of appointees are the focus of the discussion at confirmation hearings.
- 4.36 To adopt such an approach in this country could lead to the strong perception that judicial appointments were being politicised, and such a perception could have an impact on confidence in the independence of the judiciary. Even though it would not be open to Parliament to substitute its own candidate, and it would have to rely on those candidates selected

<sup>32</sup> For example, Professor Vernon Bogdanor: [http://www.ukpac.org/bogdanor\\_speech.htm](http://www.ukpac.org/bogdanor_speech.htm)

by the JAC, there would nonetheless be the risk that the decision to confirm or reject could be based on factors other than the candidate's ability to do the job effectively. The questioning during the hearing could stray away from the candidate's experience into matters of a more political nature.

- 4.37 There are other difficulties with a Parliamentary veto over appointments. If a Select Committee chose to reject a candidate, there would be a potentially significant delay in the appointments process and posts could be left vacant for long periods of time. One further likely side-effect of pre-appointment hearings is that the prospect of having to appear before a Parliamentary committee may discourage potential candidates from applying, particularly at the lower levels. This could have a severe impact on the ability of the JAC to select the best candidates for posts and could reduce the numbers of high-quality applicants from diverse backgrounds who were willing to put themselves forward. But it may be that once the process bedded in, and firm ground rules were set, the number of applications would regularise.
- 4.38 In addition, although Select Committees aim to work by consensus, it is possible that any voting to confirm or reject an appointment would be along party lines. Given the executive's inbuilt majority on Commons Committees, this would not in practice remove the executive from the decision-making process on appointments.
- 4.39 Finally, there is the practical question of Parliamentary time and resources. It does not seem possible that hearings could be held for the thousands of Magistrates, Tribunals, Recorder, and District bench appointments made each year. Even the Circuit Bench, usually with over 50 appointments in any year, and the High Court, with 10 or more per year, would be problematic. One solution might be to restrict hearings to only the most senior appointments (Court of Appeal and above), and to make the decision to hold a hearing discretionary.
- 4.40 The Government recognises that pre-appointment hearings could be a way of giving Parliament a real and meaningful say in appointments. However, for the reasons outlined above, the Government has serious reservations about adopting this approach. The Government considers that the independent selection process provided by the JAC is the best way to identify the best candidates on merit, and with no political input into the decision making.

- 4.41 An alternative option would be to allow Parliament, perhaps through a Select Committee, to hold non-binding hearings on appointments before they were confirmed. This approach would allow for a similar level of scrutiny of the JAC's selection as the model outlined above, but without some of the difficulties posed by a formal power of veto.
- 4.42 However, the Government's view is that the risk of politicisation, or perception of politicisation, would still remain even under this option. If the issue under consideration at the hearing was whether or not the selected candidate was right for the post, it is difficult to see how the committee would perform that role and what factors it would base its advice on. In the case of judges, the qualities needed – intellectual capacity, sound judgement, integrity and merit – are specifically tested through the JAC's selection process in an open and transparent manner. It is difficult to see what questions the committee could ask to add to that process.
- 4.43 In addition, the non-binding nature of the hearings could lead to a situation in which Parliament had publicly cast doubt on an appointee's capabilities or suitability for office. This would potentially be very damaging for the candidate in question once confirmed in post.

#### **Post-appointment hearings**

- 4.44 A further possible option might be for Parliament to hold Select Committee hearings for candidates after they have been appointed but before they take up post. This is similar to the approach the Treasury Select Committee takes in relation to new Governors and Deputy Governors of the Bank of England, and other members of the Bank's Monetary Policy Committee.
- 4.45 Such an approach would allow for a degree of Parliamentary oversight of the JAC's decisions in relation to individual appointments, but without influencing the appointments themselves. This approach is therefore less likely to lead to the perception of politicisation of the appointments process than other models, such as the binding pre-appointment confirmation hearing that take place in the United States. However, some risk of perceived politicisation could remain, since MPs would be able to question judges on an individual basis in a way that does not currently happen.
- 4.46 An added advantage is that this approach would be unlikely to result in additional delay to the appointments process, since hearings could take place once the appointment had been made, and taking up the post would not be contingent on a hearing having taken place.
- 4.47 The issue of Parliamentary resources remains, however, and unless such hearings were restricted to the most senior posts, it is difficult to see how Parliament could cope with such numbers of hearings.

- 4.48 Aside from perceived politicisation, there appear to be two other significant disadvantages to this approach. Firstly, it is likely that there would still be a reduction in the number of candidates applying for posts. Secondly, it is not immediately clear what benefits post-appointment hearings would add to the process. It could be argued that they would create a stronger link between Parliament and the judiciary by allowing MPs the opportunity to get to know senior judges before they take up office. But if a stronger link between Parliament and the judiciary and greater accountability of the judiciary is what is sought, there are other ways to achieve that, for example the presentation by the Lord Chief Justice of an annual report to Parliament on judicial matters. If the objective of hearings is to ensure effective scrutiny of the JAC's selection, the fact that they would take place after appointments had been made would mean that if, as a result of a hearing, the Select Committee casts doubt on an appointee's suitability for office, there would in reality be very little, if anything, that could be done to remedy the position. This would also put the judge in a very difficult position.
- 4.49 There is one set of senior judges for which post-appointment hearings of a specific kind might be considered to be more suitable. Certain senior judges – the Lord Chief Justice and the Heads of Division (the Master of the Rolls, President of the Queen's Bench Division, President of the Family Division and the Chancellor of the High Court) – have specific leadership roles within the judiciary and are responsible for the deployment of judges and judicial work and for representing the judiciary within their area. It might be deemed appropriate for Parliament to hold post-appointment hearings in relation to those administrative roles, rather than in relation to the appointees' role as sitting judges. This could be partly as a familiarisation exercise with those key judicial members before they take up post, and partly with a view to questioning the appointees on how they intend to approach the challenges of office (in relation to their "non-judicial" functions). The Lord Chief Justice commented in a recent speech that, in his view, Select Committees do provide an appropriate forum for the senior judiciary to discuss issues relating to the administration of justice, albeit not in the specific context of post-appointment hearings.<sup>33</sup>
- 4.50 At that most senior level, it may be much less likely that the prospect of a Parliamentary hearing, especially if post-appointment, would have an impact on candidates' willingness to put themselves forward for posts. Equally, if hearings were restricted to only those most senior judicial appointments, it is unlikely that hearings would have a significant impact on Parliamentary resources. Finally, since such hearings would not address the appointees' roles as judges in individual cases, it is arguable that such hearings would not adversely affect judicial independence.

<sup>33</sup> Commonwealth Law Conference speech, Nairobi, 12 September 2007.



**Parliamentary scrutiny of the judicial appointments process**

- 4.51 As an alternative to, or possibly in addition to, a formal Parliamentary role in relation to individual appointments, there might be benefit in Parliament taking a more active role in scrutinising the procedure used by the JAC to select judges. While Parliament already has the power to call for evidence and witnesses, there might be merit in encouraging a greater Parliamentary role, especially if the Lord Chancellor's current role is to be reduced. Such an approach would ensure that there was proper scrutiny of the processes used, but without straying into the territory of politicisation.
- 4.52 To assist in this function, the existing powers of the JACO in investigating JAC selection processes could be used. Parliament might be encouraged to make more use of existing methods to draw specific concerns to the attention of the Lord Chancellor, who could then require JACO to investigate. This would ensure that the scrutiny and investigation function could be performed making use of JACO's expertise as an independent Ombudsman.
- 4.53 A further variation on this would be to enable Parliament to call on the JACO directly at any time: this would arguably necessitate a transfer of responsibility for the JACO from the Lord Chancellor to Parliament, along with responsibility for resources. Unless the executive were to play no role at all in respect of appointments, it would be necessary to consider whether the Lord Chancellor should retain the existing power to call on the JACO to carry out an investigation (albeit with the JACO still, ultimately, being responsible to Parliament).
- 4.54 Considering the doctrine of separation of powers and the principle that power should not be too concentrated in one arm of state without proper accountability arrangements involving at least one of the other two arms:

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

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

***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?***

***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?***

***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?***

## Operation of the existing arrangements

4.55 The current system for making judicial appointments is outlined at paragraphs 3.8 to 3.23. Experience of operating the CRA has thrown up a number of areas where changes to the legislation could be beneficial in increasing the efficiency and effectiveness of the appointments system overall. These are set out below.

### **Deployment, Authorisations, Nominations, and Extensions of Service**

4.56 The Lord Chancellor, in consultation with the Lord Chief Justice, is responsible for the efficient and effective administration of the court system. This includes deciding the overall numbers of judges needed, together with decisions on the number required for each Division, jurisdiction, region and the number needed at each level of the judiciary. Within the broad framework set, deployment issues are for the Lord Chief Justice. There is also a range of nominations to various posts, which are similar to deployment (for example, particular judges may be nominated to deal with specific areas of business). Such nominations and assignments are made by the Lord Chief Justice, after consultation with the Lord Chancellor. Similarly, authorisation of serving judiciary to sit in particular courts is for the Lord Chief Justice, but requires consultation with, or sometimes the concurrence of, the Lord Chancellor. The Lord Chancellor's concurrence is required for extending service of judicial office holders who have reached retirement age, due to the resource implications.

4.57 In addition, the nomination of judges to fill posts that provide judicial leadership, but which do not involve formal promotion – for example, Presiding Judges and Resident Judges – are for the Lord Chief Justice, but on the basis of either the concurrence of, or consultation with, the Lord Chancellor. Prior to the CRA, all matters of deployment and authorisation lay with the Lord Chancellor in his role as the head of the judiciary (albeit after discussion with the Lord Chief Justice). Under the 2004 Concordat that led to the Act, it was felt that, once the Lord Chief Justice took over as head of the judiciary, there would be a need for concurrence or consultation. This reflected the fact that the Lord Chief Justice would be exercising a function which he had not previously carried out, and the Lord Chancellor retained responsibility for the overall delivery of justice and the courts, including resourcing, and enabled Ministers to bring to the Lord Chief Justice's attention any local considerations that would affect the qualities needed by a judge in a particular community.

4.58 The Government would welcome views on whether the need for the Lord Chancellor's concurrence or consultation should be retained for decisions on authorisation, nomination, assignment, and extensions of service. There is now over a year's experience of operation. In that time, the Lord Chancellor has always accepted the Lord Chief Justice's proposals. There

are many situations in which the concurrence or consultation of the Lord Chancellor is required, and a significant amount of senior officials' time is taken up in obtaining this. Subject to comments received in this consultation process, the Government is willing to reconsider whether it should be necessary to be consulted or to concur in these decisions, as long as decisions concerned do not have expenditure implications.

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

#### **Delegation of the Lord Chancellor's functions**

- 4.59 The Lord Chancellor has a number of functions in relation to judicial appointments. These include making or recommending appointments, concurring with some of the Lord Chief Justice's decisions (nominations, authorisations, and extensions of service for judges), and being consulted (eg in relation to some nominations, assignments, and authorisations by the Lord Chief Justice). Judicial appointments need to be made in a timely fashion, and channelling all decisions through the Lord Chancellor risks creating a bottleneck in the process. We think that, in some circumstances, these functions may be exercised by junior Ministers and (at least as regards consultation) senior officials. On the assumption that these functions are retained by the Lord Chancellor, we invite views about setting out in legislation the limits of these powers to delegate, and invite your views on what those limits should be. Decisions would still be made on behalf of the Lord Chancellor, and he or she would remain ultimately accountable.

***Q10: Should the Lord Chancellor's functions in making or recommending judicial appointments be exercisable by junior Ministers or senior officials, or should the Lord Chancellor always exercise those functions personally?***

***Q11: Should the Lord Chancellor be required to act personally when making or recommending judicial appointments above a certain level, and if so, what should that level be?***

***Q12: Should it be possible for junior Ministers or senior officials to act on behalf of the Lord Chancellor, when his concurrence or consultation is required in relation to nominations, assignments, authorisations, or extensions of service?***

#### **Eligibility criteria for judicial office**

- 4.60 Whether someone is eligible to apply for judicial office depends on a combination of both statutory and non-statutory factors. Statutory conditions are set out in relevant legislation. For individual tribunals this can vary from quite specific conditions covering specific knowledge and experience, to a more general provision allowing the Lord Chancellor (or

the responsible Secretary of State for tribunals not part of the Tribunal Service) to determine eligibility. For the courts, statutory eligibility is based on possession of an appropriate legal qualification for a specific period, and following implementation of the Tribunals, Courts and Enforcement Act 2007, legal experience. In practice, non-statutory eligibility criteria are added, either to ensure that applicants have sufficient, relevant experience for judicial office (for example, the Lord Chancellor's current policy is that applicants for salaried judicial office, in addition to meeting relevant statutory criteria, should normally have completed two years, or 30 sitting days, in a fee-paid judicial office), or to deal with the particular needs of specific posts (for example, it may be decided that the ability to speak Welsh would be a desirable factor, or even a requirement, for a judicial post in Wales, or candidates should have specific legal or judicial experience in a particular field of law, or a certain level of judicial experience).

- 4.61 At present, legislation is unclear on where ultimate responsibility for non-statutory eligibility lies and, as a result, currently the Lord Chancellor and the JAC jointly consider what is appropriate. There can, therefore, be some degree of tension between the JAC's statutory requirement to have regard to the need to encourage diversity in the range of persons available for selection for appointments and the business need to ensure that specific posts are filled by those best able to do the job needed. The Government, within the absolute need to appoint on merit, is committed to promoting a diverse judiciary. However, in considering the eligibility requirements for some particular judicial appointments vacancies, a key consideration must be business need, and additional eligibility requirements, such as specific experience, may be needed to ensure that these are met. The Government would welcome views on whether the law should be changed to clarify the overriding nature of business need and whether the Lord Chancellor should be ultimately responsible for deciding on non-statutory eligibility criteria.

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

#### **Medical checks**

- 4.62 The CRA provides that the Lord Chancellor can request that the JAC carry out an assessment of the health of those selected for judicial office. Medical checks are an important factor in ensuring that those who are going to be appointed to salaried judicial office have no health problems which might impact on their ability to deliver a reasonable length of service. Salaried judicial office holders cannot easily be removed from that office and generous pension arrangements are attached, so there is a significant issue of properly protecting the public purse. Such medical checks have been a long-standing part of the selection and appointment

process, but do add significant time (at least several weeks) before they are completed and formal offers of appointment can be made. Together with the need for appointees to arrange release from work commitments (which, in the case of barristers involved in lengthy cases, or partners in law firms, can take several months), there can be significant delay before new judges can take up their duties.

- 4.63 The Government is considering amending the law to put beyond doubt that medical checks can be carried out earlier in the selection process. By allowing for checks to be carried out at an earlier stage (for example concurrently with the checks on character that the JAC has to carry out before it puts selections forward) there would be potential for a significant time saving and it would be possible to get new judges in post more quickly. However, there could be a small risk that some candidates are required to have medical checks even though they are subsequently not appointed (for example because the Lord Chancellor exercises his power to reject that person's selection).

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

#### **Vacancy Notices**

- 4.64 The CRA provides that the formal process of selecting people for judicial office begins when the Lord Chancellor, having consulted the Lord Chief Justice, makes a request for a selection to the Judicial Appointments Commission, known as a Vacancy Notice. In practice, informal discussions about forthcoming vacancies take place between the Ministry of Justice, Her Majesty's Courts Service, and the judiciary for some time before the formal Vacancy Notice is issued. At present the legislation could be interpreted as limiting the ability of the Commission to take any action before receipt of the Vacancy Notice. It has been suggested that this legal framework reduces the scope available to the Commission to plan ahead for the selection programme and that more efficient and speedy processes would be possible if it was clear that the Commission had the power to take the early steps in planning a selection process before receiving the formal Vacancy Notice: for instance, selection panels could be appointed and advertising plans made, thus saving time after the Vacancy Notice has been issued.

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

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

## Scotland and Northern Ireland

### Scotland

- 4.65 Scotland has its own separate legal and judicial system. Since devolution, the Scottish Executive has had the power to make judicial appointments, and since 2002 these have been based on the recommendations of the Judicial Appointments Board for Scotland. The Board has not yet been put on a statutory footing, although this is included in the recent Proposals for a Judiciary (Scotland) Bill. The Scottish Executive retains more say in appointments than is the case in England and Wales, although in practice the recommendations of the Board are followed, and there are no proposals to change this approach. Any change in the role of the executive in England and Wales would not have a direct impact on the process for making judicial appointments to the Scottish courts.
- 4.66 However, there are a number of judicial posts where appointments, despite being the responsibility of the Lord Chancellor, have an impact on Scotland. These occur principally in the context of GB/UK-wide tribunals (for example, the President of the Appeals Tribunals and the Copyright Tribunal) where consultation with the Scottish Executive currently takes place before recommendations are accepted and appointments confirmed. If the role of the Lord Chancellor were to change, the issue of such consultation would need to be addressed.

### Northern Ireland

- 4.67 The position in Northern Ireland is different. Although the Northern Ireland judiciary are separate from those in England and Wales, with their own Lord Chief Justice, and there is a separate Judicial Appointments Commission, appointments are still made by the Lord Chancellor (or by The Queen on the advice of the Lord Chancellor or Prime Minister). Further, the Northern Ireland Judicial Appointments Commission does not handle the selection of the Lord Justices of Appeal or the Lord Chief Justice.
- 4.68 In the event of devolution of justice and policing responsibilities to the Northern Ireland Assembly, provision is made for responsibility for appointments to pass to the First Minister and Deputy First Minister (although Lord Chief Justice and Lord Justices of Appeal appointments will remain with The Queen, on the recommendation of the Prime Minister, after consultation with the First Minister and Deputy First Minister and Lord Chief Justice or Senior Lord Justice of Appeal).<sup>34</sup>

<sup>34</sup> Section 12 of the Judicature Act as amended by Section 4 of the Justice (Northern Ireland) Act 2004.

- 4.69 If this happens, then any changes to the role of the Lord Chancellor would cease to have any direct impact on the Northern Ireland position, although the Lord Chancellor will still have a role in respect of pay and conditions.
- 4.70 There are similar issues to Scotland in respect of consultation on UK-wide appointments.

### The Supreme Court

- 4.71 The CRA creates a new judicial body, the Supreme Court of the United Kingdom. When the relevant provisions of the CRA come into force (currently expected to be October 2009) the Supreme Court will replace the House of Lords as the highest appellate body in the UK. As a UK-wide body, any changes to the role of the Lord Chancellor and the Prime Minister would have implications for the devolved legislatures, particularly if there were to be greater oversight by Parliament of appointments to the Court.
- 4.72 Under the arrangements in the CRA for appointments to the Supreme Court, when the Lord Chancellor receives the report of the selection commission, he must consult the relevant senior judiciary and the First Minister in Scotland, the Assembly First Minister in Wales and the Secretary of State for Northern Ireland. If it is accepted that the executive, in the form of the Lord Chancellor and the Prime Minister, should be removed entirely from the appointments process, there would appear to be no good reason for retaining the need to consult the devolved administrations. However, if Parliament were to be given a greater role, then the devolved assemblies might need to be given a scrutiny role, or consulted.

## Summary of consultation questions

We would welcome responses **by 17 January 2008** to the following questions set out in this consultation paper.

**Question 1:** Do you consider these principles for judicial appointments to be broadly right?

**Question 2:** Are there any other fundamental principles that should underpin the process for judicial appointments?

**Question 3:** Do you consider the existing arrangements for making judicial appointments properly take account of these principles?

**Question 4:** Should the current role of the executive in judicial appointments be altered? If so, how?

**Question 5:** Should the current role of the judiciary in the process be altered, and if so how?

**Question 6:** 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?

**Question 7:** 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?

**Question 8:** 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?

**Question 9:** Should the need for consultation or concurrence be removed for decisions on authorisation, nomination, assignment, and extensions of service?

**Question 10:** Should the Lord Chancellor's functions in making or recommending judicial appointments be exercisable by junior Ministers or senior officials, or should the Lord Chancellor always exercise those functions personally?

**Question 11:** Should the Lord Chancellor be required to act personally when making or recommending judicial appointments above a certain level, and if so, what should that level be?



**Question 12:** Should it be possible for junior Ministers or senior officials to act on behalf of the Lord Chancellor, when his concurrence or consultation is required in relation to nominations, authorisations, assignment, or extensions of service?

**Question 13:** Do you agree that the Lord Chancellor should ultimately have the responsibility for determining eligibility criteria for specific judicial posts?

**Question 14:** Should medical checks be carried out earlier in the selection process?

**Question 15:** Should the CRA be amended to allow the Judicial Appointments Commission to take the preliminary steps in a selection process before a formal Vacancy Notice is received?

**Question 16:** Are there, in your view, any additional changes that should be made to the judicial appointments process?

## How to respond

An electronic version of this questionnaire is available on the Ministry of Justice website. Please email your completed form to:  
[judicialappointments@justice.gsi.gov.uk](mailto:judicialappointments@justice.gsi.gov.uk)

Alternatively, please send your response to:

**Judicial Appointments Consultation  
Ministry of Justice  
2.21 Selborne House  
54-60 Victoria Street  
London  
SW1E 6QW**

**Tel: 020 7210 1832  
Fax: 020 7210 8283**

**Email: [judicialappointments@justice.gsi.gov.uk](mailto:judicialappointments@justice.gsi.gov.uk)**

### Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at <http://www.justice.gov.uk/index.htm>

### Publication of response

A paper summarising the responses to this consultation will be published within three months of the closing date of the consultation. The response paper will be available on-line at <http://www.justice.gov.uk/index.htm>

### Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

## Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

## Impact assessment

Initial analysis of the potential changes to the judicial appointments process canvassed in this paper does not indicate any impact, direct or indirect, on businesses, local government, or on the third sector (charities or the voluntary sector). Consequently, and given that the Government does not put forward a preferred option or set of options at this stage, no formal Impact Assessment (formerly Regulatory Impact Assessment) is attached to this consultation document.

In terms of costs and benefits on the public sector, we believe that any reduction in the role of the executive in relation to appointments would have a negligible impact on Ministry of Justice resources. Similarly any such change would be unlikely to have more than a negligible impact on the Judicial Appointments Commission or its service delivery. Any impact would depend on the scale of change proposed.

In terms of an increased role for Parliament, as the paper notes, increased use of select committee hearings would have implications for Parliamentary resources, although it is almost impossible at this stage to gauge that impact. This would of course depend on the extent Parliament was willing to become involved in the process.

Similarly, an increased role for the Judicial Appointments and Conduct Ombudsman would have resource implications, but the extent of those implications would depend on the extent to which JACO was to be involved. An increased role for JACO would have implications in turn for JAC resources and JAC service delivery, but again, this is difficult to quantify at this stage.

# Judicial Impact Assessment

## Role of the judiciary

We do not consider that any of the options discussed in the consultation paper would significantly alter the role of the judiciary, although the paper does seek views on whether the role of the judiciary in relation to appointments should increase or decrease.

Any change to the judicial appointments process made as a result of consultation would be designed to support and further enhance judicial independence from Government, by reducing the role of the executive in relation to appointments. The paper highlights the risks of an enhanced Parliamentary role in relation to individual appointments to judicial independence and perceptions of politicisation.

## Judges

We do not consider that any of the options canvassed in the paper would have an impact on the type and number of judges. As we point out in the paper, the option of pre-appointment Parliamentary hearings could add delay to the appointments process. However, the Government has made clear that it does not favour this option for a number of reasons.

## Tribunal judiciary

The options in this paper have no impact on tribunals, nor would they lead to the creation of any new tribunals.

## Timing

Any changes to the judicial appointments process would clearly have an impact on the current arrangements for appointing judges, although we consider that the impact on the current selection process operated by the JAC would be minimal, with the focus on the decision point in making appointments.

## Consultation

We have consulted representatives of the judiciary to gauge initial views on the issues presented in this paper. We look forward to receiving a formal response to the consultation paper from the judiciary in due course.

### **Training**

We do not consider that any of the options discussed would have any impact on judicial training.

### **Location**

We do not consider that any of the options put forward would have any particular disproportionate regional or local impact. Any changes would apply across England and Wales.

## Equality Impact Assessment

The initial EIA on the judicial appointments consultation concludes that none of the options consulted on would affect equality. There is no proposal to move away from the overriding principle of selection on merit, or from any of the existing obligations concerning judicial diversity under the current system.

The paper does not propose any change to the role of the Lord Chancellor in improving judicial diversity. A trilateral Judicial Diversity Strategy was agreed in 2006 between the Lord Chancellor, the Lord Chief Justice and Chairman of the Judicial Appointments Commission. The Lord Chancellor's overall policy aim is to bring about a more diverse judiciary with increased understanding of the communities it serves. This will ensure a judiciary of the highest quality, and contribute to the wider aim of increased public confidence in the justice system.

The Judicial Appointments Commission has statutory responsibility for encouraging diversity in the range of persons available for selection and also for ensuring fair and open selection processes and is accountable to the Lord Chancellor for delivering against this responsibility. The proposals in this paper do not impact upon this relationship. They are concerned specifically with the process for making appointments to judicial office, rather than the broader policy framework around judicial diversity.

## The Consultation Criteria

The six consultation criteria are as follows:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the time scale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.



## Consultation Co-ordinator contact details

If you have any complaints or comments about the consultation **process** rather than about the topic covered by this paper, you should contact the Ministry of Justice Consultation Co-ordinator, Laurence Fiddler, on 020 7210 2622, or email him at [consultation@justice.gsi.gov.uk](mailto:consultation@justice.gsi.gov.uk)

Alternatively, you may wish to write to the address below:

**Laurence Fiddler**  
**Consultation Co-ordinator**  
**Ministry of Justice**  
**5th Floor Selborne House**  
**54-60 Victoria Street**  
**London**  
**SW1E 6QW**

If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given under the **How to respond** section of this paper at page 50.

## Annex A: International comparisons

### Australia

In Australia judicial appointments are made solely by the executive on the advice of the Attorney General and without any screening process via an advisory board or committee.

There is an informal consultation process conducted by the Attorney General before making federal judicial appointments. This generally includes consultation with the federal judiciary and the legal profession but is at the discretion of the Attorney General.<sup>35</sup>

The Australian Constitution does not set out specific qualifications required by federal judges and magistrates and judicial positions are not formally advertised. However subsequent legislation stipulates that, to be appointed as a federal judge, an individual must have been a legal practitioner for at least five years or be a judge of another court.

### Canada

In Canada the power to appoint federal judges rests with the executive. Appointments are officially made by the Governor General on advice from the cabinet. Advisory committees screen applicants for the federal judiciary and recommendations are made to the Minister of Justice.

The Judges Act 1985 established a Commissioner for Federal Judicial Affairs who acts on behalf of the Minister of Justice in the administration of judicial appointments through 16 Federal Advisory Committees.<sup>36</sup> Applications for judicial appointment are received by the Office of the Commissioner for Federal Judicial Affairs.

This appointments process applies to the appointment of judges of the superior courts of every province and territory, the Federal Court of Appeal and the Federal Court.

<sup>35</sup> With the exception that the Attorney General must consult the all the state Attorneys General before making an appointment to the High Court.

<sup>36</sup> The creation of a new Judicial Advisory Committee was announced by the Minister of Justice on November 10, 2006 as a one-year pilot project to assess all candidates for appointment to the Tax Court of Canada. If this is ratified the number of committees would increase to 17.

## Membership

Each advisory committee consists of eight members:

- a nominee of the provincial or territorial law society
- a nominee of the provincial or territorial branch of the Canadian Bar Association
- a judge nominated by the Chief Justice or senior judge of the province or territory
- a nominee of the provincial Attorney General or territorial Minister of Justice
- a nominee of the law enforcement community
- and three nominees of the federal Minister of Justice representing the general public.

The Committee Chairs and members are appointed by the Minister of Justice from a list of nominees provided by each of the groups outlined above for two or three year terms with the possibility of a single renewal.

It is the responsibility of the committee to assess the skills and qualifications of each applicant against formal assessment criteria. An assessment is made of whether the committee will 'recommend' or is 'unable to recommend' an individual to the Minister. Applicants are provided with the date but not the results of their assessment. 'Recommended' applicants are kept on a confidential list for two years, during which time they may be selected for appointment by the Minister of Justice. After two years they must resubmit their application.

## Provincial appointments

Appointments to the provincial courts are made by the Lieutenant Governor on advice from the provincial government. Processes for selection and recommendation vary by state but four out of 13 provinces currently have appointment commissions.

While there has been no formalised role for the legislature in the process for making judicial appointments, for the first time in 2006, the Executive referred a proposed Supreme Court of Canada appointment to an ad hoc select committee for consideration.

## Cyprus

The manner of judicial appointments in Cyprus, and the terms of service of its members, are intended to safeguard the independence of judges and exclude the possibility of external influence. The powers, jurisdictions and duties of the Executive, Legislature and Judiciary are specifically defined in separate parts and provisions of the Constitution.

The Judges of the Supreme Court are appointed by the President of the Republic who obtains the recommendations of the Supreme Court beforehand. The selection is usually made from among the senior Presidents of District Courts. To qualify for appointment a candidate must be an advocate with at least 12 years practice (a term which also includes service in any judicial post) and be of high moral standard.

The District Judges, Senior District Judges and Presidents of District Courts are appointed by the Supreme Council of Judicature, a body consisting of the judges of the Supreme Court. Judges of the Courts exercising specialised jurisdiction are also appointed by the Supreme Council of Judicature.

## Czech Republic

The judiciary in the Czech Republic is independent and is not accountable for its activities to the State, either legislative or executive. The Constitution explicitly guarantees independence of the exercise of judicial functions to the extent that the impartiality of judges cannot be challenged.

Judges are appointed by the President of the Czech Republic upon nominations submitted by the Minister of Justice. Eligibility for appointment as a judge in the Czech Republic is contingent on the following conditions: Czech nationality; legal capacity; good character; a university education; personal experience and moral qualities guaranteeing that the judge will duly discharge his functions; and the passing of a professional judicial examination. The appointment becomes effective upon taking the oath before the President of the Czech Republic. Preparations to become a judge involve three years' service as a trainee judge, which takes place in the courts. At the end of their preparatory service, trainee judges sit a professional judicial examination.

## France

Judges in France are civil servants, but enjoy special statutory protection from the executive. There are special procedures for naming, promoting and removing them, depending on the status of the courts in which they sit. Specifically, the appointments of most judges have to be approved by the *Conseil Supérieur de la Magistrature* (High Council of the Judiciary), in which representatives of the judges sit; and they may not be removed from office without specific disciplinary proceedings conducted before the Council, with due process.

The Ministry of Justice has responsibility for the administration of the judicial system, such as the payments of salaries or the construction of new court buildings. It also funds and administers the prison system.

## Membership

The Higher Council of the Judiciary is made up of 12 members as follows:

- five elected by judges
- one public prosecutor
- one councillor of state chosen by his/her peers
- three individuals nominated one each by President of the Republic, the Senate and National Assembly; and
- two ex-officio members – the President of Republic and the Minister of Justice.

## Germany

Germany, as a rule, has career judges, which means that judges spend all or most of their working life in the judiciary. Judges are employed either by the Federal Government or by one of the 16 *Bundesländer* (federal states).

The federal administrations organise their systems of primary recruitment for the judiciary. Within the *Bundesländer* this is usually a function of the relevant Ministry of Justice, although in some states appointments for the social and labour courts come within the remit of the Ministry of Labour and Social Affairs. When a vacancy in a promotion grade occurs, the post is advertised and suitably qualified judges may apply. In many states the recommendation for such appointments is made by a *Richterwahlausschuß* (the judicial selection committee). This committee is composed typically of 11-15 members drawn from the Land Parliament and judiciary, but the appointment is made by the Minister of Justice of the Land. Since this is a genuine election, the committee does not have to give reasons for its decision. In other states, the decision is made by the Minister of Justice. Prior to the decision of the judicial selection committee or the Minister of Justice, an opinion on the suitability of candidates is delivered by the *Präsidentialrat*, a representative organ of the local judges. This opinion is based typically on an assessment of a trial period which the candidate has undertaken sitting in the court to which he or she seeks promotion.

## Membership

The membership of the *Bundesländer* Appointment Boards is not consistent and may include some or all of the following:

- members of the judiciary
- members of the *Bundesländer* Parliament; and
- members of the bar.

The Federal Selection Committee has 32 members:

- 16 representatives of regional Ministries of Justice; and
- 16 elected by the Federal Parliament.

## Hungary

The right to appoint judges lies with the President of Hungary, who, prior to making an appointment, obtains the recommendation of the National Judicial Council (NJC).

Judges are first appointed for three years; after this period the NJC can recommend that they are appointed for an indeterminate period. Judges are assigned to courts by the NJC and specialise in civil, criminal or administrative law.

### Composition of the Council

The National Council of Justice has 15 members made up as follows:

- the President of the Supreme Court (ex officio member)
- nine judge members, who are elected for six years by the judiciary through delegates
- the Minister of Justice
- the Chief Public Prosecutor
- the President of the National Bar Association; and
- two additional ex-officio members of the Parliament, appointed by the Constitutional and Judicial Commission, and the Budget and Financial Commission respectively.

Any judge with at least five years of judicial practice is eligible to be a member of the National Council of Justice. The elector delegates are elected at a full meeting of the Supreme Court, the plenary session of judges of the courts of appeal and the county courts, by the majority of the votes of the judges attending. The nine judge members of the National Council of Justice are elected secretly by the meeting of the delegates of the judges from among the delegates, by a majority of the votes. Simultaneously with the election of the nine judge members, the meeting of the delegates also elects nine alternate members.

The National Council of Justice is a fully independent legal entity, with its own budget, approved by Parliament. The Council was established with regard to the basic principles of independence of the judiciary, and the clear separation of the legislative, judicial and executive powers.

## India

The Indian Constitution, established following independence from British colonial rule in 1950, sets out the process for the appointment of Supreme Court and High Court (state level) judges. Judges are appointed by the President, on advice from the Chief Justice and other senior judges.

In India there is no independent advisory board or judicial selection committee. The legislature plays no role in the appointment of judges.

### Supreme Court Judges

The judges of the Supreme Court are appointed after consultation with the Chief Justice. The Chief Justice is always consulted in the case of a judge other than the Chief Justice. Supreme Court judges cannot be removed from office unless by order of the president and sanctioned by a majority vote in both Houses of Parliament.

In order to be appointed as a judge of the Supreme Court an individual must be a citizen of India and must have been a Judge of a High Court for at least five years or an Advocate of a High Court for at least 10 years.

### High Court Judges

High Court judges are appointed after consultation with the Chief Justice, the Governor of the state and the Chief Justice of the state High Court.

Provisions exist for the appointment of a Judge of a High Court as an ad-hoc Judge of the Supreme Court and for retired Judges of the Supreme Court or High Courts to sit and act as Judges of that Court.

## Ireland

In Ireland judges are appointed by the President on the binding advice of the Cabinet. Recommendations for suitable appointees are made to the Cabinet by the *Judicial Appointments Advisory Board*.

The Judicial Appointments Advisory Board was established following the *Courts and Court Officers Act, 1995*. Prior to this Act judicial appointments had been made solely by the executive. This selection process applies to Supreme Court judges, High Court judges, Circuit (Appeal) judges and District judges.

## Membership

The Board consists of up to 10 members:

- the Chief Justice (Chairperson)
- the President of the High Court
- the President of the Circuit Court
- the President of the District Court
- the Attorney General
- a practising barrister who is nominated by the Chairman
- a practising solicitor who is nominated by the President of the Law Society of Ireland; and
- no more than three individuals, appointed by the Minister for Justice, Equality and Law Reform, who have knowledge of commerce, finance, administration, or experience as consumers of the service provided by the courts.

Members who are nominated by the Chairperson, Minister or President of the Law Society serve on the Board for no longer than three years, although members are eligible for re-appointment at the end of this period.

It is the responsibility of the Advisory Board to assess the suitability of applicants against set minimum eligibility criteria outlined in the Courts and Court Officers Act 1995. The applicant must submit a detailed application form outlining their professional practice, qualifications, education and character. A decision is reached about whether an individual is suitable for nomination by majority vote.

For each vacant judicial office the Board recommends seven individuals to the Minister for Justice.

## Israel

Following the end of the British Mandate in Palestine and the *Declaration of the Establishment of the State of Israel*, judges were nominated by the Provisional Government and appointed by majority vote in parliament. Pursuant to the *Judges Act 1953* powers of judicial selection were transferred from the *Knesset* (the legislature) to the Judicial Selection Committee while the executive, namely the Minister of Justice, retained powers of nomination. The same system of judicial selection is in place today, though the judicial independence guaranteed in this process has been further strengthened by the *Basic Law: Judicature, 1984*. This act, passed by the *Knesset*, has upgraded this process of appointment from normative legislation into a basic law and therefore forms part of Israel's Constitution.



This system of appointment applies to judicial appointments in all Israeli courts, including Magistrates Courts and Tribunals.

### Membership

All three branches of government – the executive, legislative and judiciary – and the legal profession are represented on the Committee, though significantly, 'non-politicians' make up the majority, three of whom are Supreme Court judges.

The committee consists of nine members:

- the Minister of Justice (Chairperson)
- another cabinet minister
- President of the Supreme Court
- two other justices of the Supreme Court
- two Members of the Knesset; and
- two representatives of the Israel Bar Association.

### Italy

In Italy the *Consiglio Superiore della Magistratura* (CSM) is responsible for – among other matters – recruitment and training of judges. Access to a career in the judiciary is by way of a public competitive examination. The successful candidates are appointed as Trainee Judges, and are posted to a first instance judicial office attached to a Court of Appeal for the prescribed training. The length of the training is decided by the CSM and is not normally less than 12 months. The training is directly organised, co-ordinated and controlled by the CSM.

Following training, the CSM compiles a list of vacancies and assigns the judges accordingly. Promotions are decided by the CSM, but are typically based on application and seniority. This is an extreme model of judicial self-government.<sup>37</sup>

### Membership

The *Consiglio superiore della magistratura* has 33 members as follows:

- 20 judges elected directly by the judiciary
- 10 lawyers or university law professors nominated by Parliament
- President of the Court of Cassation (ex officio member)

<sup>37</sup> See C. Guarnieri and P. Pederzoli, *The Power of Judges. A Comparative Study of Courts and Democracy* (Oxford 2001) 52 – 60.

- Prosecutor General of Cassation (*ex officio* member); and
- The President of the Republic (*ex officio* member).

## Malta

The judges of the Superior Courts and magistrates of the Inferior Courts are appointed by the President acting on the advice of the Prime Minister. The Superior Court judges cannot be removed from judicial office except by the President upon an address by the House of Representatives supported by the votes of not less than two-thirds of all the members.

The constitution provides that the Commission for the Administration of Justice, when so requested by the Prime Minister, is to advise on any appointment to be made to the bench of judges or to the bench of magistrates. This provision is rarely applied, and in practice the appointment of judges and magistrates is entirely in the hands of the executive branch of Government.

The Commission consists of the President, who is the Chairman, and nine other members as follows:

- the Chief Justice (who is the Deputy Chairman)
- the Attorney General, *ex officio*
- two members elected for a period of four years by the judges of the Superior Court from among themselves
- two members elected for a period of four years by the magistrates of the Inferior Courts from among themselves
- two members appointed for a period of four years – one appointed by the Prime Minister and the other appointed by the Leader of the Opposition – being in each case, a person of at least forty-five years of age, and who enjoys the general respect of the public and a reputation of integrity and honesty; and
- the President of the Chamber of Advocates, *ex officio*.

## New Zealand

Judicial appointments are made by the executive following consultation with the senior judiciary. The Governor General makes appointments on the recommendation of the Attorney General. The legislature plays no part in judicial appointments.

There is no independent advisory board or committee in New Zealand. An independent review of the judicial appointment process in 2002 rejected calls for an independent appointment commission.<sup>38</sup> The issue was raised again in a public consultation in 2004, although this did not lead to any legislative changes.<sup>39</sup>

## Poland

Judges in Poland are appointed by the President of the Republic on the recommendation of the National Council of Judiciary. The twenty-four member council, consisting of judges from the national, district, and local levels, serves a four-year term and has the primary function of recommending judicial candidates to the President. Another basic function of the body is to oversee the entire judiciary and establish professional standards.

Judges in Poland are independent and are accountable only to the law. Candidates for judicial appointment must successfully pass an exam and be employed for at least one year as an assistant judge. Professional judges must attain a university law degree and complete the two-year period of court apprenticeship.

## South Africa

Following democratic elections in 1994, and the ensuing constitutional reforms, the independence and power of the judiciary was increased. Prior to 1994 judicial selection was controlled entirely by the executive. Judges were appointed directly by the Minister of Justice and magistrates were civil servants, answerable to senior officials, who controlled salaries and promotion.

The *Bill of Rights 1994* established, along with a Constitutional Court that has the power to invalidate legislation, a *Judicial Service Commission* to govern the higher judiciary. (A separate *Magistrates Commission* was established to govern the lower judiciary). It is prescribed within the constitution that Judges cannot be appointed without the *participation* of the Judicial Service Commission. The degree to which the JSC participates in appointment and the extent to which it can prescribe appointments varies by the type of judicial office.

## Membership

The Judicial Service Commission (JSC) consists of 23 members, and includes representatives from the executive, the judiciary and the legal professions:

<sup>38</sup> Review entitled: *Judicial Administration Issues: 2002* Sir Geoffrey Palmer.

<sup>39</sup> "Appointing Judges: A Judicial Appointments Commission for New Zealand?" A Public Consultation Paper: New Zealand Government 2004 <http://www.justice.govt.nz/pubs/reports/2004/judicial-appointment/index.html>

- The Chief Justice (Chairperson)
- The President of the Supreme Court of Appeal
- A judge president (head of a High Court and 'designated by' all judges as president)
- Five members of the legal profession (appointed by the President upon nomination by their constituencies – two advocates, two attorneys and one legal academic)
- The Minister of Justice
- Six members of the National Assembly ('designated by' the National Assembly, three of whom must be members of the opposition party)
- Four members of the National Council of Provinces
- Four individuals chosen by the President after consulting with the leaders of all parties in the National Assembly.

The JSC is obliged by Section 174 of the constitution to consider the need for the judiciary to reflect the racial and gender composition of South Africa when making judicial appointments.

The degree to which the JSC has determinative control over the appointment of judges increases according to the extent of a judge's powers. For example, the President can only make appointments to the High Court on advice from the JSC. However, appointments to the Constitutional Court, the President of the Supreme Court of Appeal and the office of Chief Justice are the prerogative of the President as the head of the National Assembly. In respect of the appointment of Constitutional Court judges the JSC provides the President with a list of nominees. The President appoints an individual from this list after consulting with the Chief Justice (who is head of the Constitutional Court).

## Spain

Judges in Spain are independent and are subject only to the rule of law. They are not subject to any orders or instructions by any other power of the State or other judges. They may only be dismissed, suspended, transferred or retired on the grounds provided for by the law.

Appointment is by means of an Order of the Judges and a *Real Decree* (A *Real Decree* is sanctioned by the King, and authenticated by the President of the Government, or other Minister).

The judicial system is controlled by the General Council of the Judiciary (*Consejo General del Poder Judicial (CGPJ)*), which is responsible for judicial selection and appointment processes. The CGPJ comprises 21 members including the President of the Supreme Court who presides over the Council. All appointed by

Parliament, with six each nominated by the Congress of Deputies and the Senate by a three/five majority. The *Consejo General Del Poder Judicial* is responsible for judicial appointments, but there is far less discretion than this might imply. Most appointments are based on applications and seniority. There is discretion really only in relation to the most senior appointments. The Organic Law of 2003 increased the use of evaluations by judicial superiors for such appointments.

### Membership

The make up of the *Consejo General del Poder Judicial* is:

- twelve judges and magistrates from all judicial groups
- eight members chosen from among the legal profession with more than 15 years of professional practice; and
- one member of the Justice Department (ex-officio member).

Members of the Council are appointed for a five-year period and they cannot be re-elected with the exception of the President.

### Sweden

In Sweden judges are appointed by a Government agency, Domstolsverket (DV), on the basis of ability and suitability for the post. Initial recruitment is made by DV by way of competitive application. Promotions are decided by DV, assisted by a special judicial appointments commission (*Tjänsteförslagsnämnden för domstolsväsendet* (TFN)), whose main function is to make recommendations on appointments. The process is conducted by applications and references.

For appointment to the most senior judicial posts, Justices of the Supreme Court, a group comprised of three serving Justices is set up by the Supreme Court to prepare a list of suitable candidates for appointment. This list is put before the Court for discussion and then presented by the President of the Supreme Court to the Ministry of Justice. The Ministry may have a candidate of its own and if so there will be an oral exchange of views between the Ministry and the Court. In most cases the candidate presented by the Court has been accepted. When an informal agreement has been reached on the name of the new Justice, the Minister of Justice personally comes to the Supreme Court in plenary and presents his candidate. Thereafter the Government makes the formal appointment. The appointment of a Justice of the Supreme Court cannot be appealed.

Domstolsverket is directed by a board (*Domstolsverket styrelsen*) which consists of no more than ten members appointed by the Government, including the chief executive. Its membership represents judges, politicians and legal professions.

## United States of America

Federal judges are nominated by the President of the United States. However, although Article III of the United States constitution allows the President to nominate any individual, regardless of their qualifications, all federal appointments must be confirmed by the legislature. This involves a simple majority vote in the upper house of Congress (the Senate).

The judiciary and legal professions play no part in nominating or appointing federal judiciary.

Prior to the Senate vote, judicial nominations are put before the United States *Senate Committee on the Judiciary* where a decision is made on whether to provide a positive, neutral or negative report to the Senate. In practice, nominations for judicial office are rarely rejected by the house.

This selection process applies to Supreme Court judges, Circuit Court judges and District judges.

## Membership

The United States Senate Committee on the Judiciary is a standing committee in the Senate. The committee consists of 18 members, with equal membership from the majority and minority parties, and a chair from the majority party. The chair primarily controls the business of the committee, but has the casting vote in the event of a tie.

The Committee is responsible for holding public hearings where judicial nominees are questioned by committee members regarding their suitability for appointment. The recommendation to be made to the Senate is agreed at the close of the hearing by majority vote.

## State level appointments

Appointments at the state level follow a similar process to the appointment of federal judges, but nominations are made by the state governor and confirmation is made by the state legislature.

## Annex B: Overview of the Judiciary in England and Wales

Judicial appointments in England and Wales cover a huge range of posts, both salaried (full and part-time) and fee paid at all levels of the courts and tribunals systems as well as magistrates (who are volunteers, receiving travel and other expenses only).

There are 42 senior positions: the Lord Chief Justice and Heads of Division, and the Lord Justices of Appeal (for which there are special procedures directly involving the Lord Chief Justice or his representative).

In the ordinary courts there are 108 High Court judges, around 600 Circuit judges, and over 2500 others, including District Judges, Recorders, and the Supreme Court Masters and Registrars), together with several thousand tribunal appointments. Selection for these appointments is the responsibility of the JAC. The more senior of these appointments are made by HM The Queen, on the advice of the Lord Chancellor and/or the Prime Minister. Appointments below the Circuit Bench are made by the Lord Chancellor.

There are some 30,000 magistrates. Selection for these posts is carried out by local Advisory Committees, who carry out the selection process and then put recommendations to the Lord Chancellor, who makes the appointments. The CRA 2005 provides for responsibility for selection to pass to the JAC, but no decision has yet been made on the timing of this change.

Many of the tribunals posts are directly equivalent to those in the ordinary courts. The table below shows how the various salaried posts compare, based on pay grade.

### Group 1:

- Lord Chief Justice

### Group 1.1:

- Master of the Rolls
- Senior Lord of Appeal in Ordinary

**Group 2:**

- Lords of Appeal in Ordinary
- Lord Justice Clerk
- President of the Family Division
- President of the Queen's Bench Division
- The Chancellor of the High Court

**Group 3:**

- Lords Justices of Appeal

**Group 4:**

- High Court Judges
- Vice-Chancellor of the County Palatine of Lancaster

**Group 5:**

- Chairman, Criminal Injuries Compensation Appeal Panel
- Chief Social Security Commissioners (England, Wales; Scotland and Northern Ireland)
- Circuit Judges at the Central Criminal Court in London (Old Bailey Judges)
- Deputy President, Asylum & Immigration Tribunal
- Judge Advocate General
- Judges of the Technology and Construction Court
- Permanent Circuit Judge, Employment Appeals Tribunal
- President, Appeal Tribunals (England, Wales and Scotland)
- President, Care Standards Tribunal
- President, Employment Tribunals (England and Wales)
- President, Claims Management Services Tribunal
- President, Financial Services and Markets Tribunal (FINSMAT)
- President, VAT and Duties Tribunals
- Presiding Special Commissioner of Income Tax
- President, Lands Tribunals (England and Wales)
- Recorder of Liverpool
- Recorder of Manchester
- Senior Circuit Judges
- Senior District Judge (Chief Magistrate)
- Specialist Circuit Judges



**Group 6.1:**

- Chief Registrar and Senior and Chief Masters
- Circuit Judges
- Judge Advocate of the Fleet
- Regional Chairmen, Appeal Tribunals
- Regional Chairmen Employment Tribunals (England and Wales; and Scotland)
- Registrar of Criminal Appeals
- Senior District Judge, Principal Registry of the Family Division
- Senior Cost Judge
- Senior Immigration Judges
- Social Security Commissioners (England, Wales; Scotland and Northern Ireland)

**Group 6.2:**

- Adjudicator, HM Land Registry
- Chairmen, VAT and Duties Tribunals
- Deputy Senior District Judge (Magistrates' Courts)
- Members, Claims Management Service Tribunal
- Members, Lands Tribunals (England and Wales; Scotland and Northern Ireland)
- Regional Chairmen, Mental Health Review Tribunals, England
- Special Commissioners of Income Tax
- Vice-Judge Advocate General
- Vice-Presidents, VAT and Duties Tribunals (England and Wales; and Scotland)
- Deputy Chief Asylum Support Adjudicator

**Group 7:**

- Assistant Judge Advocates General
- (District) Chairmen, Appeal Tribunals
- Chairmen, Employment Tribunals (England and Wales; and Scotland)
- Costs Judges
- Deputy President Pensions Appeal Tribunal
- District Judges
- District Judges of the Principal Registry of the Family Division
- District Judges (Magistrates' Courts)
- Immigration Judges
- Masters and Registrars of the Supreme Court
- Members, Gambling Appeals Tribunal
- Chief Medical Member, Appeals Tribunal