



From The Honorary Secretary
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RESPONSE TO THE CONSULTATION PAPER CP10/03

CONSTITUTIONAL REFORM: A NEW WAY OF APPOINTING JUDGES

Introduction

The Society of Legal Scholars (SLS), formerly the Society of Public Teachers of Law (SPTL), is the foremost learned society for legal academics and jurists. Its purpose is the advancement of legal education and scholarship in the United Kingdom and Ireland. The Society was founded in 1908 and currently has over 2,300 members worldwide. This response was drafted on behalf of the Society by Dr Kate Malleson of the Department of Law at the London School of Economics with input from officers of the Society. It was debated, amended and approved at the meeting of the Society's Executive Committee at the Institute of Advanced Legal Studies on 7 November 2003.

Question 1: Do you prefer:

- i. An appointing commission?**
- ii. A recommending commission? or**
- iii. A hybrid commission?**

What are your reasons?

The Society's preference is for a recommending commission. This ensures that an appropriate degree of accountability is retained in the system. A hybrid model would be acceptable, though in practice it is unlikely to make much difference which of the two is used at the lower ranks since the Secretary of State will have little personal involvement in the selection of the large number of such posts.

Question 2: If you favour a Recommending Commission, what degree of discretion do you think should be exercised by the Secretary of State or Prime Minister?

What are your reasons?

Discretion should be limited so as to avoid the danger of inappropriate political influence. No more than two ranked names per vacancy should be recommended, although there should be an expectation, as in Scotland, that the Secretary of State should not interfere with the ranking unless it is for compelling reason with clearly and explicitly defined grounds e.g. that the Commission has failed to comply with its equal opportunity processes in selecting the name(s) or that the Secretary of State has reliable information relating to the suitability of the candidate(s) for appointment which was not available to the Commission. Where the Secretary of State has so

acted, or in the very unlikely circumstance that both names are unacceptable for these reasons and the Secretary of State has asked the Commission for another name, this fact should be published in the Commission's Annual Report.

In our view the Prime Minister should not play any part in the selection process. The replacement of the Lord Chancellor by an elected member of Parliament removes the need for Prime Ministerial involvement on accountability grounds. The PM is unlikely to know anything about the candidates' qualities which is not known by the Secretary of State or the Commission and her/his involvement is therefore likely to be based on ideological considerations.

Question 3: If you favour a Hybrid Commission, which appointments do you think should be made by the Commission and which should it recommend? How much discretion should the Secretary of State or Prime Minister have in relation to recommended appointments?

What are your reasons?

See above.

Question 4: Do you have a view as to any special arrangements that will need to be made by the Commission in dealing with senior appointments from among the existing judiciary?

Senior appointments should as far as possible be dealt with in the same way as lower appointments, that is through an open and formal application process using references and interviews. The use of appointment by invitation should end. However, we believe that there will have to be a separate body to recommend candidates for appointment to the new Supreme Court. (It would be inappropriate for the English and Welsh Commission to nominate Scots or Northern Irish candidates for appointment to the Supreme Court). Moreover, we would expect that the appointment process for the Supreme Court would take account of the differing social and policy views of candidates for such appointments.

Question 5: Do you agree that the Commission should not be involved in authorisations to allow judges who have retired before their compulsory retirement age to then sit part-time as deputies until they reach the compulsory age of retirement?

The use of deputies has historically been a weak link in the system and provides the potential for undermining judicial independence. The Society believes that all deputies should be appointed in the same way as any other post, openly and properly by the Commission. This is all the more important given that a candidate's experience as a part time judicial office holder is effectively a prerequisite for appointment to the full-time bench. The Commission should, therefore, have some role in monitoring and authorising such practices, even if the day to day decisions about the need for and use of deputies lies with the DCA. Thus in our view the Commission should approve a list of qualified deputies and monitor their renewal in the light of performance. Budgetary and manpower planning decisions on the need for deputies should be made by the DCA, and deployment and selection decisions by the relevant head of the court.

Question 6: What arrangements should be made for the appointment of magistrates? In particular (a) should there be a continuing role for local Advisory Committees? and (b) what role should there be for the Judicial Appointments Commission?

We do not believe that it would be sensible for the judicial appointments commission to be given the role of appointing magistrates, at least in the short term. This would swamp the new body, which will already have a huge workload (particularly if it takes on the appointment of tribunal members, which we regard as essential). Nor are the issues and processes the same in relation to the appointment of professional judges and lay magistrates.

Question 7: Do you agree that the appointment of coroners should be brought into line with that of other judicial office holders?

Yes. The Society is aware of the serious reservations which have been expressed about certain aspects of the current coroners' courts and strongly supports any proposals to reform this important jurisdiction.

Question 8: Do you agree that tribunal appointments should be the responsibility of the Judicial Appointments Commission, under the arrangements discussed in paragraphs 68-69?

It is vital that the Commission should be responsible for appointing both the legally qualified members and other members of tribunals. The work of such tribunals is often of much greater significance for the ordinary citizen than the work of the traditional courts. The recommendations of the Leggatt Review highlighted the importance of establishing both the reality and the perception of the independence of such tribunals from their original sponsoring departments. These considerations all point to the need for the Commission to take on this task. Given the Government's commitment to establish an integrated Tribunal Service alongside the Court Service, it follows that appointment processes should, so far as is possible, be similar. The tribunal system is also a good recruitment pool for the mainstream judiciary, which will promote greater diversity in composition. However, it would be inappropriate for the new Commission to appoint to tribunals in Scotland or Northern Ireland. This function should be devolved to the corresponding institutions in these two countries.

Question 9: Do you agree that the Commission should not be involved in the allocation of responsibilities, as described above?

Yes.

Question 10: Do you agree that there should be a separate body with a reviewing and complaints function once the Judicial Appointments Commission has been established?

Yes. The commission should not be given this function. To do so would produce a tension in its functions and further increase its workload.

Question 11: What formal status should the Commission have? Should it be:

- a Non-Departmental Public Body?**
- ii. a Non Departmental Public Body supported by an agency?**
- iii. a non-Ministerial Department? or**
- iv. Should it have some other status? If so what?**

A Non-Departmental Public Body.

Question 12: Do you agree that the Commission should take on those functions which relate directly to the appointments process (paragraph 88) and that the Government should retain responsibility for policy relating to appointments (paragraphs 90-92)? If not, please provide views on which responsibilities should, and which should not, pass to the Commission and why.

Yes.

Question 13: Do you agree that the Commission should be tasked with establishing how best to encourage a career path for some members of the judiciary?

Yes.

Question 14: What other steps could be taken by the Commission to encourage diversity?

The new Commission should dispense with the consultations process as has been recommended by the 2003 annual report of the Commission for Judicial Appointments. The consultation process unfairly disadvantages women and minority lawyers and is incompatible with the development of a sound equal opportunities policy. It is for this reason that the Scottish Judicial Appointments Board has decided that it will not rely on information about candidates gathered from consultations in any form.

The Commission needs to be properly resourced to undertake a proactive programme of activities and initiatives which will lead to a greater diversity among the judges. There needs to be a variety of potential routes into the main judicial posts, including from the tribunals. The Commission should work closely with the Law Society, the Bar Council, the DCA, the judiciary and representative organisations of female lawyers, ethnic minority lawyers etc to ensure collective strategies for widening the recruitment pool, addressing inequalities which start early in the legal career (e.g. funding arrangements for pupillage) or which deter non-traditional applicants (e.g. the assumption that judges will always be available to sit full-time and the requirement that High Court judges go on circuit). Further, the Commission should follow the example in recent federal Canadian appointments of re-examining the concept of “merit selection” in the light of the way that that concept enshrines unwritten understandings (e.g. that High Court positions must be reserved for QC’s of ten years standing or so) which work against women and ethnic minority candidates.

The Commission must also actively and systematically encourage applicants from a wider range of backgrounds (e.g. by direct mail shots to under-represented groups of potentially qualified candidates).

Question 15: Should either (i) the Judicial Appointments Commission, or (ii) a body overseeing the work of the Commission, have a role in advising the Secretary of State for Constitutional Affairs or the Lord Chief Justice on complaints and disciplinary matters?

A separate judicial commissioner should oversee judicial complaints and discipline.

Question 16: Should the Commission have a role in an internal grievance procedure? If so, what should that role be?

If the grievance is about the commission itself, it should have an internal procedure followed by the right of appeal to a separate body if the complainant remains dissatisfied.

Question 17: Should the responsibility of the Secretary of State for protecting judicial independence be enshrined in statute?

Given that the Secretary of State will no longer have any judicial functions, and in future may not even be a lawyer, the Society questions the wisdom of him or her having this duty. Indeed, this proposal found no support amongst members of the Society's Executive. However, beyond that consensus the Society's Executive was unable to reach a unanimous view on how this issue should be addressed. Two views were expressed in Executive. Some members took the view that in a liberal democracy one of the explicit tasks of the executive should be to protect the independence of the judiciary. This group was concerned at the creation of a potential vacuum which the removal of the Lord Chancellor might produce. They believed that the goal of protecting judicial independence would be best achieved by placing a statutory duty on the Attorney-General in this respect. If so, it would arguably no longer be appropriate for the Attorney-General to appear in court on behalf of the government in sensitive cases. Other members of Executive considered that making the defence of judicial independence the responsibility of a minister or indeed the Attorney-General retains the institutional link between judges and government, confirms judicial reliance upon a member of the executive and perpetuates the secrecy surrounding judicial/executive relations. This would, in their view, be contrary to the government's aim of meeting public expectations of judicial independence and transparency.

Whatever the outcome, the Society believes that explicit arrangements must be put in place for the judiciary to communicate with the executive on matters relating to judicial independence.

Question 18: Who should be responsible for appointing Commission members?

A separate nominating body as proposed by the consultation paper. However, it is inappropriate for it to be chaired by the Permanent Secretary.

Question 19: Should the Commission include judicial members, legally-qualified members and lay members as proposed?

If so, how should the balance between the membership groups be struck?

If not, how should the Commission be constituted?

Yes. A balanced membership is critical to the success of the Commission. The current weighting includes too many legally qualified members. The 5 lay members are likely to be swamped by the 10 legally qualified members. A better balance would be 7 lay, 7 legally qualified and 1 legal academic member. This follows the model in a number of jurisdictions (including South Africa) where it is recognised that a legal academic is neither fully “lay” nor fully “legal” and thus is ideally placed to act as a bridge between the two other groups and to hold the balance between them. Contrary to the suggestion in the Consultation Paper there should be no requirement that the legal academic be professionally qualified in law.

Question 20: Who should chair the Commission?

A lay member. The experience of the current Commission for Judicial Appointments and other successful judicial appointments commission such as those in Scotland and Ontario are evidence of the advantages in having a lay member in terms of fresh ideas and confidence in the independence of the commission. There is a real danger that any Commission will be dominated by its judicial members. A lay chair can help to counter this very understandable tendency. It would also compensate for the fact that the legal members would be in a majority on the Commission.

Question 21: Should all Commission members be appointed following open competition?

If not, should some members be nominated?

If you think some members should be nominated, which bodies should be invited to provide nominations?

Should these bodies be given a statutory right to have a member on the Commission?

If not, should they be consulted by the separate recommending body to put forward candidates to apply for the selection process, under open competition?

Judge members should be elected in a way which reflects the different levels of judicial appointment: district judges, circuit judges, High Court judges and Court of Appeal judges. As regards the latter two groups, judge members should be nominated by the judges’ council but with a requirement that their nomination is made with regard for the need for the commission broadly to reflect the diversity of the community. It may be that the Commission needs to sit in panels to consider district judge and circuit judge appointments with a greater representation of those categories than would be needed for the consideration of High Court appointments. Moreover, the council should be asked to suggest several names for each judicial “position” on the Commission. It should also be expected that these nominees would be interviewed by the main nominating body, as in the case of other candidates. The final selection of the judges would therefore be by the main nominating body.

All other members should be appointed through an open application process. All qualified lawyers should be able to apply and should not be nominated. It is inappropriate for the legal members to see themselves as representatives of the Law Society or Bar Council or for the lay members to consider themselves representatives of any particular body, e.g. a trade union. The application process should be as transparent and widely advertised as possible and Nolan principles should apply in the

application and appointments process so as to avoid the danger, real or apparent, that the commission is selected from a small group of insiders.

Question 22: Do you have any views on the working arrangements for Commission members?

Commissioners should be fixed term part-time appointments with the possibility of one renewal to ensure that the best candidates apply bringing experience of outside organisations and processes. In practice, much of the day to day work of the appointments process will need to be delegated to its secretariat in view of the huge number of applications. The detailed working arrangements whereby the commission organises its work must therefore be left to the commission to determine.

7 November 2003