The SLS Response to the DCA consultation : The Appointment of Law Commissioners

We would welcome responses to the following questions set out in this consultation paper. Please give reasons for your answers wherever possible, and feel free to make any other comments you consider appropriate.

1. Do you agree that the ability to appoint part-time Commissioners would be useful for any or all of the reasons described in paragraphs 2.3, 2.6 and 2.7?

   Yes, the Society firmly supports the proposal to appoint part-time Commissioners for all three of these reasons as stated in the Consultation Paper. We have only two reservations – (1) we would be concerned if more than one or two part-time Commissioners were to be appointed at any one time, as we believe this could make it more difficult for the Commissioners to operate in a truly collegiate fashion; (2) we believe that very careful thought would have to be given to the practicalities of how such part-time appointments would work within the overall structure of the Commission.

2. Do you agree with this approach to amending the requirements in the 1965 Act about the number of Law Commissioners? If not, what approach would you prefer?

   The Society firmly believes that it is not appropriate simply to amend the law so that the Lord Chancellor (or his or her successor) may appoint whatever number of Commissioners he or she deems suitable. In our view this places far too much power in the hands of the Executive. Nor, for similar reasons, are we convinced that the alternative proposal – providing for a minimum of five Commisisoners, with the potential to be varied down by secondary legisaltion – is ideal. As we explain in response to Question 7, we would be concerned about the level of Parliamentary scrutiny involved. In our opinion the best solution would be to provide, as now, that there should be a minimum of five Commissioners but to grant the Lord Chancellor the power to appoint *further* Commissioners as the need arises. Given the experience of law reform over the past 40 years, we find it hard to envisage a situation in which the appointment of *fewer* than five Commissioners would ever be appropriate. We would also add that we are not convinced that there is any real difficulty in defining clearly a statutory distinction between full and part-time Law Commissioners. Such a distinction is commonplace in judicial appointments (see, for example, Social Security Act 1998, Schedule 4, para. 1, providing for the appointment of full and part-time Social Security Commissioners – although clearly one would wish to avoid any suggestion that part-time Law Commissioners were in any way 'deputies').

3. Do you think that High Court Judges would be unlikely to apply to an open competition for the Chairmanship? (We would be particularly interested in the views of High Court judges.) How could this be reduced? Would the same problem arise if there was a formal recruitment competition restricted to the senior judiciary?

Although this is somewhat speculative on our part, we think it very unlikely that High Court judges would apply for the Chairmanship in an open competition. We cannot see any obvious way of reducing this. We simply do not know whether the problem would be entirely solved by confining a formal recruitment competition to the senior judiciary. If the appointment is reserved to this pool of candidates, we regard it as axiomatic that the Code of the Commissioner for Public Appointments applies.

4. Do you think that other candidates for Commissioners would be put off if the Chairman was not a High Court judge? (We would be particularly interested in the views of judges, practitioners and legal academics.)

The Society is well placed to answer this, as the pre-eminent learned society for legal academics and jurists. We regard it as unlikely that candidates for other Commissioner posts would be deterred from applying in the event that the Chairman was not a High Court judge. Academic applicants are much more likely to have regard to other considerations (career advancement, a new intellectual challenge, disillusionment with the current state of university education, a more attractive salary package, personal reasons, etc) than the identity and status of the Chairman.

5. Do you think the standing or reputation of the Law Commission would be damaged if the Chairman (or any other Commissioner) was not a High Court judge? What effect do you think this would have?

In our view the standing and reputation of the Law Commission depends for the most part on the quality of its consultation papers and reports. If the best candidates are appointed to Commissioner posts, and they continue to have the best research support staff and to be adequately resourced, then we see no reason why the standing and reputation of the Law Commission should diminish. We accept that, if the Chairman was not a High Court judge, then there is the risk that over time the Commission's output would come to be seen as 'too academic' or 'divorced from reality'. Such a perception *might* develop amongst the senior judiciary. But we emphasise that we see this as a risk that a perception may develop – not that the reality may change. Obviously much would depend on the individual qualities and strengths of the candidates appointed as Chairman and Commissioners in

the future. It should be obvious that we would regard e.g. an outstanding academic or practitioner Chairman to be much more of an asset to the Commission than, say, a High Court judge who lacked a genuine commitment to the role.

6. On balance, do you think the Chairmanship should be open to anyone qualified to be a Commissioner or restricted to High Court judges?

We regard this as the most difficult and finely balanced question on the Consultation Paper. As a matter of principle the Society is committed to openness and transparency in public appointments. We see this as furthering the causes of equality and diversity, as well as being right as a matter of principle. However, on balance, and notwithstanding these considerations, we are not persuaded that the Chairmanship should be open to anyone qualified to be a Commissioner. We have reached this conclusion, although it might at first sight seem inimical to the interests of some of our members, for four reasons.

First, we believe that if the Chairman were not a High Court judge there simply would not be a Commissioner from the senior judiciary. This would mean the Commission would lack that particular perspective and expertise, which would be a retrogade step.

Secondly, whilst we doubt that the true standing and reputation of the Commission would be undermined by a non-judicial appointment to the Chairmanship, we accept that a High Court judge provides a degree of 'added value' to the post in terms of judicial experience, access to the senior judiciary, the perception of the Commission's standing in the professions etc. Even if there is only a slight risk that the Commission's standing would be perceived to be lower, we believe on balance that this is not a risk that is worth taking.

Thirdly, we take the view that in the long-term a Law Commission with a non-judicial Chairman might develop into a rather different type of law reform body. This might have advantages as well as disadvantages, but we do not belive that such a potentially fundamental change in the nature of the Commission should be put in train via a 'sidewind' such as the current proposal. It would require a much more extensive analysis and debate.

Finally, we would also add that we are not aware of any proposal that the Chairmanship of the Scottish Law Commission or the Law Reform Advisory Committee for Northern Ireland should be opened up to applicants outside the senior judiciary. We can see obvious advantages in having a uniform approach to such matters across the United Kingdom.

7. Do you agree that these proposals are suitable for implementation by an order under the Regulatory Reform Act 2001.

   The Society does not believe that any proposal which might result in fewer than five Commissioners being appointed should be implemented under the Regulatory Reform Act 2001. We accept that any actual reduction in future might have to be effected through secondary legislation. However, we are not convinced that this provides adequate parliamentary scrutiny – unless there is a guarantee that any such regulations would necessarily be subject to the affirmative procedure. If the substance of the proposal is to go ahead as currently planned, we believe that Parliament, and especially the House of Lords, should have the opportunity to debate the proposal. If the final proposal is amended so that the number of Commissioners cannot be fewer than five, then we accept that the Regulatory Reform Act 2001 procedure is appropriate.

8. Do you agree that the proposals would not remove any necessary protection or prevent any person from continuing to exercise any right or freedom that they might reasonably expect to?

   We accept that these proposals do not prevent any person from continuing to exercise any right or freedom, for the reasons set out at para. 2.27 of the consultation paper. However, as to the wider issues we refer to our answer to Question 7 above.

9. Do you agree that a statutory burden on the Lord Chancellor to appoint only a High Court judge as Chairman of the Law Commission would be proportionate to the benefit and strike a fair balance between the interests of those affected and the wider public; and that an order including this measure would be desirable overall.

   Yes, subject to the reservations above.

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(add usual statement)

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