JUDICIAL OFFICE

Governance of Britain: Judicial Appointments

Response to Consultation Paper on behalf of the Judicial Executive Board and the Judges' Council

1. This response to the Government's consultation paper, 'The Governance of Britain: Judicial Appointments', is on behalf of the Judges' Council and the Judicial Executive Board. The paper is divided into two parts, the first dealing with issues of constitutional principle, the second with how the system works and how it might be improved. (We have indicated below in square brackets where our comments address the specific questions listed on pages 48 to 49.)

Issues of constitutional principle[1]

2. The present constitutional structure for judicial appointments is right. It is based on the correct balance of responsibilities between the Executive, the Judiciary and an independent JAC, and was established through the Constitutional Reform Act 2005 (CRA) following extensive and constructive discussions in Parliament and between the Government and the Judiciary. In the view of the judiciary, it is both unnecessary and unwise to attempt to overhaul a system which has proven to be sound in principle and, overall, in practice. [Q1]

3. We are content with the level of judicial involvement in the appointment of judges, and with the principle and statutory requirement that selections must be based on merit. [Q5]

4. The judiciary is completely opposed to any confirmation hearing (such as those that take place in the US) where, for example The Queen would appoint judges subject to ratification by Parliament. Parliamentary involvement of any sort in the appointments process is wholly contrary to constitutional principles. It would act as a

[1] The consultation paper does not refer to the appointment of magistrates but the general principles apply as much to them as to other members of the judiciary, although it is recognised that present arrangements have not yet enabled the JAC to assume responsibility for their appointment.

deterrent to potential applicants and, more importantly, would risk potential political interference in the appointment or nomination of judges who in this country are seen as entirely above politics. [Q6]

5. It is essential, throughout the appointments process, that the independence of the judiciary is protected, that the JAC is properly funded, and that the system meets the business needs of courts and tribunals. [Q2]

Possible improvements to how the system works

6. Since the CRA came into force the quality of judicial appointments has remained consistently high – this in itself is testimony to the calibre of each of the JAC Commissioners, judicial and non-judicial. There are inevitably some technical adjustments which could and should be made to ensure that the process runs more smoothly and delays in filling vacancies are kept to a minimum. Nevertheless, we see no reason to change the essential scheme of the Concordat and CRA, which is that appointments should be made following selection by the JAC (or in the case of appointments to the Court of Appeal and Supreme Court, through the bodies set out in the CRA), and that in all cases the views of the judiciary on the individual and comparative merits of candidates should form an important, though by no means the only, source of evidence in determining who is the best candidate for any given judicial office. [Q3]

7. The system may benefit from clarification, in statute if necessary. Firstly, the duty on the part of the Lord Chancellor, under s.1 of the Courts Act 2003, 'to ensure that there is an efficient and effective system to support the carrying on of the business of [the courts]', includes the need to guarantee sufficient funding for the JAC to select the best candidates for vacancies which arise. Secondly, we see merit in a general statutory duty on the JAC and other parties in the appointments system to have regard to the needs of the courts and tribunals, along the lines of s.64 of the CRA which requires the JAC to 'have regard to the need to encourage diversity in the range of persons available for selection for appointments'. [Q16]

8. We agree that there is a formal constitutional role for the Lord Chancellor to recommend appointments to The Queen, or to make them himself depending on the type of appointment. This role should not create delays in the process but serve more as a final check to ensure that due process has been followed as part of the Lord Chancellor's wider responsibility for the maintenance of the justice system. [Q4]

9. Since it is no longer required for the Lord Chancellor to be legally qualified, it is difficult to see the benefit of his being personally involved in appointments. However, there remains an argument for his involvement in appointments at High Court level and above,

because of the constitutional position of the role and the involvement of Parliament in any disciplinary measure. Below the High Court, our view is that he should not exercise discretion, but that instead he should accept the advice of the JAC, rather as the Prime Minister acts in relation to appoints to the Court of Appeal and above. [Q7]

10. We do not recommend any change to the current role of the judiciary. However we propose that the CRA, particularly sections 87, 88, 94, be amended to include a power for the Lord Chief Justice to nominate where necessary other suitable judges to carry out his responsibilities under the Act. This will help ensure that the appointments process is more streamlined and that unnecessary delays do not occur. [Q5]

11. We maintain the view that the Lord Chancellor in person should formally appoint judges or recommend them to The Queen for appointment. This is because of the personal duty, conferred by the CRA, to uphold judicial independence, to ensure the judiciary have the necessary support to enable them to exercise their functions and to have regard for the public interest in judicial matters. Any delegation of other appointments functions must also carry with it a delegation of these responsibilities, so that the Lord Chancellor can be assured that he and his junior Ministers or officials are properly exercising their functions. [Q11, Q12]

12. We believe that the Lord Chancellor should have responsibility for determining non-statutory eligibility for judicial posts, such as the ability to speak Welsh, which are critical to operational needs of the courts. This should be done in consultation with the judiciary, and this consultative role should be established in the statute. We recognise that the JAC should not be held accountable for decisions, such as those on non-statutory eligibility, for which they are not responsible. More could and should be done to clarify therefore the criteria for non-statutory eligibility are set by the MoJ, in consultation with the judiciary, on the basis of the needs of the business, and not by the JAC. [Q13]

13. We believe that, in the interests of clarity, the CRA should be amended to confirm that the JAC may carry out preliminary work before the receipt of a signed vacancy notice. Anticipation of vacancies will greatly improve the efficiency of the appointments process. [Q15]

14. We do not see any role for the Lord Chancellor in judicial deployment decisions where there are no financial implications, for example when moving judges from one circuit to another and the appointments of judges to boards and leadership posts. In particular, the requirement for the Lord Chancellor to be consulted on individual authorisations of Circuit Judges and recorders to sit in the High Court under s.9(1) of the Supreme Court Act 1981 should

be removed, as should the requirement for JAC concurrence. Neither the Lord Chancellor nor the JAC are in a position to decide which existing judges should be ticketed to do particular kinds of work. These authorisations should simply be decided by the senior judiciary in the same way as other authorisations. There may, however, be merit in the JAC being consulted on the transparency and fairness of processes for authorisations. [Q9]

15. There should be scope for the Lord Chancellor and Lord Chief Justice to agree that judicial posts, which could be filled by means of a JAC competition, should in fact be filled by the deployment of existing holders of other judicial offices on their existing salaries, who would therefore not gain financially or in terms of any promotion by that deployment. In such a case the Lord Chancellor would need to agree that a post or posts should be filled in this way, but should not have to agree to the deployment of the individuals concerned. Such deployments should be permitted within the courts (so for example from District Judge to District Judge of the Principal Registry of the Family Division), from the courts to tribunals (e.g. to the MHRT (RPP)), and between different tribunals. [Q16]

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