ANNEX 4

24 NOV 2011

Ministry of JUSTICE

The Right Honourable
Lord McNally
Minister of State
102 Petty France
London
SW1H 9AJ

T 020 3334 3555
F 020 3334 3669
E general.queries@justice.gsi.gov.uk

www.justice.gov.uk

Peter Lodder QC
Chairman of the Bar Council
289-293 High Holborn,
London
WC1V 7HZ

REFERENCE 316032

21 November 2011

Dear Peter,

CONSULTATION PROPOSALS ON JUDICIAL APPOINTMENTS AND DIVERSITY

I am writing to let you know that we have today published a consultation document on proposals on judicial appointments and diversity in England and Wales and the Supreme Court of the United Kingdom.

A number of the proposals give effect to recommendations arising from the Report of the Advisory Panel on Judicial Diversity, which the Government, together with other members of the Judicial Diversity Taskforce, has publicly committed to implement. Others come from the judiciary and the Judicial Appointments Commission to improve the efficiency and effectiveness of the appointments process, and evidence given before the House of Lords Constitution Committee Inquiry on Judicial Appointments Process. Our proposals include:

- Transferring the Lord Chancellor's powers of appointment or powers to make recommendations for appointment to the Lord Chief Justice in relation to appointments below the High Court or Court of Appeal (we are consulting on both). This is consistent with the Lord Chief Justice's role as head of the judiciary. The Judicial Appointments Commission, who are an independent body chaired by a lay individual, will continue to run the selection process and provide oversight.

- Giving the Lord Chancellor a more meaningful role in the most senior judicial appointments through (1) early consultation on potential candidates for the most senior appointments (Court of Appeal and above) which is consistent with the existing process for Supreme Court appointments and (2) as a member of the selection panel for the appointment of the Lord Chief Justice and the President of the UK Supreme Court (UKSC). Given the importance of these roles, I believe there is a clear case for providing accountability for the executive to express a view in terms of its accountability to public and parliament for an effective justice system.

- Removing the Prime Minister from the appointment process since the Lord Chancellor can now make recommendations directly to HM the Queen, as a member of the executive.

- Increasing independent participation and oversight through (1) moving to odd-numbered membership of selection panels for all senior judicial appointments, (2) replacing the judicial chair for the selection of the Lord Chief Justice with the Chair of the Judicial Appointments Commission for England and Wales who is a lay member in that he is not a member of the judiciary and (3) replacing the judicial chair for the selection of the President of the UK Supreme Court with a non-judicial member from either the Judicial Appointments Commission for England and Wales, the Judicial Appointment Board for Scotland or the Northern Ireland Judicial Appointment Commission.

- Encouraging more diverse applicants to apply for judicial roles through (1) extending salaried part-time working to the High Court and above, (2) enabling the Judicial Appointments Commission to apply the positive action provisions of the Equality Act 2010 when two candidates are essentially indistinguishable and (3) limiting all fee-paid judicial appointments to three 5 year renewable terms.

- Improving the efficiency and effectiveness of the appointments process through (1) reducing the number of Judicial Appointments Commissioners, (2) removing the second round of formal consultation for Supreme Court appointments and (3) focusing the JAC process solely on the appointment of judicial office holders whose office requires a legal qualification.

I look forward to formally hearing your views on these proposals. The closing date for these will be 14 February 2012.

Yours Sincerely

Tom McNally

TOM MCNALLY

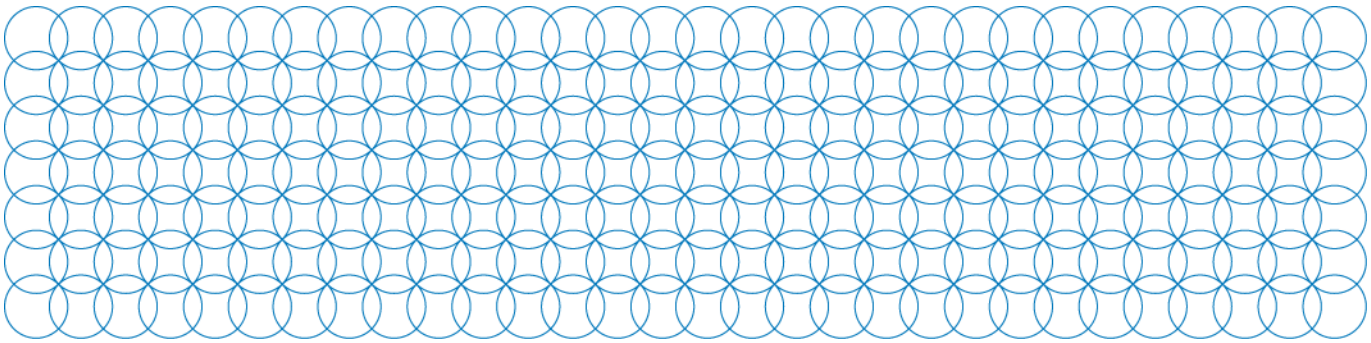
Ministry of JUSTICE

Appointments and Diversity

'A Judiciary for the 21st Century'

A Public Consultation

Consultation Paper **CP19/2011**
This consultation begins on 21 November 2011
This consultation ends on 13 February 2012



Ministry of JUSTICE

Appointments and Diversity

'A Judiciary for the 21st Century'

A consultation produced by the Ministry of Justice. It is also available on the Ministry of Justice website at www.justice.gov.uk

About this consultation

To:	This consultation sets out proposals for changes to the statutory and regulatory frameworks for judicial appointments. The consultation is aimed at members of the judiciary, legal practitioners and their representative organisations, those responsible for aspects of the judicial appointments process, equality and diversity groups and those who have an interest in judicial appointments.
Duration:	From 21/11/2011 to 13/02/2012
Enquiries (including requests for the paper in an alternative format) to:	Graham Mackenzie Ministry of Justice 102 Petty France London SW1H 9AJ Tel: 020 3334 3853 Email: graham.mackenzie@justice.gsi.gov.uk
How to respond:	Please send your response by 13 February 2012 to: Graham Mackenzie Ministry of Justice 102 Petty France London SW1H 9AJ Tel: 020 3334 3853 Email: graham.mackenzie@justice.gsi.gov.uk
Response paper:	A response to this consultation exercise will be published within 3 months of the conclusion of the consultation at http://www.justice.gov.uk

Contents

1 Foreword

An effective justice system is a cornerstone of a civilised society and the UK is fortunate indeed that ours is a byword for integrity, independence and excellence. This reputation is owed in no small part to the calibre of our judiciary – its independent-mindedness, wisdom and sound good sense. The judiciary play a critical role in the administration of justice and it is therefore vital that we select candidates for judicial office on merit, through fair and open competition, from the widest range of eligible candidates.

Yet no system is perfect and it is evident in recent years that some aspects of the appointments process urgently need to be modernised. The Coalition is introducing a range of reforms across civil, criminal and family justice to make them more efficient and effective. Delivering improvements to the way judges are appointed is an important part of this programme.

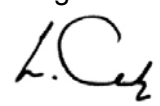
I am committed to improving the diversity of the judiciary, and will be working with the President of the UK Supreme court, the Lord Chief Justice and the Senior President of Tribunals to deliver these essential changes through a range of measures. A judiciary which is visibly more reflective of society will enhance public confidence in the justice system.

We also need to address other issues with the current systems including: the length of time and amount of money it can cost to run a selection process; the degree of transparency surrounding some appointments; and the inflexibility of the Constitutional Reform Act, which means even minor process changes require primary legislation.

All of this makes the case for revisiting judicial appointments. Accordingly I am consulting on legislative changes to achieve the **proper balance** between executive, judicial and independent responsibilities, improve **clarity, transparency and openness**; create a more **diverse** judiciary that is reflective of society; and deliver **speed and quality of service** to applicants, the courts and tribunals and value for money to the taxpayer.

Together with the Lord Chief Justice, the Senior President of Tribunals and the President of the Supreme Court of the United Kingdom, I remain unequivocal in our determination to respect the constitutional separation of powers and our respective accountabilities.

In addition to the proposals that we outline, the House of Lords Constitution Committee have launched an inquiry into the judicial appointments process for the Courts and Tribunals of England and Wales and Northern Ireland (including first instance courts) and for the Supreme Court of the United Kingdom. The government intends to consider the Committee's findings alongside responses to this consultation.



The Right Honourable Kenneth Clarke QC MP
Lord Chancellor and Secretary of State for Justice

2 Executive summary

1) This consultation paper sets out proposals for amending the statutory and regulatory frameworks for judicial appointments. A number of the proposals come from the Report of the Advisory Panel on Judicial Diversity, which the government has publicly committed to implementing. [1]

2) Others have come from work the Ministry of Justice has been taking forward with the judiciary, the Supreme Court of the United Kingdom (UKSC), the Judicial Office of England and Wales and the Judicial Appointments Commission (JAC) to improve the efficiency and effectiveness of the appointments process.

3) These proposals cover all fee-paid and salaried judicial office holders (not lay Justices) in the Courts and Tribunals of England and Wales, together with the UK Supreme Court, and are intended to:

   - achieve the **proper balance** between executive, judicial and independent responsibilities;
   - improve **clarity**, **transparency** and **openness**;
   - create a more **diverse** [2] judiciary that is reflective of society and appointed on merit; and
   - deliver **speed and quality of service** to applicants, the courts and tribunals and value for money to the taxpayer.

4) Our overarching objective remains in respecting the constitutional separation of powers and delivering a high quality, independent judiciary that is appointed on merit, is more reflective of the society that it serves and has the skills that it needs to meet the challenges of the present and the future.

5) The Government recognises that these are matters of constitutional significance that are at the heart of the relationship between the executive and the judiciary. The judiciary forms one of the three arms of the state, together with the executive and the legislature. The rule of law is the basic foundation of our democracy and the ongoing maintenance of the independence of the judiciary is an integral aspect of that.

6) Following the creation of HM Courts and Tribunals Service ("HMCTS"), the Lord Chancellor has agreed with the Lord Chief Justice and the Senior President of Tribunals that a single head of the judiciary should be established across England and Wales. This will see the Lord Chief Justice become the head of the judiciary for both the Courts and Tribunals. As a consequence, some of the functions for administering the

---

[1] http://www.justice.gov.uk/publications/policy/moj/judicial-diversity-report.htm

[2] Diversity within this consultation covers all of the protected characteristics detailed within the Equalities Act 2010, namely race, sex, disability, sexual orientation, religion and belief, age, marriage and civil partnership, gender reassignment, pregnancy and maternity.

First-tier Tribunal and Upper Tribunal in Scotland and Northern Ireland may be transferred to the devolved administrations. We will shortly consult publicly on this but for the purposes of these consultation proposals, we are working on the assumption that the Lord Chief Justice will be the head of the judiciary for both the Courts and Tribunals and will assume the judicial leadership functions that are currently exercised by the statutory office of the Senior President of Tribunals.

2.1 The case for change

7) The Constitutional Reform Act 2005 (CRA) established in statute, principles and a new organisation, the Judicial Appointments Commission (JAC), for the identification and appointment of judges for courts in England and Wales, for Tribunals and the newly created Supreme Court of the United Kingdom. These new arrangements, which responded to the Peach report, replaced a system of confidential and informal consultation with the judiciary, largely closed to independent or public scrutiny. [3]

8) The changes brought about through the CRA delivered progress in many areas particularly in respect of transparency and openness. However, the Ministry of Justice, JAC, judiciary and HMCTS have identified a number of issues which continue to attract criticism and should be addressed. These include the balance between the executive, judicial and independent roles and accountabilities in the appointment processes, the speed with which the diversity of the judiciary is changing, the degree of transparency surrounding some senior appointments, and the length of time and amount of money it can cost to make a selection.

The balance between executive, judicial and independent roles and accountabilities and ensuring clarity, transparency and openness

9) The CRA provided for greater separation of powers. It implemented substantial changes to the office of Lord Chancellor, bringing the role more squarely into the executive branch and transferring many of its judicial responsibilities to the Lord Chief Justice. The CRA changed the role of the Lord Chancellor so that the office holder was no longer a judge, nor exercised any judicial functions.

10) The Lord Chief Justice is now responsible for representing the views of the judiciary of England and Wales to Parliament, the Lord Chancellor and Ministers of the Crown generally. The CRA conferred upon the Lord Chief Justice the office of President of the Courts of England and Wales and Head of the Judiciary of England and Wales. He is also responsible, within the resources made available by the Lord Chancellor, for maintaining appropriate arrangements for the welfare, training and guidance of the judiciary of England and Wales, and for maintaining appropriate arrangements for the deployment of the judiciary of England and Wales and allocating work within courts. The Tribunals, Courts and

[3] http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/judicial/peach/indexfr.htm

Enforcement Act 2007, conferred comparable powers on the Senior President of Tribunals.

11) The CRA created the Judicial Appointments Commission (JAC) as an independent commission that selects candidates for judicial office in courts and tribunals in England and Wales, and for some tribunals whose jurisdiction extends to Scotland or Northern Ireland (as set out within schedule 14 to the CRA). The JAC select candidates for judicial office on merit, through fair and open competition, from the widest range of eligible candidates. They were set up to create independent scrutiny and oversight while strengthening judicial independence, by taking responsibility for selecting candidates for judicial office out of the hands of the Lord Chancellor and making the appointments process clearer and more accountable.

12) Our proposals therefore consider:

- whether the Lord Chancellor should transfer his decision-making role to the Lord Chief Justice in relation to appointments to the Courts and Tribunals below the level of Court of Appeal or High Court;
- whether the role of the Lord Chancellor should have more meaningful involvement in appointments for the most senior judiciary in England and Wales (Lord Chief Justice, Heads of Division, Senior President of Tribunals and Lords Justices of Appeal) as well as appointments for the President of the UK Supreme Court;
- the role of the Prime Minister in judicial appointments;
- the composition and balance of independent responsibilities on selection panels; and
- the role of the Judicial Appointments Commission.

Changes that create a more diverse judiciary reflective of society and appointment on merit

13) Since 1998 there has been gradual but slow progress in the percentage of women and Black, Asian and Minority Ethnic (BAME) members of the judiciary. The latest published figures for April 2011 indicates that the percentage of women within the courts based judiciary has increased to 22.3%, while 5.1% were BAME. [4] Within the most senior courts judiciary (High Court and above) the percentage of women is 13.7%, while the percentage of BAME is 3.1%. This compares with most recent estimates of women representing around 51% of the population and BAME groups representing 12% of the population. [5]

14) In July 2010 and January 2011, the JAC together with the Ministry of Justice jointly published a report comparing judicial appointments across a 10-year period between 1998/99 to 2008/09. The two reports presented an

[4] http://www.judiciary.gov.uk/publications-and-reports/statistics/diversity-stats-and-gen-overview

[5] These estimates are based on ONS Mid year population estimates 2010 and ONS Population Estimates by Ethnic Group (PEEGs) 2009. Calculations presented are based on figures available on the ONS website, which were rounded to the nearest 100.

analysis of judicial appointments before and after the inception of the JAC, focusing upon women, BAME and solicitor applicants. Numbers were in some cases too small for statistically significant differences to be determined. However in a number of areas where the comparisons were statistically significant, it was established that improvements had been made. [6] These included women applicants for Circuit Judge, Deputy District Judge, Deputy District Judge (Magistrates Courts) and Legal member of the Social Security and Child Support Appeals Tribunal (SSCSAT); and BAME applicants for Deputy District Judge (Magistrates Courts).

Year	Total number of Judges	%Women	%BAME
1998	3174	10.3%	1.6%
1999	3312	11.2%	1.7%
2000	3441	12.7%	2.1%
2001	3535	14.1%	1.9%
2002	3545	14.5%	2.0%
2003	3656	14.9%	2.2%
2004	3675	15.8%	2.5%
2005	3794	16.9%	2.9%
2006	3774	18.0%	3.8%
2007	3545	18.7%	3.5%
2008	3820	19.0%	4.1%
2009	3602	19.4%	4.5%
2010	3598	20.6%	4.8%
2011	3694	22.3%	5.1%

15) The above table details the number of judges in office (as recorded at 1 April each year) by women and ethnic background in England and Wales. [7]

[6] Statistical digest of judicial appointments of women, BAME and solicitor candidates from 1998/99 to 2008/09 – published July 2010 and January 2011, http://www.judicialappointments.gov.uk/about-jac/1005.htm

[7] The database of the ethnic origin of the judiciary may be incomplete as (a) candidates are asked to provide the information on a voluntary basis and (b) such details have only been collected since October 1991. Further ethnicity data was collected from judiciary in post through a diversity survey undertaken by the Judicial Office in 2007. In May 2009, the Judicial Office began collecting ethnicity data from all new judicial appointees with the help of Ministry of Justice. Figures from 2008 onwards are not directly comparable with earlier years as the data has been widened to include four new types of judicial post. From 2009, the black and minority ethnic figure is calculated as a percentage of those members of the judiciary who provided ethnicity data. See the accompanying Equality Impact Assessment for further details.

Source – Historical data from Judicial Office website and archived websites of the Department for Constitutional Affairs (http://www.judiciary.gov.uk/publications-and-

16) Since its creation, the JAC has made almost 2,500 selections. Over 35% of these were women and at least 9% were BAME candidates. Of those selections for the courts, approximately 34% were women and 7% were BAME. While of those selections for tribunals, approximately 39% were women and 11% were BAME candidates. [8]

17) The available statistics on the diversity of the judiciary suggest that, in spite of improvements made, there are low levels of representation of ethnic minority groups and women, particularly at the higher levels of the judiciary. A comprehensive study of judicial diversity has not been undertaken in this country. A review of the historical research evidence has shown that low levels of representation may have a negative impact on public perceptions of the courts among ethnic minorities. [9] It is therefore important that improvements continue to be made.

18) Research on attitudes within the legal profession is quite limited and often consists of small or partial samples. These studies have, however, highlighted perceived obstacles for women and BAME respondents. [10] For example; a recent study commissioned by the JAC (BRMB, 2009) reported perceptions of prejudice in the application process by eligible barristers and solicitors. Women and BAME respondents were, for example, found to perceive these attributes as a distinct disadvantage (white respondents and men perceived these as positive influences), although statistical analysis suggested that such demographic characteristics were not the most important characteristics affecting propensity to apply.

19) The report of the Advisory Panel on Judicial Diversity set out a strong case for a more diverse judiciary. This was based on the value of equality of opportunity and the importance in a democratic society of a judiciary that is more reflective of the society that it serves. The Panel believed that Judges drawn from a wide range of backgrounds and life experiences would bring varying perspectives to bear on critical legal issues and a judiciary that was visibly reflective of society would enhance public confidence.

---

reports/statistics/diversity-stats-and-gen-overview and http://www.dca.gov.uk/dept/depstrat.htm).

[8] Management Information taken from the Judicial Appointments Commission Equitas database

[9] See Thomas, C. (2005). Judicial Diversity in the United Kingdom and Other Jurisdictions: a Review of Research, Policies and Practices – The Commission for Judicial Appointments.

[10] See, for example, British Market Research Bureau (2009) and Sommerlad et al (2010), Diversity in the Legal Profession in England and Wales: A Qualitative Study of Barriers and Individual Choices Funded by the Legal Services Board. Available at: http://www.legalservicesboard.org.uk/what_we_do/Research/Publications/pdf/lsb_diversity_in_the_legal_profession_final_rev.pdf

22. Equal opportunities. *All properly qualified people should have an equal opportunity of applying and of being selected for judicial office. Well-qualified candidates for judicial office should be selected on their merits and should not be discriminated against, either directly or indirectly.*

23. *Inherent in the concept of human equality is the principle that talent is randomly and widely distributed in society, and not concentrated in particular racial or other groups. It therefore follows that the more widely one searches for talent, the more likely it is that the best candidates will be identified*.

24. *The current under-representation of certain well-qualified groups within the judiciary suggests that factors other than pure talent may be influencing either people's willingness to apply or the selection process, or both*

25. Legitimacy. *In a democratic society it is unacceptable for an unelected institution that wields the power of the judiciary to be drawn from a narrow and homogenous group that reflects neither the diversity of society nor that of the legal profession as a whole. Failure to appoint well-qualified candidates from diverse backgrounds to judicial office represents exclusion from participation in power. A judiciary which is visibly more reflective of society will enhance public confidence.*

26. Perspectives. *Judges drawn from a wide range of backgrounds and life experiences will bring varying perspectives to bear on critical legal issues. This is particularly important where there is scope for the exercise of judicial discretion or where public interest considerations are a factor.*

The Report of the Advisory Panel on Judicial Diversity, February 2010

20) The Government has committed to implementing all 53 of the Advisory Panel's recommendations on creating a more diverse judiciary and will work together with the Lord Chief Justice, the JAC, the Bar Council, the Law Society and the Institute of Legal Executives to implement the recommendations. Of those recommendations, there are six which specifically relate to the appointments process and require primary legislation. We are therefore consulting on:

- amending schedule 8 to the CRA to ensure that only one serving justice of the UK Supreme Court be present on selection panels for future justices of the UK Supreme Court;
- amending Part 3 of the CRA to clarify that serving Presidents or Deputy Presidents of the UK Supreme Court should not participate in the selection of their successors;
- amending Part 4, Chapter 2 of the CRA (sections 71 and 80) to increase the number of members on selection panels for Lord Justices of Appeal, Lord Chief Justice and Heads of Division from four to five;
- the introduction of flexible and part-time working for judicial appointments to the High Court and above;
- limiting fee-paid appointments to a period of 15 years; and
- enabling the JAC to apply the Equality Act 2010's positive action provisions when two candidates are essentially indistinguishable.

Speed and quality of service to applicants, the courts and tribunals and value for money to the taxpayer

21) The Government's recent review of its judicial arms-length bodies identified that the appointments process took too long and was unnecessarily bureaucratic and costly (see Appendix 1). The Ministry of Justice has been working closely with HMCTS, the JAC and Judicial Office to reduce the length of time and associated costs with identifying a need for a judicial office holder and appointing one. The JAC has made significant improvements over the past 12 months. In 2010/11, the number of applications increased by 50% while overall costs have reduced by 20%. [11] The JAC continues to look for and implement ways to shorten the appointments process without sacrificing the quality of selections made, fairness or transparency.

22) Schedule 14 to the CRA has, in practice, been found to work against the increased flexibility that many would like to see in the appointments system. The application of the JAC's processes (developed for selection to judicial offices which require a legal qualification) to selection for specific judicial offices not requiring a legal qualification (such as specialist members of tribunals) is seen by those involved in the appointments process as overly prescriptive and inflexible.

23) The size, shape and composition of the Commission could be changed, along with the scope of the judicial offices for which the JAC makes selections. This is about maintaining delivery of the right people for the right positions that meets the needs of the judiciary and HMCTS. A smaller Commission may facilitate clearer, faster and more focused decision-making. We are therefore proposing to:

- amend the CRA so that, with the agreement of the Lord Chancellor, the Lord Chief Justice and the Commission itself, individual judicial offices could be moved in or out of the JAC's remit, where it is appropriate to do so; and
- reduce the size and change the composition of the Commission.

2.2 Delivering the Changes

24) The House of Lords Constitution Committee is carrying out an inquiry into judicial appointments processes in the UK and is considering many of the issues outlined in this consultation paper. [12] We therefore intend to carefully consider the Committee's findings alongside responses to this consultation.

25) Taking forward some or all of the changes would require a significant number of amendments to primary legislation because the appointments process is prescribed in great detail on the face of the CRA (Part 3,

[11] http://jac.judiciary.gov.uk/about-jac/167.htm

[12] http://www.parliament.uk/business/committees/committees-a-z/lords-select/constitution-committee/inquiries/judicial-appointments-process/

sections 26 to 31 for UK Supreme Court appointments and Part 4, Chapter 2 for other judicial appointments).

26) While it must be right that those of our proposals that address the principles of judicial appointments, such as the positive action provision, should be discussed by Parliament during the passage of a Bill, in a number of cases, we are seeking to achieve small changes to essential business processes. While the principles should remain in primary legislation, we believe that powers that relate to the selection processes and composition of selection panels could be included within secondary legislation that would be subject to Parliament's affirmative procedure. This would enable us to introduce minor process changes in response to business needs without the need for primary legislation.

27) We are therefore consulting on whether we should take all those provisions currently detailed within the CRA (Part 3, sections 26 to 31 for UK Supreme Court appointments and Part 4, Chapter 2 for other judicial appointments) off the face of primary legislation. Such change would be replaced by secondary legislation and guidance that would be subject to the affirmative procedure and agreement between the Lord Chancellor and Lord Chief Justice and, in relation to Supreme Court appointments, the President of the UK Supreme Court. This would provide the same degree of safeguard for transparency and accountability, while creating a greater degree of flexibility in the future to respond to changing business requirements.

3 Introduction

This consultation sets out a range of proposals for changes to the statutory framework for judicial appointments. The consultation is aimed at members of the judiciary, legal practitioners and their representative organisations, those responsible for aspects of the judicial appointments process, equality and diversity groups and those who have an interest in judicial appointments.

A Welsh language version of the consultation paper together with alternative formats is available upon request.

This consultation is conducted in line with Code of Practice on Consultation and falls within the scope of the Code. The consultation criteria, which are set out on page 45, have been followed.

Copies of the consultation paper are being sent to:

President of the UK Supreme Court

Deputy President of the UK Supreme Court

Lord Chief Justice of England and Wales

Senior President of Tribunals

The Judges Council

Judicial Executive Board

Tribunals Judicial Executive Board

The Council of Circuit Judges

The Association of District Judges

The Association of Women Judges

Administrative Justice and Tribunals Council

Forum of Tribunal Organisations

Lord President of the Court of Session

Lord Chief Justice of Northern Ireland

The Judicial Council for Scotland

Judicial Appointments Commission

Judicial Appointments Board for Scotland

Northern Ireland Judicial Appointments Commission

Judicial Appointments and Conduct Ombudsman

House of Lords Constitution Committee

The General Council of the Bar of England and Wales

The Law Society of England and Wales

The Faculty of Advocates of Scotland

The Law Society of Scotland

The General Council of the Bar of Northern Ireland

The Law Society of Northern Ireland

Institute of Legal Executives

The Legal Services Commission

The Scottish Legal Aid Board

Northern Ireland Legal Services Commission

Association of Women Solicitors

Bar Council Equality and Diversity Advisers

Black Lawyers Directory

Black Solicitors Network

Solicitors Association of Higher Courts Advocates

Solicitors in Local Government

Solicitors Regulation Authority

Society of Asian Lawyers

Society of Black Lawyers

Interlaw Diversity Forum

Judicial Diversity Forum

Justice

Liberty

Office for Disability Issues

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.

4 The proper balance between executive, judicial and independent roles and responsibilities

28) In this section, we explore options for changing the role of the Lord Chancellor and Lord Chief Justice in the judicial appointments process to better reflect the way in which their responsibilities and accountabilities have evolved following the implementation of the Constitutional Reform Act 2005 (CRA). We also look at ways of making the appointments process for the most senior appointments more transparent and open, given the concerns raised by the Advisory Panel on Judicial Diversity.

29) The CRA implemented substantial changes to the office of Lord Chancellor. Prior to the CRA the office of the Lord Chancellor had functions spanning the legislative, executive and judicial branches of government. The CRA sought to abolish the functions it deemed inappropriate within the context of the new constitutional arrangements so that the Lord Chancellor would no longer be the Speaker in the House of Lords and his judicial functions were transferred to the Lord Chief Justice.

30) The Lord Chancellor can now be a Member of the House of Commons and is no longer a judge, nor the Head of the Judiciary. As a senior member of Cabinet, he is responsible for criminal, civil and family justice, democracy and rights, as well as the efficient running of the courts and tribunals (in partnership with the Lord Chief Justice and Senior President of Tribunals), and as Secretary of State for Justice, the prison and probation services.

31) The Lord Chief Justice has assumed responsibility as Head of the Judiciary for England and Wales for representing the judiciary's views to Parliament, the Lord Chancellor and Ministers of the Crown generally. He is also responsible, within the resources made available by the Lord Chancellor, for maintaining appropriate arrangements for the welfare, training and deployment of the judiciary of England and Wales and for the appointment of judicial office holders to committees, boards and similar bodies. The Tribunals, Courts and Enforcement Act 2007, conferred similar powers on the Senior President of Tribunals. We will shortly consult publicly on this but for the purposes of this consultation, we are working on the basis that the Lord Chief Justice will be the head of the judiciary for both the Courts and Tribunals and will assume the judicial leadership functions that are currently exercised by the statutory office of the Senior President of Tribunals in relation to England and Wales.

32) The Judicial Appointments Commission (JAC) was created as an independent commission that selects candidates for judicial office in courts and tribunals in England and Wales, and for some tribunals whose jurisdiction extends to Scotland or Northern Ireland (as set out within schedule 14 to the CRA). The JAC selects candidates for judicial office on merit, through fair and open competition, from the widest range of eligible candidates. It was set up to create independent scrutiny and oversight and make the appointments process clearer and more accountable. In

practice, the JAC selects one candidate for each vacancy and recommends that candidate to the Lord Chancellor who can accept or reject a JAC recommendation, or ask the Commission to reconsider it.

33) The creation of the UK Supreme Court was the final aspect of the policy embodied within the Act to be delivered. Through its creation it established a complete separation between the United Kingdom's senior Judges and Parliament, as well as demonstrating the independence of the Supreme Court Justices and increasing the transparency between Parliament and the courts.

34) The procedure for appointing a Justice of the Supreme Court of the United Kingdom is governed by sections 25 to 31 (as amended by the Tribunals, Courts and Enforcement Act 2007) of and Schedule 8, to the CRA.

35) It is the responsibility of the Lord Chancellor to convene a selection commission: he usually does this by way of a letter to the President of the Court who chairs the selection commission. Other members are the Deputy President, and a member of each of the Judicial Appointments Commission for England and Wales, the Judicial Appointments Board in Scotland and the Judicial Appointments Commission in Northern Ireland. At least one of those representatives has to be a lay person. Nominations are made by the Chairman of the relevant Commission/Board.

4.1 All judicial appointments

36) As it currently stands, the Lord Chancellor is required to make the vast majority of judicial appointments. The CRA prescribes that he should consider the name(s) put forward by the selecting committee (the JAC or an ad hoc selection commission for UK Supreme Court appointments) and either accept, or reject the selection or request that the selecting committee reconsider. In so doing, the Lord Chancellor validates the selection processes. Last year, the Lord Chancellor approved 686 judicial appointments: 400 for the Tribunal Service; 284 for the Courts Service; and 2 for the UK Supreme Court. [13] The Lord Chancellor accepted every recommendation put forward by the Supreme Court and the JAC except for one. [14]

37) In September 2010 the Lord Chancellor announced that he agreed with the Lord Chief Justice and Senior President of Tribunals that a single head of the judiciary should be established in England and Wales (encompassing both Courts and Tribunals judiciary). This consultation paper therefore assumes that Tribunals judicial office holders in Northern Ireland and Scotland will no longer be appointed through the JAC and will therefore not fall under the remit of the LCJ. In light of this and other changes to the partnership that exists between the Lord Chief Justice and Lord Chancellor we believe that it would be more appropriate for the Lord Chief Justice to decide whether or not to accept a recommendation from

[13] Judicial Appointments Annual Report 2010/11; Supreme Court Annual Report 2010/11

[14] Judicial Appointments Annual Report 2010/11

the JAC in the vast majority of judicial appointments. We have taken this view that the Lord Chief Justice is better placed to understand the requirements of a particular judicial role.

38) We consider that the complete removal of the Lord Chancellor from the entire process would result in an accountability gap and are of the view that this gap increases with the seniority of the appointment being made, given the Lord Chancellor's statutory duty to Parliament for the effective operation of the justice system and the key role the senior judiciary play in that regard.

39) The most significant change in risk appears to be around the level of appointments to the High Court or Court of Appeal and above. This is because there is far more potential for members of the High Court and above to become involved in cases involving high-profile, complex, sensitive, and contentious issues. They are required to take decisions that are binding on other courts and often have national implications.

40) The Court of Appeal consists of a Civil Division and a Criminal Division, which between them hear appeals in a wide range of cases covering civil, family and criminal justice. Although in some cases a further route of appeal lies, with permission, to the UK Supreme Court, in practice the Court of Appeal is the final court of appeal for the great majority of cases.

41) An alternative option would be to set the cut-off at the High Court and above. Judges of the High Court are assigned to one of the three divisions of the High Court, either Chancery Division, Queen's Bench or Family Division. They deal with serious criminal cases, important civil cases, applications for judicial review and often assist the Court of Appeal to hear criminal appeals. In terms of volumes, last year, there were 25 appointments at the level of High Court and above, which included three appointments to the Court of Appeal. This represents 5% of all appointments made during that period.

Question 1: Should the Lord Chancellor transfer his decision-making role and power to appoint to the Lord Chief Justice in relation to appointments below the Court of Appeal or High Court? (S67, 70 - 76, 79-85, 88 – 93 of CRA)

(Please support your answer with reasons)

4.2 Selection panels for Deputy High Court Judge authorisations in England and Wales

42) As it currently stands, the process for authorising individuals (section 9(1) Senior Courts Act 1981) or identifying and appointing (section 9(4) Senior Courts Act 1981) to act as Deputy Judge of the High Court remains within the ambit of the Lord Chief Justice who has delegated it to the Heads of Division, while the JAC provides concurrence following a selection (in relation to section 9(1) authorisations only).

43) There are currently three routes by which Deputy High Court Judges are authorised under section 9(1) of the Senior Courts Act 1981.

44) The first is through freestanding expressions of interest exercise run by the Heads of Division, when it is open to Circuit Judges and Recorders to seek a section 9(1) authorisation. In the past, these exercises have taken place at intervals of approximately once a year to 18 months.

45) The second is through a JAC competition to select Senior Circuit Judges (Designated Family Judges and Designated Civil Judges where the posts have been assessed as meriting Senior Circuit Judge status, rather than a Circuit Judge, post) or Specialist Circuit Judges (Chancery, Mercantile, TCC, Patents). In these instances the candidates selected to fill the posts will require section 9(1) authorisations in order to do their job. The requirement for section 9(1) authorisation is assessed by the JAC at the time the appointment is made, the effect being that the JAC effectively gives concurrence to future section 9(1) authorisation for any candidate they select through these exercises. This also means that the Lord Chancellor's agreement to section 9(1) authorisation is also addressed at the time s/he accepts the JAC recommendations. It is currently open to Circuit Judges, Recorders or practitioners to apply through these exercises.

46) The third route reflects the fact that the majority of Designated Family Judge and Designated Civil Judge appointments do not acquire Senior Circuit Judge status. These posts are filled via expressions of interest exercises which are run on behalf of the senior judiciary by the regional Judicial Secretariats. The ability to deal with High Court level work is fundamental to the post of Designated Family/Civil Judge. Unless they already hold a section 9(1) authorisation, Circuit Judge candidates are therefore asked to submit an assessment as to their suitability for a section 9(1) authorisation. In these circumstances the senior judiciary seek JAC concurrence to the successful candidate being authorised under section 9(1).

47) This is out of step with most other appointments where the JAC is responsible for the management of the selection process and in all cases appoints an appropriate selection panel, which is in turn a committee of the Commission itself. [15]

48) No information is publicly available on the identity or diversity of those holding appointments. This is a concern because authorisation as a deputy High Court Judge provides many with an opportunity to gain experience of sitting in the High Court and is viewed as an important stepping stone to appointment to the High Court.

49) Any change here has to be balanced with the needs of managing courts caseload effectively. We are therefore proposing that in relation to the section 9(1) process, the JAC should be involved in a more meaningful way to provide greater transparency, openness and an independent element in these appointments. They should also collect and publish data on the diversity of Deputy High Court judges in the same way that they do

[15] The JAC are responsible for every appointment within Schedule 14 of the CRA which includes appointments to the High Court and Court of Appeal.

for other judicial appointments. This would improve candidates' confidence in the identification process and should widen the eligible pool for appointments to the High Court Bench.

50) Given the needs for the courts to secure a Deputy High Court judge at very short notice, we are not proposing to introduce a full JAC selection exercise. One option would be to involve a member of the JAC in the selection process and panel alongside the Heads of Division. This would then negate the need to seek the JAC's concurrence at the end of the process.

Question 2: Do you agree that the JAC should have more involvement in the appointment of deputy High Court judges? (Part 4, Chapter 2 of the CRA, s.9 Senior Courts Act 1981)

(Please support your answer with reasons)

4.3 The most senior judicial appointments (Lord Chief Justice, Senior President of Tribunals, Heads of Division and Court of Appeal)

51) For the appointment of the Lord Chief Justice, Heads of Division, Senior President of Tribunals and Lords Justices of Appeal, the CRA sets out the necessary membership of selection panels. Sections 71, 75C and 80 require that the selection panel must consist of four members and that there will be two judicial members plus the Chairman of the JAC and a lay member of the JAC. There is no such prescription as to the membership of selection panels below the Court of Appeal, where section 88(1) of the CRA requires the JAC to determine the selection process to be applied.

52) At present the balance between accountability and the need for an appropriately independent and transparent process is detailed within the CRA by a process whereby the Lord Chancellor can accept, reject or ask for reconsideration of names put forward by the selection panel. This veto is intended to provide the executive with a clear responsibility for the decision, creating visible accountability and providing a limited "safety net", should the Lord Chancellor feel the person selected is unsuitable. But it also limits the Lord Chancellor's powers of discretion, as a means of safeguarding the independence of the selection process and by extension, the judiciary itself.

53) Part of the selection process for Justices of the UK Supreme Court provides for the Lord Chancellor to be consulted (section 27(2) of the CRA). This is not something that is currently provided for within appointments to the other most senior judicial offices within England and Wales. For appointments below the level of Lord Chief Justice, and above the High Court, providing a requirement for the selection panel to consult with the Lord Chancellor, would allow the panel to take the Lord Chancellor's views into account.

54) Allowing the Lord Chancellor to comment on candidates prior to the start of the selection process could give rise to concerns that the selection might be unduly influenced by the Lord Chancellor's views. However, as noted above the Lord Chancellor, together with Ministers on behalf of the

Devolved Administrations, is consulted as part of the process for Supreme Court appointments, the most senior court in the United Kingdom, which has not given rise to such concerns. Furthermore the Lord Chancellor (and other Ministers of the Crown) has a statutory duty to maintain the independence of the judiciary which also applies to the appointments process.

Question 3: Should the Lord Chancellor be consulted prior to the start of the selection process for the most senior judicial roles (Court of Appeal and above)? (s70, 75B and 79 CRA)

(Please support your answer with reasons)

55) Where a four-member panel reaches a tied result, then the Chair has an additional casting vote. The Advisory Panel on Judicial Diversity recognised that this may be seen as unfair and recommended that an odd-numbered panel should be used to avoid a tied result.

> ***140**. In Court of Appeal appointments the Lord Chief Justice has the casting vote if a selection panel comes to a tied result. Although the casting vote provision has never been used, we doubt this is a sustainable position and think an alternative approach with a five person panel should be considered.*
>
> ***The Report of the Advisory Panel on Judicial Diversity, February 2010***

56) We are therefore proposing that the selection panels for these roles be comprised of five members instead of four so that the Chair does not have a casting vote. While judicial members better understand the requirements of a particular role, lay members bring independent scrutiny, oversight and transparency to the appointments process. We are consequently of the view that while a judicial member should chair the panel, the selection panel should be constituted of five members, two judicial with at least two of the remaining three members being a lay member.

Question 4: Should selection panels for the most senior judicial appointments be comprised of an odd number of members? (S71, 75C and 80, of the CRA)

(Please support your answer with reasons)

57) The CRA prescribes that the most senior England and Wales Supreme Court Justice should chair the selection panel for Heads of Division roles. The Lord Chief Justice or his nominee is present alongside the JAC Chairman and another lay member of the JAC. In practice though, these roles work alongside and report to the Lord Chief Justice not the most senior English and Welsh Supreme Court justice, on a day-to-day basis. We are therefore proposing that for these appointments, the Lord Chief Justice and not the most senior England and Wales Supreme Court Justice should chair the selection panels. The most senior England and Wales Supreme Court Justice also chairs the selection panel for the Lord Chief Justice and our proposals for that selection panel are detailed below (see questions 7 and 8).

58) We are therefore proposing that the selection panel for Heads of Division should be made up of five members, two judicial with at least two of the remaining three members being a lay member. The Panel would consist of the Lord Chief Justice as Chair, the most senior English and Welsh Supreme Court justice or their nominee, the Chair of the JAC, a lay member of the JAC and a nominee of the Lord Chief Justice. There should always be a gender and, where possible, an ethnic mix on the selection panel.

Question 5: Should the Lord Chief Justice chair selection panels for Heads of Division appointments in England and Wales? (S71 CRA)

(Please support your answer with reasons)

4.4 UK Supreme Court appointments

59) The process for appointing UK Supreme Court Justices is distinct from the process for appointing judges in England and Wales. Schedule 8 to the CRA prescribes that two judges (the President and Deputy President unless disqualified or either office is vacant) of the Supreme Court should sit on a selection commission, alongside a representative from the Judicial Appointments Commission for England and Wales, the Judicial Appointments Board for Scotland, and the Northern Ireland Judicial Appointments Commission, at least one of whom must be non-legally qualified. The selection commission is chaired by the President and the Commission submits a report with its final selection to the Lord Chancellor. The Lord Chancellor initiates the selection process and makes the final recommendation to HM The Queen, via the office of Prime Minister. The Lord Chancellor is consulted before the start of the selection process and then upon receipt of the report with the final recommendation he undertakes a second round of consultation with other statutory consultees, which includes the First Minister for Scotland, First Minster for Wales and Northern Ireland Judicial Appointments Commission.

> ***Recommendation 43:*** *The selection process for the Supreme Court of the United Kingdom should be reviewed to reduce the number of serving Justices involved …..*
>
> **The Report of the Advisory Panel on Judicial Diversity, February 2010**

60) The involvement of two serving members of the Supreme Court on the selection panel has given rise to criticism that the Court is appointing in its own image. The Advisory Panel on Judicial Diversity has argued that only one UKSC Justice should be involved, with a second senior judge drawn from the territorial jurisdictions. This is intended to reduce the risk that there is a perception that the selection process results in the appointment of a candidate that “fits in” rather than whether they best meet the merit criteria.

Question 6: Should only one serving Justice of the Supreme Court be present on selection commissions, with the second Justice replaced with a judge from Scotland, Northern Ireland or England and Wales? (Schedule 8, pt1 to the CRA)

(Please support your answer with reasons)

4.5 The appointment of the Lord Chief Justice and President of the UK Supreme Court

61) The two most senior judicial appointments for which the Lord Chancellor is responsible are the Lord Chief Justice of England and Wales and the President of the UK Supreme Court.

Appointment of the Lord Chief Justice

62) The Lord Chief Justice of England and Wales is the head of the judiciary and President of the Courts of England and Wales. He is also the presiding judge of the Criminal Division of the Court of Appeal.

63) The CRA specifies that the most senior England and Wales Supreme Court Justice should chair the selection panel for this appointment and that the departing Lord Chief Justice is not permitted to participate. The other members of the selection panel include a person designated by the most senior England and Wales Supreme Court judge, the Chairman of the JAC and a lay member of the JAC. We are proposing in question 4 above that the selection panel for the appointment of the Lord Chief Justice should be increased by one member from four members to five.

64) Given the importance of this role and the level and nature of engagement between the Lord Chief Justice and the executive, there is a clear case for providing an opportunity for the executive to express a view in terms of its accountability to the public and Parliament to provide for an effective justice system. We therefore consider that the Lord Chancellor should be the fifth member of the selection panel for the appointment of the Lord Chief Justice.

65) We do not believe that this would put the independence of the process at risk since the Lord Chancellor would only be one of five members. We are of the view that his participation on the selection panel should result in the loss of the Lord Chancellor's current right of veto. This is because the retention of the veto would enable him to reject or ask for the reconsideration of a candidate who he had not recommended as a member of the selection panel, (section 73 CRA).

Question 7: Do you agree that the Lord Chancellor should participate on the selection panel for the appointment of the Lord Chief Justice as the fifth member and in so doing, lose the right to a veto? (S 71, 73 and 74 of CRA)

(Please support your answer with reasons)

66) In relation to the chair of the selection panel, this role is currently undertaken by the most senior English and Welsh Justice of the UK

Supreme Court. It is conceivable that the most senior English and Welsh Supreme Court Justice may not have previously been appointed as a member of the senior judiciary in England and Wales (e.g. Heads of Division or Lords Justices of Appeal) and may therefore have limited experience of the responsibilities or leadership skills required for the role.

67) In order to provide openness and transparency, to address concerns around fairness and to deliver real scrutiny to the appointments process, we are proposing that someone who is independent from the executive and judiciary should chair the selection panel. Given the seniority and high profile nature of the positions, it would need to be someone who commands the confidence of the judiciary, executive, legislature and the public. We are therefore proposing that the chair of the JAC, should chair the selection panel for the appointment of the Lord Chief Justice of England and Wales.

68) The selection panel for the Lord Chief Justice of England and Wales would consequently be made up of five members, two judicial and at least two lay. The Panel would consist of the Chair of the JAC as Chair, the Lord Chancellor, the most senior English and Welsh Supreme Court justice, a lay member of the JAC and a judicial nominee of the Lord Chief Justice. There should always be a gender and, where possible, an ethnic mix on the selection panel.

Question 8: Do you agree that as someone who is independent from the executive and the judiciary, the Chair of the JAC should chair the selection panel for the appointment of the Lord Chief Justice? (S71 of CRA)

(Please support your answers with reasons)

Appointment of the President of the UK Supreme Court

69) The President of the Supreme Court of the United Kingdom is the head of the Supreme Court and the most senior member of the judiciary across the three jurisdictions of the United Kingdom.

70) Currently the membership of the selection commission is detailed within Schedule 8, Part 1, to the CRA and is formed of the President of the UK Supreme Court, the Deputy President and one member from each of the territorial appointments bodies.

71) Given the importance of this role and the level and nature of engagement between the President and the executive, there is a clear case for providing an opportunity for the executive to express a view in terms of its accountability to the public and Parliament to provide for an effective justice system. We therefore consider that the Lord Chancellor should sit as an additional member of the selection panel for the appointment of the President of the UK Supreme Court and that in so doing he should lose his right of veto.

Question 9: Do you agree that the Lord Chancellor should participate in the selection commission for the appointment of the President of the UK Supreme Court and in so doing, lose the right to a veto? (S26, 27, 29, 30 of, and Schedule 8 to, the CRA)

(Please support your answers with reasons)

72) Schedule 8 to the CRA specifies that the departing President should chair the selection panel for his or her successor with the Deputy President (unless the Deputy President is a candidate for the office), alongside representatives from the Judicial Appointments Commission for England and Wales, the Judicial Appointments Board for Scotland, and the Northern Ireland Judicial Appointments Commission, one of whom must be a lay member. We are in agreement with the Advisory Panel on Judicial Diversity that this is not acceptable for the reasons we have previously outlined.

> ***139**. The current processes for both the Court of Appeal and the Supreme Court require the significant involvement of the serving judiciary. Given the concern expressed to the Panel that selection panels may subconsciously recruit in their own image, this involvement runs the risk that the process is perceived, rightly or wrongly, as unfair. In particular we believe it is unacceptable for a judge to be directly involved in the selection of his or her successor.*
>
> **The Report of the Advisory Panel on Judicial Diversity, February 2010**

73) We are therefore seeking views on who should replace the current President as the chair of the selection commission for the appointment of their replacement.

74) Similar to the proposals for the chair of the selection panel for the Lord Chief Justice, there is a requirement to provide openness and transparency, address concerns around fairness and deliver real scrutiny to the appointments process. We are therefore proposing that someone who is both lay and independent from the executive and judiciary should chair the selection panel. Given the seniority and high profile nature of the positions, it would need to be someone who commands the confidence of the judiciary, executive, legislature and the public.

75) The Government is therefore proposing that the Chair of the selection panel to identify the President of the UK Supreme Court should be a non-judicial member from either the Judicial Appointments Commission for England and Wales, the Judicial Appointment Board for Scotland or the Northern Ireland Judicial Appointments Commission. [16]

76) We are proposing that there should be a seven member selection commission which would include the Lord Chancellor, alongside two

[16] Under the Justice (Northern Ireland) Acts 2002 & 2004, the Chair of the Northern Ireland Judicial Appointments Commission is the Lord Chief Justice for Northern Ireland.

judicial representatives (one Supreme Court Justice and a senior nominated second judge from another part of the United Kingdom), together with a representative from each of the Judicial Appointments bodies for England and Wales, Scotland and Northern Ireland and the chair (as detailed in the above paragraph). Of the four members from the territorial appointments bodies we are proposing that one of them must be a judicial office holder and at least two, including the chair, must be lay members. There should always be a gender and, where possible, an ethnic mix on the selection panel. These proposals ensure that at least three of the panel would be members of the senior UK judiciary.

Question 10: What are your views on the proposed make-up of the selection panel for the appointment of the President of the UK Supreme Court? (S26, 27 of, and Schedule 8 to, the CRA)

Question 11: Do you agree with the proposal that the Chair of the selection panel to identify the President of the UK Supreme Court, should be a lay member from either the Judicial Appointments Commission for England and Wales, the Judicial Appointment Board for Scotland or the Northern Ireland Judicial Appointments Commission?

(Please support your answers with reasons)

4.6 The role of the Prime Minister

77) Historically, the Prime Minister has made recommendations to HM Queen for the most senior judicial offices (by convention for appointments to Lord Chief Justice, Heads of Division and Court of Appeal, and by statute for appointments to the UK Supreme Court) on the advice of the Lord Chancellor. This arrangement provided a clear line of executive accountability when the Lord Chancellor used to be the head of the judiciary.

78) The Lord Chancellor's role in relation to senior appointments is now clearly as a member of the executive. The old ambiguity over which branch of state the Lord Chancellor represents no longer exists. It could be argued that there is little need, therefore, for appointments to be recommended by the Prime Minister as a representative of the executive. Removing the Prime Minister's role and allowing the Lord Chancellor to make recommendations directly to HM Queen would streamline the process and remove a layer of administration and duplication which is now constitutionally redundant.

79) It is interesting to note that a change to the Prime Minister's role in relation to Supreme Court appointments was proposed as part of the Constitutional Renewal Bill. The proposals were removed before the Bill was passed as the Constitutional Reform and Governance Act 2010. The Parliamentary Committee scrutinising the Bill commented:

"While there is no need for urgent reform, we accept the proposal to remove the Prime Minister's residual role in relation to appointments to the Supreme Court. The additional check that the Prime Minister used to provide on the Lord Chancellor's nomination is no longer necessary in light of the statutory selection processes introduced by the Constitutional Reform Act 2005."

Question 12: Should the Lord Chancellor make recommendations directly to HM the Queen instead of the Prime Minister? (S26 and 29 CRA and convention)

(Please support your answer with reasons)

5 Improving diversity

80) In February 2010, the independent Advisory Panel on Judicial Diversity published its report detailing 53 recommendations that it believed, if implemented, would increase diversity within the judiciary. [17] The Panel's vision for the judiciary was:

> *..That by 2020 we will have a much more diverse judiciary at all levels which:*
>
> - *is as talented, respected and independent as it is in 2010;*
> - *recognises the concept of a judicial career;*
> - *seeks and finds talent in more unusual places;*
> - *gives opportunities to a wider range of individuals, and*
> - *Is more flexible in its working practices.*

81) One of those recommendations was that a Judicial Diversity Taskforce, comprising the Ministry of Justice, senior members of the judiciary, the JAC, the Bar Council, the Law Society and Institute of Legal Executives, be constituted to oversee implementation of the recommendations.

82) All of the members of the Taskforce have committed to implementing all 53 of the Advisory Panel's recommendations for creating a judiciary that better reflected the society it served. Six of those recommendations are detailed within these consultation proposals and of those there are three which specifically relate to improving the diversity of the judiciary and where it was felt that primary legislation would be required in order to enable their effective delivery. We are therefore consulting on:

- the introduction of salaried part-time working for the most senior judicial appointments (High Court Judge and above);
- enabling the JAC to apply the Equality Act 2010's positive action provisions when two candidates are essentially indistinguishable, and
- limiting fee-paid appointments to a maximum period of 15 years so that the opportunities to obtain fee-paid experience can be regularly refreshed.

5.1 Introducing flexible working

83) In April 2005, the option of part-time working was extended to include all existing salaried judicial office holders below High Court level. The working arrangements for judges are designed to meet the needs of a broad range of people and their circumstances. These include, depending on the needs of the court/tribunal, flexible working patterns and part-time working.

[17] http://www.justice.gov.uk/publications/docs/advisory-panel-judicial-diversity-2010.pdf

84) This flexibility in working patterns currently does not apply to judicial office holders in the High Court and above. This is in part due to provisions within the Senior Courts Act 1981 which limits the number of judges in the High Court and Court of Appeal. The limit does not refer to 'full time equivalent', simply to the number of judges, i.e. a complement of 108 High Court judges and a complement of 38 in the Court of Appeal. Although in principle there is nothing to prevent the extension of flexible working to the High Court and above by either HMCTS or the judiciary, in practice however if two judges wished to apply for salaried part-time working within the High Court, under the provisions of the Senior Courts Act they would be deemed as being two judges, rather than one full-time equivalent. This reduces the numbers of judges available in the High Court, which impacts upon the ability of the High Court to complete cases in a timely fashion.

Question 13: Do you believe that the principle of salaried part-time working should be extended to the High Court and above? If so, do you agree that the statutory limits on numbers of judges should be removed in order to facilitate this? (Sections 2 and 4 of the Senior Courts Act 1981)

(Please support your answer with reasons)

5.2 Equality Act 2010

Recommendation 21: 'The JAC should make use of the Equality Bill positive action provisions where the merits of the candidates are essentially indistinguishable'

(Paragraph 99) – We (the Advisory Panel) welcome the positive action provisions for recruitment or promotion in the Bill whereby possession of a protected characteristic can tip the balance in favour of that candidate where two or more applicants are essentially indistinguishable.

The Report of the Advisory Panel on Judicial Diversity, February 2010

85) The Equality Act 2010 (Part 11, Chapter 2, sections 158 and 159), allows any of the eight protected characteristics (age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, gender and sexual orientation) to be taken into consideration when deciding who to select for appointment in specified circumstances.

86) The positive action provisions apply where candidates are "as qualified as" each other for a particular vacancy. This does not mean that those candidates have to have exactly the same qualifications as each other; it means that any selection assessment on a range of criteria rates them as equally capable of doing the job.

The new positive action provisions mean that it is not unlawful to recruit or promote a candidate who is of equal merit to another candidate, if the employer reasonably thinks the candidate:

- *has a protected characteristic that is underrepresented in the workforce; or*
- *that people with that characteristic suffer a disadvantage connected to that characteristic.*

*However, positive action does not allow an employer to appoint a **less suitable candidate** just because that candidate has a protected characteristic that is under represented or disadvantaged.*

Equality Act 2010: What Do I Need To Know? A Quick Start Guide To Using Positive Action In Recruitment And Promotion, Government Equalities Office

87) In response to the publication of the Advisory Panel report, recommendation 21 has been considered, in conjunction with guidance published by the Equality and Human Rights Commission and Government Equality Office regarding the application of Positive Action. It has been concluded that given the requirements detailed within the CRA to appoint solely on merit, it would be difficult to conceive how these provisions could be applied to judicial appointments without amending section 63 of the CRA, which specifies that selections for judicial appointment must be made 'solely on merit', so that the principle where two candidates are essentially indistinguishable can be accurately represented in revised guidelines.

88) The JAC, following consultation, have detailed the definition of merit that they use to assess individual applications. This is an impartial mechanism, which ensures that all appointments are made through fair and open competition. The JAC currently do not treat possession of a protected characteristic outlined within the Equality Act 2010 as an indicator of 'merit'.

89) The Government is therefore consulting on whether the appointments process operated by the JAC should be amended to enable the JAC to utilise the Equality Act positive action provisions where the merits of the candidates are essentially indistinguishable. This would retain the fundamental principle that judicial appointments should always be made on merit. However, where at the end of the selection process, two candidates are essentially indistinguishable, then any of the eight protected characteristics could be applied to decide who to select for appointment. The application of the Equality Act positive action provisions to the selection process would be a powerful statement and an enabling tool that could increase the diversity of the judiciary.

Question 14: Should the appointments process operated by the JAC be amended to enable the JAC to apply the positive action provisions when two candidates are essentially indistinguishable? (S63 of the CRA)

(Please support your answers with reasons)

5.3 Three renewable terms for fee-paid judicial office holders

90) Fee-paid judicial experience is a standard non-statutory eligibility condition for some salaried appointments and is in principle seen as the "training ground" for salaried office. However, in some exceptional cases candidates have been able to demonstrate the necessary skills in some other significant way. This enables potential applicants for salaried offices to test whether such a career is for them and to gauge their suitability for the office.

91) Previous administrations have consulted on whether to limit the length of time fee-paid office holders can remain in post. Respondents to these previous consultations have raised concerns about the risk of removing valuable knowledge and experience from the talent pool. We think that concerns can be over come through a process that enables the provision to be reviewed reflecting the circumstances of specific business need. On balance, we believe that this proposal is worth taking forward in order to improve diversity, whilst retaining sufficient flexibility to extend individual tenure in order to respond to specialist Tribunals jurisdictions or business needs.

"To ensure that such fee paid opportunities are made more widely available, and that the pool of fee paid judiciary is regularly refreshed, we recommend that fee paid judges should not be able to stay in post until the statutory retirement age, but should ordinarily be appointable for a maximum of three renewable terms. "

The Report of the Advisory Panel on Judicial Diversity, February 2010

92) The Government is therefore consulting on whether fee-paid appointments should be limited to a maximum of three renewable terms of 5 years, but that there should be sufficient flexibility to ensure that the overall effectiveness of the courts and tribunals can be safeguarded.

Question 15: Do you agree that all fee-paid appointments should ordinarily be limited to three renewable 5 year terms, with options to extend tenure in exceptional cases where there is a clear business need?

(Please support your answers with reasons)

6 Quality, Speed of Service and Value for Money

93) An exercise for recruitment of non-legal members of Employment Tribunals in 2009, demonstrated how exercises for such offices might work. This exercise was run entirely within the Tribunals Service, as there is no legal requirement for selections to non-legal Employment Tribunal members to be carried out by the JAC. The campaign lasted 24 weeks, which is around average for JAC-run exercises of a similar size. However, references were not obtained for candidates and the usual period of statutory consultation was not required to be undertaken. Nearly 4000 applications were received and around 340 appointments made at a total cost of £965 per appointment.

6.1 The composition of the Judicial Appointments Commission

94) Although the JAC has reduced its overall costs and increased its efficiency, there remain areas where further improvement is possible in order to deliver improved value for money. However, these changes can only be achieved through primary legislation. Reducing the size of the Commission would contribute towards the overall cost-reduction that a refocused JAC would provide. A Commission of eight, combined with a more efficient use of Commissioner time, could reduce running costs by up to £50,000 per year (0.6% of the annual expenditure, based upon 2010/11 figures).

95) The membership of the Commission is designed to reflect, in a balanced and proportionate way, the various elements of the judicial system and the society which it serves. As such, none is a representative of their profession, but they provide experience, expertise and independence to the selection process.

96) The same principles would be used to determine future membership of the JAC. There would continue to be lay, professional and judicial representation with the Chairman remaining a lay member and the judicial members not in the majority.

97) A smaller Commission would facilitate clearer and more responsive decision-making. Where currently, courts and tribunals often work with a different Commissioner from one selection exercise to the next, a smaller Commission would provide more opportunities for Commissioners to work repeatedly within the same jurisdiction, creating stronger and more appreciative working relationships between the JAC and HMCTS.

98) Schedule 12, paragraph 2(2), to the CRA specifies that one of the commissioners must be a lay justice (magistrate) member. However, the responsibility for managing the selection process of lay justices is not carried out by the JAC (the lay justice entry in Schedule 14 to the CRA having not been commenced for appointment purposes, although it has been commenced for discipline purposes).

99) If the number of Commissioners is reduced, as proposed, from 14 (apart from the Chairman) to eight, then it seems desirable to loosen the rigid criteria which currently prescribe who can be a Commissioner. We are therefore inviting views on abolishing the numerical and other requirements in Schedule 12, paragraph 2(2) to the CRA. Instead we would propose that the Lord Chancellor, when making recommendations for appointment, must ensure that between them the Commissioners will have -

- knowledge and experience of holding judicial office;
- knowledge and experience of practice in a legal profession and
- other knowledge and experience which the Lord Chancellor considers suitable.

100) It is proposed that the bar on appointment of a person employed in the civil service of the State would remain.

Question 16: How many Judicial Appointments Commissioners should there be? (Schedule 12 to CRA)

(Please support your answer with reasons)

Question 17: Should the membership of the Commission be amended as proposed above? (Schedule 12 pt1 to CRA)

(Please support your answer with reasons)

6.2 The scope of the judicial offices for which the JAC makes selections

The total length of the appointments process, from identification of the vacancy to an appointed candidate being available to sit can be too long as a whole; both for HM Courts and Tribunals Service, and for candidates going through the process.

JAC Evidence to Lords Constitution Committee [18], the Judicial Appointments Process: Call for Evidence, July 2011, Paragraph 40

101) Schedule 14 to the CRA lists the judicial offices (legal and non-legal) for which the responsibility for carrying out selection (under section 88 of the CRA) falls to the JAC.

102) Changes to Schedule 14 would allow the JAC to focus on selection for offices requiring a legal qualification when the need is most pressing, and provide for the specialist non-legal selection exercises to be carried out elsewhere if necessary. Section 85 of the CRA could also be amended explicitly to allow the JAC the flexibility to carry out exercises for offices that would not normally be within its remit, if it has the

[18] http://www.judicialappointments.gov.uk/static/documents/JAC_constitution_evidence_FINAL.pdf

capacity to do so, and where it makes sense in business and cost terms for the JAC to undertake such work. This would create more flexibility to enable changes to processes to meet the needs of the judiciary and HMCTS.

103) The Government is proposing that the CRA could be amended so that, with the agreement of the Lord Chancellor, the Lord Chief Justice and the Commission itself, selection exercises for non-legal judicial office holders could be moved out of the JAC's remit, where it is appropriate to do so. This would be achieved by establishing a protocol in statute for agreeing where other exercises should be carried out on a case-by-case basis. It is not proposed to change the process by which Lay Magistrates are appointed.

Question 18: Should the CRA be amended to provide for selection exercises (such as judicial offices not requiring a legal qualification) to be moved out of the JAC's remit, where there is agreement and where it would be appropriate to do so? (S85 CRA)

(Please support your answer with reasons)

7 Delivering the Changes

104) The House of Lords Constitution Committee is carrying out an inquiry into judicial appointments processes in the UK and is considering many of the issues outlined in this consultation paper.[19] We therefore intend to carefully consider the Committee's findings alongside responses to this consultation.

105) In order to support the delivery of these proposals, we have been reviewing the CRA to establish what would need amending as a result of these consultation proposals. One of the issues that became clear was that due to the way that the CRA has been drafted, in order to make even minor process changes we would require primary legislation. This is because all of the appointment processes are set out on the face of the CRA. Taking forward changes would therefore require a significant number of amendments to primary legislation because the appointments process is prescribed in great detail on the face of the CRA (Part 3, sections 26 to 31 and schedules 8 and 12 for UK Supreme Court appointments and Part 4, Chapter 2 for other judicial appointments).

106) This is a significant commitment of Parliamentary business time. It also highlights the lengths which are necessary to achieve relatively small changes to essential processes and the lack of flexibility hampers our ability to introduce even minor process changes in response to the needs of the justice system.

107) We believe that it is possible that powers relating to the processes and composition of selection panels or selection commissions could be included within secondary legislation that would be subject to Parliament's affirmative procedure (in that it would need to be approved by both Houses of Parliament). This would create an enabling framework for judicial appointments without losing the transparency and clarity the CRA sought to achieve.

108) We are therefore proposing that instead of making piecemeal change, we future proof the appointments process by including details of the selection process into regulations and guidance. Such change would be replaced by secondary legislation and guidance that was subject to the affirmative procedure and agreement between the Lord Chancellor and Lord Chief Justice and, in relation to Supreme Court appointments, the President of the UK Supreme Court. This would provide parliamentary scrutiny and the same degree of safeguard for transparency and accountability, while creating a greater degree of flexibility in the future to respond to changing requirements within the Justice system.

[19] http://www.parliament.uk/business/committees/committees-a-z/lords-select/constitution-committee/inquiries/judicial-appointments-process/

Question 19: Do you agree with the proposed approach to delivering these changes?

(Please support your answer with reasons)

Question 20: Are there any other issues/proposals relating to the process for appointing the judiciary or for improving the diversity of the judiciary that you believe the MoJ should pursue?

(Please support your answer with reasons)

8 Appendix 1 – MoJ Review of Judicial Appointments

Letter from the Lord Chancellor to Baroness Jay of Paddington, Chair of the House of Lords Constitution Committee – January 2011

Review of Judicial Appointments and Judicial Arms Length Bodies

On 28 June 2010, I announced to Parliament my intention to undertake an internal review of the judicial appointments process that assessed the organisation and operation of the process from end to end, addressing in particular:

- The proper balance between executive, judicial and independent responsibilities
- Ensuring clarity, transparency and openness
- Quality and speed of service to applicants and the courts and tribunals the process serves
- Governance, efficiency and value for money

I also asked the review to consider whether the current structure of those arms length bodies supporting the Lord Chief Justice and me on judicial matters such as the Office for Judicial Complaints (OJC) and the Judicial Appointments and Conduct Ombudsman (JACO):

- best meets the needs of the constitutional settlement, properly protecting judicial independence
- provides clear accountability
- Provides the most effective means of delivering a high quality service and value for money.

The core principles that have underpinned the review are that the appointments process must: fully respect and maintain the independence of the judiciary; hold appointment on merit at the heart of the process; deliver openness and transparency throughout the process.

I was pleased to be able to announce on 9 November the outcomes of the review. I have decided that the Judicial Appointments Commission (JAC) and the Judicial Appointments and Conduct Ombudsman will remain in place as valued independent bodies, which do much to bring openness to the way candidates are selected for judicial appointments. I have also decided that the OJC should be moved to the Judicial Office and the complaints process, which works well overall, streamlined.

It is clear that at times the appointments process can take too long and cost too much. The first duty of the Commission is to maintain the high quality of judicial appointments but the JAC should also focus on delivering efficiency in the selection of judges, working with the judiciary and the unified Courts and Tribunals Service to do so. The vast majority of the necessary improvements

to the end-to-end appointments process can be delivered through streamlining the process itself and without the need for any legislative change.

I welcome the programme of reform that the JAC now have underway and which closely mirrors the proposals identified by the review in relation to improvements to the selection process. As a result of the issues identified as part of this review, I would like the JAC to consider:

- radical organisational changes in order to reduce the cost to the public of the selection process, including:
    - Commissioners should no longer sign-off recommendations collectively as a committee of 15; they should be involved in selection exercises as strategic "sponsors".
    - A review of staff grading, with a view to reducing the numbers and grades of the most senior staff which in my view are high when compared to posts of equivalent responsibilities in other organisations.
    - More flexible deployment of administrative staff, to respond more effectively to fluctuations in workload.
    - Focus staff resourcing on selection activity and reduce the amount of resource currently invested in other corporate functions.
    - Use of external providers to carry out functions, such as administration, transactional finance and organisation of test and selection days.
- Developing a more flexible set of selection activity options, to better suit the scope of different types of competition, for example generic qualifying tests for "entry-level" posts, psychometric tests, appropriate use of role play assessments.
- Considering the use of technology to make the selection process more efficient, and to improve the candidate experience.
- Considering contracting out some aspects of the selection process through an external provider.
- Limiting the number of references taken, and ensuring that they are strictly evidence-based.
- The JAC should undertake such data collection, sharing and evaluation as is necessary to ensure the selection process is fair, transparent and based solely on merit.

I would also propose that:

- The stages of the process before and after the JAC's selection exercise should be simplified, with a smaller role for the Ministry of Justice and the Judicial Office taking responsibility for the post-selection process.
- The approach to outreach should be consolidated across the JAC, Judicial Office and Courts.

A collaborative approach to reform between the JAC, the judiciary and the new courts and tribunals service (HMCTS) will enable us to improve the

efficiency, speed and flexibility of the process, whilst maintaining the increased transparency and neutrality that has been delivered by the JAC and continuing to ensure appropriate independent scrutiny of the process. It will deliver a service more responsive to the needs of applicants, the judiciary and HMCTS, while also reducing costs. It should be possible to deliver a smooth transition to the new arrangements, and therefore a reduced risk to business as usual. Much can be done to move towards greater efficiency and flexibility of process in advance of legislation.

In addition to the process level improvements, there are also a series of important 'constitutional' issues which would require legislative change. Before making any firm recommendations on these issues in the future, broader consultation would be required. Given that we do not have an immediate legislative vehicle, I am not minded to pursue these proposals further at this point.

The scope of 'constitutional' questions to which I refer include:

- Should the Lord Chancellor relinquish his decision-making role in relation to appointments below Court of Appeal level? This responsibility could pass to the Lord Chief Justice as Head of the Judiciary.
- Should the Lord Chancellor's role in the most senior appointments be made more meaningful by allowing him an opportunity to comment on the shortlist of candidates, before the interview stage?
- Where the Lord Chancellor makes recommendations for appointment to HM Queen, should he do this directly, and not by way of the Prime Minister?
- Should there be some consistent principles for the composition of selection panels for the most senior posts? For example: judges should not be involved in appointing their successors; there should not be more judicial than independent representation on the panel.
- Should the Commission be reduced in size? A smaller commission could be conceivably be composed in one of two ways:
    - Reflecting the current balance: a lay chair; two judicial nominees; one nominee of the Lord Chancellor; and two independent Commissioners selected through open competition overseen by the Commissioner for Public Appointments.
    - Alternatively a smaller Commission could consist of six lay independent appointments experts.
- Should the JAC's remit, as defined by Schedule 14 of the Constitutional Reform Act, be limited to legal positions, allowing selection of non-legal tribunal members to be carried out by HMCTS?

More straightforward is the matter of moving the OJC to sit administratively within the Judicial Office. This does not require legislative change and will enable a more coherent approach to be taken to conduct and discipline matters. There will, however, need to be a sufficient degree of independent scrutiny to maintain public confidence in the system: for this reason and because of the significant benefits arising from such scrutiny, we propose to

retain JACO. JACO's role will also provide reassurance as we take forward changes in the approach to appointments.

The recruitment of the new Chair of the JAC is underway and, with the Lord Chief Justice, I look forward to working with the Commission on proposals for improving the appointments process, in the first instance within the existing statutory framework.

I am also copying this letter to the Chair of the House of Commons Justice Committee, the Lord Chief Justice, the Senior President of Tribunals, the President of the UK Supreme Court, the Chairman of the Bar Council, the President of the Law Society, the President of the Institute of Legal Executives, the interim Chair and interim Chief Executive of the JAC, the head of the Office for Judicial Complaints and the Judicial Appointments and Conduct Ombudsman.

9 Questionnaire

We would welcome responses to the following questions set out in this consultation paper. Please support your responses to the consultation questions with reasons.

Question 1: Should the Lord Chancellor transfer his decision-making role and power to appoint to the Lord Chief Justice in relation to appointments below the Court of Appeal or High Court? (S67, 70 - 76, 79-85, 88 – 93 of CRA)

Question 2: Do you agree that the JAC should have more involvement in the appointment of deputy High Court judges? (Part 4, Chapter 2 of the CRA, s.9 Senior Courts Act 1981)

Question 3: Should the Lord Chancellor be consulted prior to the start of the selection process for the most senior judicial roles (Court of Appeal and above)? (s70, 75B and 79 CRA)

Question 4: Should selection panels for the most senior judicial appointments be comprised of an odd number of members? (S71, 75C and 80, of the CRA)

Question 5: Should the Lord Chief Justice chair selection panels for Heads of Division appointments in England and Wales? (S71 CRA)

Question 6: Should only one serving Justice of the Supreme Court be present on selection commissions, with the second Justice replaced with a judge from Scotland, Northern Ireland or England and Wales? (Schedule 8, pt1 to the CRA)

Question 7: Do you agree that the Lord Chancellor should participate on the selection panel for the appointment of the Lord Chief Justice as the fifth member and in so doing, lose the right to a veto? (S 71, 73 and 74 of CRA)

Question 8: Do you agree that as someone who is independent from the executive and the judiciary, the Chair of the JAC should chair the selection panel for the appointment of the Lord Chief Justice? (S71 of CRA)

Question 9: Do you agree that the Lord Chancellor should participate in the selection commission for the appointment of the President of the UK Supreme Court and in so doing, lose the right to a veto? (S26, 27, 29, 30 of, and Schedule 8 to, the CRA)

Question 10: What are your views on the proposed make-up of the selection panel for the appointment of the President of the UK Supreme Court? (S26, 27 of, and Schedule 8 to, the CRA)

Question 11: Do you agree with the proposal that the Chair of the selection panel to identify the President of the UK Supreme Court, should be a lay member from either the Judicial Appointments Commission for England and Wales, the Judicial Appointment Board for Scotland or the Northern Ireland Judicial Appointments Commission?

Question 12: Should the Lord Chancellor make recommendations directly to HM the Queen instead of the Prime Minister? (S26 and 29 CRA and convention)

Question 13: Do you believe that the principle of salaried part-time working should be extended to the High Court and above? If so, do you agree that the statutory limits on numbers of judges should be removed in order to facilitate this? (Sections 2 and 4 of the Senior Courts Act 1981)

Question 14: Should the appointments process operated by the JAC be amended to enable the JAC to apply the positive action provisions when two candidates are essentially indistinguishable? (S63 of the CRA)

Question 15: Do you agree that all fee-paid appointments should ordinarily be limited to three renewable 5 year terms, with options to extend tenure in exceptional cases where there is a clear business need?

Question 16: How many Judicial Appointments Commissioners should there be? (Schedule 12 to CRA)

Question 17: Should the membership of the Commission be amended as proposed above? (Schedule 12 pt1 to CRA)

Question 18: Should the CRA be amended to provide for selection exercises (such as judicial offices not requiring a legal qualification) to be moved out of the JAC's remit, where there is agreement and where it would be appropriate to do so? (S85 CRA)

Question 19: Do you agree with the proposed approach to delivering these changes?

Question 20: Are there any other issues/proposals relating to the process for appointing the judiciary or for improving the diversity of the judiciary that you believe the MoJ should pursue?

Question 21: We welcome your views on the EIA in terms of likely equality impacts. Are there other ways in which these proposals are likely to impact on race, sex, disability, sexual orientation, religion and belief, age, marriage and civil partnership, gender reassignment, pregnancy and maternity?.

Question 22: We are particularly interested in understanding more about the barriers faced by people with protected characteristics. Are there any further sources of evidence of equality impact that you are aware of that would help better understand the impacts of the proposals?

Thank you for participating in this consultation exercise.

10 About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	☐ (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

11 Contact details/How to respond

Please send your response by 14 February 2012 to:

Graham Mackenzie
Ministry of Justice
Judicial Policy Division
6th Floor, 6.10
102 Petty France
London SW1H 9AJ

Tel: 020 3334 3853

Email: graham.mackenzie@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.

Alternative format versions of this publication can be requested from **graham.mackenzie@justice.gsi.gov.uk, Judicial Policy**

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.

12 Impact Assessment Process

Type of Impact	*Response*
Impact Assessment	Upon consideration of the proposals detailed within the consultation it has been concluded that an impact assessment will not be required for the following reasons: • The proposals are not regulatory in nature and do not have direct cost/benefit impact on business or civil society; • The proposals are public sector and essentially internal facing, with estimated costs/benefits of less that £5m per annum, and • Media and political interest is not expected to be high.
Competition Assessment	We do not consider these proposals to be pro or anti-competitive. There are no impacts on suppliers or providers.
Small Firms Impact Test	These proposals have no effects on small businesses.
Carbon Assessment	We do not anticipate any significant impact on emissions of greenhouse gases.
Other Environment	We do not anticipate any significant impact on the environment.
Health Impact Assessment	We do not anticipate any significant impact on human health. These proposals will have no impact on the lifestyles of any major subgroup of the population or on the demands for health and social care services.
Human Rights	These proposals are compliant with the Human Rights Act.
Rural Proofing	The impacts of these proposals will be no different in rural areas.
Sustainable Development	The proposed reforms are consistent with the principles of sustainable development. In particular, they are aimed at promoting good governance of the judicial selection process, through a more effective Appointments Commission.
Equality Impact Assessment	The proposals contained in this consultation are aimed at promoting equality and improving the diversity of the judiciary. An initial EIA has been completed and will be published alongside this consultation. The EIA will be updated as considered necessary in the light of the consultation responses.
Justice Impact Test	Consideration will be given as to whether a Justice Impact Test is needed once the consultation is completed. If it is concluded that one is required, then it will be incorporated into the supporting documentation for the selected legislative vehicle.

12.1 Equality Impact Assessment

109) Under the Equality Act 2010 section 149, when exercising its functions, Ministers and the Department are under a legal duty to have 'due regard' to the need to:

- Eliminate unlawful discrimination, harassment and victimisation;·
- Advance equality of opportunity between different groups (those who share a protect characteristic and those who do not); and·
- Foster good relations between different groups.

110) Paying 'due regard' needs to be considered against the eight 'protected characteristics' under the Equality Act 2010 - namely race, sex, disability, sexual orientation, religion and belief, age, gender reassignment, pregnancy and maternity.

111) MoJ has a legal duty to consider how the proposed policy proposals are likely to impact on the protected characteristics and take proportionate steps to mitigate or justify the adverse ones and advance the positive ones. MoJ records its fulfilment of its equality duties by completing an Equality Impact Assessment (EIA).

112) This consultation is accompanied by an EIA. We would welcome responders'' views on equality impacts identified in the EIA and on any further ways in which these proposals might impact positively or adversely on people with protected characteristics during the judicial appointments process. We will be updating the EIA as necessary following the responses to the consultation in the light of any new evidence of equalities impact.

Question 21: We welcome your views on the EIA in terms of likely equality impacts. Are there other ways in which these proposals are likely to impact on race, sex, disability, sexual orientation, religion and belief, age, marriage and civil partnership, gender reassignment, pregnancy and maternity?.

Question 22: We are particularly interested in understanding more about the barriers faced by people with protected characteristics. Are there any further sources of evidence of equality impact that you are aware of that would help better understand the impacts of the proposals?

(Please support your answer with reasons)

13 The consultation criteria

The seven consultation criteria are as follows:

1. **When to consult** – Formal consultations should take place at a stage where there is scope to influence the policy outcome.
2. **Duration of consultation exercises** – Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
3. **Clarity of scope and impact** – Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
4. **Accessibility of consultation exercises** – Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
5. **The burden of consultation** – Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
6. **Responsiveness of consultation exercises** – Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
7. **Capacity to consult** – Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

These criteria must be reproduced within all consultation documents.

13.1 Consultation Co-ordinator contact details

Responses to the consultation must go to the named contact under the How to Respond section.

However, if you have any complaints or comments about the consultation **process** you should contact the Ministry of Justice consultation co-ordinator at consultation@justice.gsi.gov.uk.

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

Ministry of Justice Consultation Co-ordinator

Better Regulation Unit
Analytical Services
7th Floor, 7:02
102 Petty France
London SW1H 9AJ