



**The Government response to the
House of Lords Constitution
Committee's Report:
Judicial Appointments –
25th Report of Session 2010 - 12**

May 2012



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

May 2012

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Overview

- 1) In January 2011 the Lord Chancellor wrote to the Chair of the House of Lords Constitution Committee detailing the findings arising from the internal review of judicial appointments and judicial arms length bodies.
- 2) In May 2011 the Constitution Committee issued a call for evidence in support of its own inquiry into the judicial appointments process. The aim of the inquiry was to understand whether the appointments system was fair, independent, transparent and open.
- 3) Concurrent with the Constitution Committee inquiry, on 21 November 2011 the Government launched a public consultation on delivering changes to the statutory and regulatory frameworks for judicial appointments, and implementing measures to increase the diversity of the judiciary. It invited views on the Government's proposals from a range of interested individuals and organisations, including members of the judiciary, legal practitioners and their representative organisations, those responsible for aspects of the judicial appointments process, and equality and diversity groups. The published consultation proposals formed the basis of the Government's written evidence submitted to the Constitution Committee inquiry.
- 4) Although the terms of reference for the inquiry did not exactly mirror the focus of the Ministry of Justice's consultation, the Committee's report addressed many of the proposals within that consultation and as such the Government's view on many of the issues raised by the Constitution Committee are reflected in the Ministry of Justice's response to consultation, which was published on 11 May 2012. However, there are a number of issues covered by the Constitution Committee that were not included within the consultation and as such this Command Paper documents the Government's response to these other recommendations.

The Committee's Recommendations

- 5) The House of Lords Constitution Committee made a number of recommendations based upon the evidence received to help ensure the appointments process remains independent, open and transparent, and to encourage judicial diversity.
- 6) This paper responds to those recommendations and observations which were not specifically addressed in the Ministry of Justice's response to consultation published on 11 May 2012.

The constitutional framework

Parliamentary oversight of the judicial appointments process

"We welcome the willingness of judges, once appointed, to give evidence to parliamentary committees on the judicial appointments process and other matters relating to the administration of justice. We recognise that the majority of judges speak on an individual basis and not on behalf of their fellow judges: indeed, Parliament benefits from the diverse range of views thus offered. We believe that this dialogue is of mutual benefit to both the judiciary and Parliament as it enables both to explore areas of common interest and concern. We encourage its continuation in the future."¹ (Paragraph 56)

- 7) The Ministry of Justice endorses this observation and welcomes the ongoing engagement between the judiciary and Parliament. Such engagement will assist in providing greater understanding of the appointments process and mechanisms being undertaken to improve diversity. However, the Ministry of Justice also recognises the need to maintain impartiality and to ensure the continued independence of the judiciary and as such all appearances by members of the judiciary before a Parliamentary Committee should not be conducted in a way that could subject individual members of the judiciary to unnecessary criticism or censure. The process by which the judiciary engage with Parliament is a matter for the judiciary and Parliament to resolve.

¹ <http://www.publications.parliament.uk/pa/l201012/lselect/lconst/272/27205.htm>

Diversity

Barriers to a more diverse judiciary

"We agree that the senior judiciary have an important role to play in encouraging applications from under-represented groups. Whilst individual judges cannot, and should not, determine the outcome of specific application, senior judges should be sufficiently well-informed about the process to be able to advise candidates and encourage them to apply."² (Paragraph 79)

- 8) The Ministry of Justice fully endorses this observation. The Advisory panel on Judicial Diversity took a similar view in making recommendation 13 "*The legal professions and the judiciary should put in place systems for supporting suitable and talented candidates from under-represented groups to apply for judicial appointment.*"³ Details of progress against the Advisory panel recommendation will be documented in the second Judicial Diversity Taskforce progress report.

Diversity training and lay panel members

"It is important that all the different elements of the JAC's merit criteria are properly taken into consideration and applied during the appointments process. In order to ensure that merit is not assessed on a narrow basis, all selection panels should themselves be gender and, wherever possible, ethnically diverse, all those involved in the appointments process must be required to undertake diversity training and lay persons must sit on every selection panel so that the judiciary are not solely responsible for the appointments made."⁴ (Paragraph 88)

- 9) The Committee recommend that all parties involved in the judicial appointments process be required to undergo diversity training.
- 10) The Advisory panel on Judicial Diversity also considered this to be an area of focus going forward and recommended that "*Panel chairs and members must receive regular equality and diversity training that addresses how to*

² <http://www.publications.parliament.uk/pa/ld201012/ldselect/ldconst/272/27206.htm>

³ <http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/advisory-panel-judicial-diversity-2010.pdf>

⁴ <http://www.publications.parliament.uk/pa/ld201012/ldselect/ldconst/272/27206.htm>

identify and value properly transferable skills and also to ensure that they are aware of any potential issues regarding their unconscious bias.”⁵

- 11) The Government fully endorses this observation made by the Committee which mirrors the views expressed by the Advisory panel. The Judicial Appointments Commission (JAC) is responsible for selections up to and including the High Court and recently recruited a new cadre of panel members to assist in that work. All new panel members took part in a two day training programme which included detailed equality and diversity training. As part of their rolling programme, the JAC ensure that all panellists (both lay and judicial) receive equality and diversity training as part of the selection exercises. This training is delivered prior to each exercise as part of the JAC’s programme of continuous development. In addition, all panel members are regularly appraised and awareness of equality and diversity issues are incorporated as part of this appraisal. For selections above the High Court the Constitutional Reform Act 2005 provides for the setting up of specific selection panels outside of the direct control of the JAC.
- 12) In our response to consultation the Ministry of Justice has outlined the principles relating to selection panels for the senior judiciary. These include the provision that there should be lay representation on the selection panel and that, where possible, there should always be a gender and an ethnic mix on the selection panel.

Quotas, targets and benchmarking

“We agree that it would not be appropriate to set targets at the present time. However, we believe that this should be kept under review. If there has been no significant increase in the numbers of women and BAME judicial appointments in five years’ time, the Government should consider setting non-mandatory targets for the JAC to follow.”⁶ (Paragraph 105)

- 13) The Constitution Committee considered the possibility of introducing quotas to help increase overall diversity within the judiciary. However, similar to the findings of the Advisory panel on Judicial Diversity, the Committee heard no evidence in favour of this approach and many were of the view that the introduction would be seen as ‘insulting’ and ‘patronising’. The Committee therefore saw no case for the introduction of quotas, and the Government agrees with this observation.

⁵ Recommendation 32 - <http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/advisory-panel-judicial-diversity-2010.pdf>

⁶ <http://www.publications.parliament.uk/pa/l201012/lselect/lconst/272/27206.htm>

- 14) The Committee additionally considered whether the introduction of non-mandatory targets would benefit the appointments process in terms of increasing diversity. However, there was no consensus amongst the witnesses as to whether non-mandatory targets would be beneficial or divisive.
- 15) The Government considers that mandatory quotas would undermine the principle of merit and should not be introduced. As the 2010 report⁷ from the Advisory panel on Judicial Diversity indicated, quotas were firmly rejected as a possible solution, by all that they spoke to in particular by those from under-represented groups.
- 16) Details of progress, looking at the data, against the recommendations arising from the Advisory panel report will be published within the second Judicial Diversity Taskforce progress report, due to be published in autumn 2012.

"The Government, the JAC and the legal professions must work together to ensure that data is collated and made openly available in such a way as to make the progression of under-represented groups through the appointments process as transparent as possible."⁸ (Paragraph 108)

- 17) The Ministry of Justice recognises that this is a significant issue that supports the effective development of policy and initiatives to improve judicial diversity and to deliver effective changes to the appointments process. This matter will therefore be discussed with members of the Judicial Diversity Taskforce and a progress update will be included within the next Taskforce report.

⁷ <http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/advisory-panel-judicial-diversity-2010.pdf>

⁸ <http://www.publications.parliament.uk/pa/l201012/lselect/lconst/272/27206.htm>

Leadership and the promotion of diversity

“The duty contained in s 64 of the CRA should be extended to the Lord Chancellor and the Lord Chief Justice.”⁹ (Paragraph 111)

- 18) Section 64 of the Constitutional Reform Act 2005, confers a duty upon the Judicial Appointments Commission “*to encourage diversity in the range of persons available for selection for appointment*”. The Constitution Committee heard from a number of witnesses who were of the view that in order to demonstrate leadership in improving the diversity of judicial office holders, this duty should be extended to both the Lord Chancellor and the Lord Chief Justice.
- 19) The Committee do recognise that the role played by the Lord Chief Justice and the Lord Chancellor in increasing diversity is essentially one of leadership, and that the Lord Chief Justice and Lord Chancellor can drive forward the imperative to increase diversity without being under a duty to do so. The Lord Chancellor and the Lord Chief Justice have made clear their commitment to diversity.
- 20) At present the Ministry of Justice is not minded to extend this duty beyond the JAC. We are of the view that the JAC is the most appropriate organisation to engage directly with the legal professions in order to encourage a more diverse range of applicants. Furthermore, we do not believe that the imposition of a statutory duty would make any difference in practice.

Increasing the pool of potential candidates

“The JAC, the Lord Chancellor and the Lord Chief Justice must encourage applications from lawyers other than barristers. There should be no sense that not having been a member of the Bar makes an individual unworthy of appointment or less meritorious.”¹⁰ (Paragraph 119)

- 21) The Ministry of Justice is committed to supporting the cultural change required among legal professionals, and to ensuring that no unreasonable restrictions are placed upon potential candidates for judicial office. Working together with the members of the Judicial Diversity Taskforce, the Ministry of Justice will consider initiatives that would support the resolution of these

⁹ <http://www.publications.parliament.uk/pa/ld201012/ldselect/ldconst/272/27206.htm>

¹⁰ ibid

concerns and will provide an update on the steps being taken to increase the pool of candidates for judicial office in the Taskforce's next report.

- 22) The degree of diversity in the judiciary is partly dependent upon the make-up of those who apply. A legal profession which better reflects the society it serves will provide a more diverse pool from which to recruit judges.
- 23) The Tribunals, Courts and Enforcement Act 2007¹¹ introduced changes regarding eligibility for judicial office. In particular, that applicants for specified judicial offices must satisfy the judicial-appointment eligibility condition (i.e. that the applicant possesses a relevant legal qualification for a specified period of years and during that period they have gained relevant legal experience).
- 24) The Constitution Committee heard from a number of witnesses around the issue of widening the potential pool of candidates.

"We are not convinced that either the Law Society or the partners of most of the large firms are sufficiently committed to the encouragement of solicitors applying to become judges. The promotion of judicial diversity will be greatly enhanced if solicitors are able to take time off to hold part-time fee-paid judicial posts whilst continuing to practise. We consider it essential in the public interest that this change be made. This will require a significant cultural change within firms and the solicitors' profession as a whole."¹² (Paragraph 125)

- 25) A number of organisations involved in the appointments process, such as the JAC, Law Society and CILEX, continue to engage in outreach events aimed at encouraging solicitors and other legal professions to apply. A degree of cultural change within the solicitors' profession needs to take place, to more actively encourage those who might want to apply for judicial office.

¹¹ <http://www.legislation.gov.uk/ukpga/2007/15/contents>

¹² <http://www.publications.parliament.uk/pa/l201012/lselect/lconst/272/27206.htm>

"Those who work for the Government Legal Service and Crown Prosecution Service must not be prevented from becoming judges because of their status as government lawyers. The Government and the JAC must act to overcome any undue impediments to their appointment as both fee-paid and full-time judges. This is important both from the perspective of ensuring equal access to judicial appointment and because it would promote the diversity of the judiciary. Furthermore, it is in the public interest that high quality candidates are not discouraged from applying to join the GLS or CPS because of a potential lack of career progression to the judiciary."¹³ (Paragraph 132)

- 26) The Committee also noted that there should be no restriction placed upon those who work for the Government Legal Service (GLS) or Crown Prosecution Service (CPS) to apply for judicial office.
- 27) The Ministry of Justice notes the observation, as well as the views expressed by the Advisory panel on Judicial Diversity in their report regarding the employed legal professions. Although we are not currently minded to relax operational restrictions relating to the appointments of members of the GLS or CPS to judicial office, through the Judicial Diversity Taskforce and co-ordinating with the JAC Outreach programme, those opportunities where members are eligible to apply will be promoted across the employed legal profession.

Post-appointment issues

Judicial careers

"There should be a greater emphasis within the judiciary on judicial careers, making it easier to move between different courts and tribunals and to seek promotions. Internal barriers to career progression and movement should, as a minimum, be removed. There also needs to be a cultural change so that all those involved in appointments and deployment are willing to recognise and promote talented judges and enable them to progress to the senior levels of the judiciary."¹⁴ (Paragraph 180)

- 28) The Advisory panel on Judicial Diversity recommended in their 2010 report that "*there should be a fundamental shift of approach from a focus on*

¹³ <http://www.publications.parliament.uk/pa/ld201012/ldselect/lconst/272/27206.htm>

¹⁴ <http://www.publications.parliament.uk/pa/ld201012/ldselect/lconst/272/27210.htm>

*individual judicial appointments to the concept of a judicial career. A judicial career should be able to span roles in the courts and tribunals as one unified judiciary.*¹⁵

- 29) The Judicial Diversity Taskforce was set up in 2010 to address the recommendations arising from the Advisory panel report and as such it will take into consideration the observations of the Constitution Committee when reporting on progress against the recommendations. The second Judicial Diversity Taskforce progress report will be published in autumn 2012.

Judicial appraisals

“A formal appraisal system should be introduced: the judiciary should not be exempt from a practice which is used in most other sectors and which has such clear benefits for those being appraised. Furthermore, without an effective appraisals system, the public cannot be assured that the judiciary is of the highest possible quality. Whilst we recognise the resource constraints, the cost of an appraisals system pales into insignificance compared with the cost of having poor judges.”¹⁶ (Paragraph 186)

- 30) The introduction of an appraisal system was recommended by the Advisory panel on Judicial Diversity in their report published in 2010, who recommended that “*An appraisal system owned and run by the judiciary should be implemented to cover all levels within the judiciary.*”¹⁷
- 31) The Constitution Committee heard from a number of witnesses regarding the introduction of a form of appraisal for the judiciary. Although the majority of the witnesses were in favour of introducing appraisal, there were mixed views on whether it should be applied at all levels of the judiciary and for what the appraisals could be used.
- 32) The second Judicial Diversity Taskforce progress report will include an update on the introduction of appraisal to judicial office holders.

¹⁵ Recommendation 1 <http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/advisory-panel-judicial-diversity-2010.pdf>

¹⁶ <http://www.publications.parliament.uk/pa/ld201012/ldselect/ldconst/272/27210.htm>

¹⁷ Recommendation 46 <http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/advisory-panel-judicial-diversity-2010.pdf>

Retirement age

“We do not agree that there should be a uniform retirement age across the whole of the judiciary. There should be differential retirement ages: of 75 for Court of Appeal judges and Supreme Court Justices and 70 for all other judges. This will ensure the retention to age 75 of judges at the highest level, where proven judicial quality and experience are at a premium in the development of the law. This will also ensure that posts become available at the lower levels whilst leaving time for talented individuals who have not followed a traditional career path to reach the highest levels. Differential retirement ages will thus help to promote diversity and to maintain public confidence in the judiciary as being of the highest quality.”¹⁸ (Paragraph 197)

- 33) The Committee in their inquiry also considered the arguments for and against increasing the statutory retirement age for members of the judiciary.
- 34) The current retirement age seeks to strike a balance between retaining the experience of the senior judiciary, while ensuring that high quality applicants can attain the highest judicial offices. We do not consider that the current retirement age compromises the quality of the judiciary at the highest levels, or works disadvantageously against those following less traditional career paths.
- 35) Upon consideration of the observations made by the Committee and the views of the judiciary on this issue, the Ministry of Justice remains of the view that the current mandatory retirement regime for judicial office holders supports the legitimate aim of a justice system which is independent, fair and efficient.
- 36) Furthermore, we note the proposal for applying different retirement ages to different levels of the judiciary, however, the Ministry of Justice remains of the view that presenting Parliament with a proposal to extend the retirement age for judges of the Supreme Court and judges of the Court of Appeal in isolation would encourage criticism from the wider judiciary, including the magistracy, as it could be interpreted as being unjustifiably discriminatory. As such we do not propose to increase the statutory retirement age for judicial office holders.

¹⁸ <http://www.publications.parliament.uk/pa/ld201012/ldselect/lconst/272/27210.htm>

Conclusions and next steps

37) The Government has carefully considered the recommendations made by the House of Lords Constitution Committee in developing its policies and is grateful for the additional insight and suggestions surrounding our policy proposals which their report has provided, as well as the insight surrounding those issues which were not included in our consultation.

38) The Government published the response to its consultation on 11 May. This coincided with the introduction of the Crime and Courts Bill, the legislative vehicle taking forward many of the Government's policy reforms¹⁹. These reforms will help to achieve the proper balance between executive, judicial and independent responsibilities, to create a more diverse judiciary that is reflective of society and appointed on merit and will deliver speed and quality of service to applicants for judicial office, the courts and tribunals and value for money to the taxpayer.

39) The reforms being taken forward include:

- Transfer the Lord Chancellor's current role in making the selection decision, in relation to particular courts-based appointments below the High Court, to the Lord Chief Justice.
- Transfer the Lord Chancellor's current role in making the selection decision, in relation to the First-tier Tribunal and the Upper Tribunal appointments, to the Senior President of Tribunals.
- Provide for a JAC selection process to operate in relation to judges sitting in the High Court whether this is as a result of being appointed as a deputy judge of the High Court or, in the case of Circuit judges and Recorders, being authorised to sit in the High Court.
- Provide that the Lord Chancellor should be consulted prior to the start of the selection process for appointments to the Court of Appeal and above, where he is not a member of the selection panel.
- Enable the Lord Chancellor to be able to sit on the selection commissions for selection for appointment of the Lord Chief Justice and the President of the UK Supreme Court.
- Provide that the Chair of the selection panel for the Lord Chief Justice will be the lay chair of the Judicial Appointments Commission.
- Provide that the Chair of the selection commission for the President of the UK Supreme Court will be a lay member from one of the UK judicial appointment bodies.

¹⁹ <http://www.justice.gov.uk/consultations/closed-with-response>

- Provide that only one serving Supreme Court judge will be on the selection commissions for new judges of the Supreme Court, and that the President and Deputy of the Court will not be able to sit on the selection commission for their successors.
- Provide that the Lord Chief Justice will chair the panels for the appointment of Heads of Division.
- Facilitate part-time working for judges in the High Court, Court of Appeal and UK Supreme Court.
- Introduce a ‘tipping point’ provision that allows positive action to promote diversity when two applicants to judicial office are of equal merit.
- Enable the number of JAC commissioners and the composition of the JAC to be determined by the Lord Chancellor, in agreement with the Lord Chief Justice of England and Wales and provided for in secondary legislation subject to the affirmative resolution procedure whilst retaining key principles, such as the requirement for judicial, professional and lay commissioners on the face of the Act.
- Make provision to enable selection for appointment to particular judicial offices that do not require a legal qualification to be removed from the auspices of the JAC by secondary legislation, after consultation with the judiciary and subject to the affirmative resolution procedure.
- Transfer elements of the judicial selection processes currently detailed in the Constitutional Reform Act 2005 to secondary legislation, subject to the affirmative resolution procedure, whilst ensuring key principles are retained on the face of the Act.
- In addition to the regulations concerning the JAC described above, the key elements that will be moved to regulations concern the specific composition of selection panels and commissions for the senior judiciary and matters of detailed appointment process.
- In relation to regulations dealing with the UK Supreme Court, these will be subject to agreement with the senior judge of the Court and consultation with the judiciary and devolved administrations as specified in the Act. In relation to regulations concerning judicial appointments in England and Wales, these will be subject to agreement with the Lord Chief Justice.



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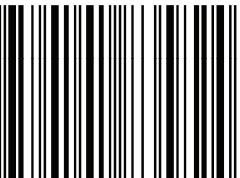
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