

Judicial Appointments Process in England and Wales

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I. INTRODUCTION

The framework for the judicial appointments process for the courts and tribunals of England and Wales, as well as the UK Supreme Court, was established by the *Constitutional Reform Act 2005 (CRA)*. For England and Wales, the *CRA* established an independent Judicial Appointments Commission (JAC). The creation of the JAC was an unprecedented move to make the process for selection of judicial office holders independent of both the executive and the judiciary. It was designed to enhance the independence of the judiciary and strengthen its legitimacy by introducing a lay element into the selection process, thereby bringing broader perspectives to make the judiciary more reflective of contemporary society.

II. WHY WAS THIS CHANGE NECESSARY?

This change was necessary for several reasons. First, the role of the Lord Chancellor was changing. Prior to the *CRA*, the Lord Chancellor exercised an extraordinary range of responsibilities: membership of the Cabinet, speaker of the House of Lords and a member of its judicial committee, guardian of the constitution, head of a significant government department, administering the courts, and head of the judiciary, responsible for its independence, discipline and appointments.

The position of Lord Chancellor, which is legally and constitutionally distinct from that of the Secretary of State for Justice, was becoming more political and changes to the role of the Lord Chancellor were seen as necessary.

In describing the changes in 2006 the then Lord Chancellor and the Secretary of State for Constitutional Affairs, the Right Honourable Lord Falconer of Thoroton said that:

The reforms of 2005 combine the best of the historical role of the Lord Chancellor—ensuring there is a strong figure within the executive who can defend the rule of law and the independence of

the judges—with changes to our constitution which reflect modern conceptions of a liberal democracy: a final court of appeal visible to the public as a court, and not as a committee of the upper house of the legislature; a judiciary with its head from within the ranks of the professional judiciary and not a politician; and a transparent, non-political means of appointing judges.¹

He emphasised that:

Our modern democracy, in which transparency, accessibility and accountability are watchwords, ‘good faith’ is important but not protection enough. The transformation of the office of the Lord Chancellor will introduce a structure dependent on more than ‘good faith’—while preserving two of its most traditional and essential functions: protection of the rule of law and the independence of the judiciary within Government.²

The second reason involved the rise in the political significance of the judiciary and demands of a modern democracy. The massive increase in judicial review of government decisions, the increased role of the judiciary, the sovereignty implications of devolution, the incorporation of the European Convention on Human Rights into the UK’s domestic law and the move to a new Supreme Court have all contributed to the rise in the political significance of the judiciary. These changes made it unacceptable that judges in a modern democracy should continue to be appointed in an opaque way, through processes which lack transparency and accountability.

Again, the then Lord Chancellor, Lord Falconer, argued that:

As a public body, the judiciary must be subject to legitimate demands of modern democracy and public expectation of transparency and accountability consistent with the need to preserve their independence. Judicial appointments are central to that. Appointments must be made, and seen to be made

¹ Rt Hon Lord Falconer of Thoroton, “Constitutional Reform: Maturity and Modernisation” (Henry Street Lecture delivered at the University of Manchester School of Law, October 2006), [unpublished].

² *Ibid.*

transparently, impartially and based solely on the principle of merit. Public confidence in the justice system depends on it.³

He further argued that:

In a world where the development of public policy and the protection of individual rights depend on true partnership between parliament, the executive, and the courts there must be confidence that the system of appointing judges is independent of politics, and is designed to get the best people who reflect contemporary society.⁴

Third, historically, the judiciary was drawn from a very narrow pool. It was mainly white and composed of males educated in private schools and at Oxbridge. There were concerns that a body which lacked diversity would, over time, begin to lose its legitimacy if steps were not taken to redress the balance.

III. THE REFORMS

Before the reforms of 2005, responsibility for the appointment of almost all judicial office holders was, to all intents and purposes, the Lord Chancellor's alone. The reforms gave the JAC the mandate to identify and recommend the most suitable candidates to the Lord Chancellor. Now, the selection exercises are run by the JAC and the Lord Chancellor has no say as to who is recommended. The Lord Chancellor only has a limited right to reject the recommendation put forward, and must set out his/her reasons for doing so. This limitation is there to ensure that the Lord Chancellor has genuine accountability to parliament for appointments. The Lord Chancellor cannot bypass the JAC and recommend other candidates. Parliament has no role in the appointment process for particular posts, though the Lord Chancellor is accountable to Parliament for his/her decisions and for the operation of the appointments process as a whole.

The *CRA* introduced the concept that the judicial appointments process should, subject to the residual powers of the Lord Chancellor, have a high degree of independence from the executive, the legislature

³ *Ibid.*

⁴ *Ibid.*

having no direct role. There are four significant features of the new arrangements.

First, the responsibility for selection now rests with a much more diverse group of people—judges, barristers, solicitors, and lay people. It is stipulated in the legislation that the Chairman of the JAC must be a lay person. Second, the process is open and transparent. It can be seen that those appointed are selected on merit and capability.

Third, removing the power of appointment from one person gives the prospective pool of applicants much greater confidence that even though they do not fit into the traditional stereotype of judicial appointment they may be considered. Fourth, the *CRA* specifies that appointments should be made solely on merit. To encourage diversity it also provides that the JAC should take steps to extend the pool from which appointments are made.

Other significant changes which were introduced in 2005 include the following: first, there is a duty on all ministers to uphold the independence of the judiciary. Second, the Lord Chancellor has a unique mandate, transcending politics, to protect the judges' independence. Third, judges are no longer led by a political appointee. The Lord Chief Justice is now the head of the judiciary because the complexity of today's cases means the courts need vigilant leadership in the management of business. In addition the Lord Chief Justice supervises the training, guidance and deployment of judges, and he can represent their views to Parliament and Government. Fourth, judicial discipline is no longer the sole responsibility of the Lord Chancellor. Decisions are taken by the Lord Chancellor and the Lord Chief Justice. Fifth, the creation of the Supreme Court has completed the separation between the UK'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.

The procedure for appointing a Justice of the Supreme Court is governed by sections 25–31 of, and schedule 8, to the *CRA*. It is the responsibility of the Lord Chancellor to convene a selection commission. He does this by writing to the President of the Supreme Court when a vacancy arises. The commission is chaired by the President and the other members of the commission are the Deputy President, and a member of each of the Judicial Appointments Commission of England and Wales, the Judicial Board in Scotland and the Judicial Appointments Commission in Northern Ireland. At least one of those representatives has to be a lay

person and nominations are made by the Chairman of the relevant Commission/Board.

IV. THE JUDICIAL APPOINTMENTS COMMISSION

The JAC was launched in April 2006. Its primary task is to select judges and tribunal members. 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. The *CRA* requires that each 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 the *CRA* requires the JAC to determine the selection process to be applied.

Under the *CRA* the JAC has three statutory duties. The first is to select candidates solely on merit. The second duty is to select only people of good character. The third duty is to have regard to the need to encourage applications from a wider range of eligible candidates. The JAC does not appoint but rather selects candidates. For each vacancy, the JAC recommends only one candidate to the Lord Chancellor for appointment. The Lord Chancellor can reject that recommendation but he is required to provide his reasons to the JAC. He cannot select an alternative candidate.

The JAC comprises fifteen Commissioners, including a lay Chairman, judges, legal and non-legal professionals. Lay members are in the majority and its make-up is finely balanced to secure judicial input and lay perspectives. With the exception of three senior judges, all the other Commissioners are selected through open competition. Schedule 12 of the *CRA* makes some provision for the appointment of JAC Commissioners requiring that they may not be appointed for more than five years at a time and not for more than ten years in all. There is, however, a lack of specific detail about how selection is conducted. In such circumstances, the guidance provided by the Office of the Commissioner for Public Appointments (OCPA) is applied. This guidance gives ministers considerable flexibility in making selections for public appointments and, importantly, choice in candidates recommended for selection.

When selections were made initially in 2005/6, it was agreed with the then Lord Chancellor, Lord Falconer, that the independent selection panel, led by the then Chairman of the Committee in Public Life, would

not follow this aspect of the OCPA guidance, and would instead provide one name only for each Commissioner appointment, consistent with the provisions in the *CRA* for the appointment of judges, which were carefully crafted to ensure judicial independence. Each Commissioner is appointed in his/her own right and is not a representative. The Commission's composition ensures a breadth of knowledge, expertise and independence of thought.

V. ESTABLISHING THE JAC: TRANSLATING ASPIRATIONS INTO REALITY

At the outset the JAC set itself four priorities. One, to define merit and determine what makes a good judge; two, to develop a policy on 'good character,' in line with its duty to select only those who meet this requirement; three, to devise and develop fair and effective ways of assessing candidates; and four, to devise ways to reach and encourage a wide range of applicants.

A. MERIT

The JAC's new definition of merit covers five core qualities and fourteen supporting abilities but remains mindful of the fact that the precise qualities and abilities vary. For example, a High Court judge would be expected to have a high level of legal knowledge, whereas a lay member of a tribunal would be expected to have expertise in his or her particular field.

The core qualities include intellectual capacity, that is, a high level of expertise in their particular field, ability to absorb and quickly analyse information, appropriate knowledge of the law and its underlying principles. Personal qualities such as integrity, independence of mind, objectivity and sound judgement; ability to treat everyone with respect and sensitivity and listen with patience and courtesy; authority and good communication skills; efficiency, ability to work under pressure and appropriate leadership and management skills.

This definition was recently amended and now requires candidates for judicial posts to have an awareness of the diversity of the communities which the courts and tribunals serve and an understanding of differing needs. The question of merit and diversity has been the subject of active

debate. It is now accepted that diversity and merit are compatible and related. They are compatible because selecting judges from a wider pool in the fairest possible way and focusing on a candidate's ability to do the job can only enhance the judiciary's excellence and legitimacy. A judiciary reflective of society is essential to maintaining public trust and confidence in the role it serves.

Merit and diversity are related because the understanding of diversity as contributing to the overall effectiveness of a court is important, particularly in relation to appointments to the Supreme Court and Court of Appeal which sit in panels and where different perspectives are brought to bear by those hearing an appeal.

In giving evidence to the House of Lords Select Committee Baroness Hale summed it up well. She said:

In disputed points you need a variety of perspectives and the life experiences to get the best possible results.... You need a variety of dimensions of diversity. I am talking not only about gender and ethnicity but about professional background, areas of expertise and every dimension that adds to the richer collective mix and makes it easier to have genuine debates.⁵

B. GOOD CHARACTER

In determining good character, the JAC adopted two fundamental principles: the overriding need to maintain public confidence in the standards of the judiciary, and maintenance of the highest standards of probity in the professional, public and private lives of those holding judicial office or aspiring for judicial office.

C. SELECTION PROCESS

Developing fair, non-discriminatory, rigorous, and proportionate selection processes to secure the effective application of the merit criteria in order to achieve high quality outcomes is critical. While merit includes

⁵ UK, HL, "House of Lords Select Committee on the Constitution," 25 in *Sessional Papers*, 272 (2010–12) at 90.

objectively determined and consistently applied criteria, what matters more is how these criteria are applied and the soundness of the reasons for selecting candidates. Appointment on merit is not just about open and fair process but also about how merit is assessed.

The new selection processes include an application form, qualifying tests, role-plays, references, and interviews. Robust quality assurance measures and equality checks are integral to these processes.

D. REACHING OUT

Reaching out and encouraging applicants from a wider pool necessitated the need to build effective working relationships with all the key interested parties, including the judiciary, legal professional bodies, and relevant minority organisations. Building confidence in the new processes, dispelling misconceptions, and managing expectations was imperative. While in order to raise awareness about the new method of selecting judges, destruction of some of the myths and enhancing the open and accountable nature of the new system was essential.

E. CHALLENGES

As already mentioned, the creation of the JAC was an unprecedented move to make the process for selection of judicial office holders independent of the executive and the judiciary. Understandably, there were apprehensions among some members of the executive, the judiciary, and the legal profession. Some had misgivings about loss of patronage and influence; others were of the view that the old system of selecting judicial office holders worked perfectly well and that there was no need for change. There were fears that the moves to widen the pool from which the judiciary was drawn might lower standards. Others feared that merit and diversity are incompatible and that the JAC might approach its task in a ‘politically correct manner.’ Among others the expectations were high of the ability of the new organisation to create a diverse judiciary overnight. Others feared that an open and accountable process for appointment, the need to apply, and the possibility of failure might deter some prospective applicants. Some were sceptical whether the JAC would be truly independent of the executive and the judiciary.

The *CRA* is an interesting mixture of high principles and low level bureaucracy. It was the product of a closely argued and carefully crafted concordat between the executive and the judiciary. So while the new statutory regime introduced clarity through more open and clearly delineated rules, it also brought rigidity through its prescriptive and inflexible nature. These statutory arrangements with prescribed individual and organisational roles created overlaps and tension between the various partners. The JAC had to deal with challenges and it was important to ensure that operational issues, which can be overcome, did not overshadow or undermine the significant achievement of establishing an independent appointments commission.

F. SIX YEARS ON

Six years on, some of the early concerns that the new system would deter the best and the brightest from applying, and that merit and diversity are incompatible have largely disappeared. The JAC has succeeded in developing rigorous selection processes which have delivered high quality and commendable recommendations. The process has become open and accountable. All this has helped to enhance the legitimacy of the appointments.

Foundations have been laid for much more sustainable change and collaborative working between all the relevant parties to make progress on diversity. There is now better understanding of the real barriers to progress. It is now widely recognised that these barriers arise from complex social and educational problems and that there are limits to what any system of judicial appointments can achieve until they are addressed. While there has been some progress, it is slow, particularly at the senior levels of judiciary.

VI. ROLES AND RESPONSIBILITIES: WHO SHOULD DECIDE?

Selection of judicial office holders is not just about sterile processes. It is about balancing independence, accountability and legitimacy. Experience of the JAC shows that tension between independence, accountability and legitimacy is inevitable and requires constant monitoring. While a broad consensus appears to have been reached that, in general terms, the model of recommendations for appointments being made by an independent commission is the right one,

this has not prevented ongoing discussion of the details of how the model works.

In November 2011, the government published a consultation paper entitled, ‘Appointments and diversity: A Judiciary for the 21st Century.’ In a Foreword to this paper, the current Lord Chancellor and Secretary of State for Justice, The Rt Hon Kenneth Clarke QC MP states, he is consulting on legislative changes “to achieve the proper balance between the 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.”⁶

The main proposals in the consultation paper were: One, 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; Two, whether the role of the Lord Chancellor should have more meaningful involvement in appointments for the most senior judges 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 Presidents of the UK Supreme Court; Three, the composition and balance of independent responsibilities on selection panels; Four, the role of the JAC, that is, to amend the *CRA* so that with the agreement of the Lord Chief Justice and the JAC itself, individual judicial offices could be moved in and out of the JAC’s remit, where it is appropriate to do so and reduce the size and change the composition of the JAC.

Most of the changes proposed in this consultation paper were designed to promote diversity and give effect to the recommendations of the Report of the Advisory Panel on Judicial Diversity which was published in 2010 (this Panel was set up in 2009 to identify steps which can be taken to promote diversity). Subsequently, the Government introduced a Crime and Courts Bill in Parliament to give effect to the proposals contained in the consultation paper. The most controversial proposal is the one which suggests that the Lord Chancellor should participate on the selection panel for the appointment of the President of

⁶ United Kingdom, Ministry of Justice, *Appointments and Diversity: ‘A Judiciary for the 21st Century,’* (London: Ministry of Justice, 2012) at 3.

the Supreme Court and the Lord Chief Justice, and in so doing, lose his right of veto.

The rationale for this proposal is that given the importance of these roles and the level and nature of engagement between the incumbents of these posts with the Lord Chancellor, 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 an effective justice system.

The counter argument put forward by the House of Lords Select Committee on the Constitution, 'Judicial Appointments,' published in March 2012, is that any closer involvement than currently permitted by the *CRA*, "risks politicising the process and would undermine the independence of the judiciary."⁷

There is also concern about the future size and the shape of the JAC. Again, the House of Lords Select Committee stressed that "the JAC is an independent body. The Lord Chancellor should have no discretion to determine the membership; this would be damaging both to the independence of the JAC and to the perception of its independence."⁸ The Report went on to say: "there should not be significantly fewer commissioners than at present and that number should be prescribed in primary legislation. [As currently is the case]. The composition of the JAC must consist of a balance of lay and judicial members."⁹ It argued that any increased flexibility in making any future changes to the precise composition of the JAC should be set out in secondary legislation, subject to affirmative resolutions of both Houses of Parliament.

This report also affirmed the original principles which underpinned the *CRA* and made the following significant recommendations:

- The principles which we believe should underpin the judicial appointments process are judicial independence, appointment on merit, accountability, and the promotion of diversity. The correct balance between these principles is vital in maintaining public confidence in the judiciary and the legal system as a whole.

⁷ *Supra* note 5 at 26.

⁸ *Ibid* at 162.

⁹ *Ibid* at 163.

- The Lord Chancellor should not be offered a shortlist of candidates from which to choose, nor should he sit on selection panels. Such changes would risk undermining judicial independence and would be contrary to appointment on merit.
- We are against any proposal to introduce pre-appointment hearings for senior members of the judiciary. However limited the questioning, such hearings could not have any meaningful impact without undermining the independence of those subsequently appointed or appearing to pre-judge their future decisions. In the UK, judges' legitimacy depends on their independent status and appointment on merit, not on any democratic mandate.
- We agree that post-appointment hearings of senior judges would serve no useful purpose. There may be an exception in the case of the Lord Chief Justice and the President of the Supreme Court who undertake leadership roles for which they can properly be held accountable.
- Parliamentarians should not sit on selection panels for judicial appointments. It would not be possible to choose one or two parliamentarians without recourse to political considerations and in so doing it would be difficult to maintain the appearance of an independent judicial appointments process.

There are, however, some other views. In a report, 'Guarding the Guardians? Towards an independent, accountable and diverse senior judiciary,' published this year, the authors Alan Paterson and Chris Paterson argue that the current constitutional arrangement lacks democratic legitimacy. They say that the push for a purer separation of powers and the corresponding removal of judicial appointments from the hands of the executive was understandable and appropriate in the context of the enhanced role of the judiciary. However, this removal of the executive left a vacuum and it is a vacuum that has, to a large extent, been filled by the judiciary. They see the current level of involvement of the judiciary in the process as problematic in a mature democracy, particularly in the appointments to the Supreme Court.

They further argue that in the context of the increasingly porous boundaries between legal and political decision making, the constitutional implications of appointments to this institution are profound. They go on to state that in the light of the new constitutional settlement, it is important to recognise that the appointment of senior judges is, in the broad sense, a

political act and it is more important than ever to protect the legitimacy of this branch of government by ensuring that it is buttressed by a constitutionally appropriate appointments process.¹⁰

Contrary to the recommendations of the House of Lords Select Committee, they argue that the democratic legitimacy requires a degree of involvement of elected representatives in the process of appointing those adjudicating on the laws passed by elected representatives. They recommend appropriately balanced appointment panels with representation of parliamentarians and post-appointment introductory parliamentary hearings. In so doing they point to the Canadian experience. They state that the introduction of post-appointment parliamentary hearings would serve to increase both accountability and legitimacy—as it has in Canada—without posing a threat to judicial independence precisely because “the purpose of this form of scrutiny ... is to promote a form of dialogue between people’s representatives and appointed judges about major legal developments, to help the governed understand what is happening and why; and to provide an opportunity to the governors to explain and justify.”¹¹

As mentioned above, the Government has introduced a Crime and Courts Bill. This Bill contains changes which are designed, first, to increase the role of the Lord Chancellor in the senior most legal appointments, and second, to change the composition of the selection panels in order to help promote diversity and reduce the influence of judges on these panels. Provisions for pre or post-appointment hearings are not included. This Bill is currently going through Parliament and may well be amended further. The debate continues.

VII. CONCLUDING COMMENTS

The process by which judges are appointed is of crucial constitutional significance. The rule of law is fundamental and judicial independence is a core and non-negotiable feature of any proper democracy. Yet the mechanisms of such independence, particularly

¹⁰ Alan Paterson & Chris Paterson, “Guarding the Guardians? Towards an Independent, Accountable and Diverse Senior Judiciary” (2012) CentreForum at 31–2.

¹¹ Andrew Le Sueur, “Developing Mechanisms for Judicial Accountability in the UK” (2004) 24 LS 71.

through the appointments process have not received sufficient attention. The JAC in England and Wales is relatively new but its short experience shows that the processes by which the judicial office holders are appointed require constant vigilance and cannot be taken for granted. Balance between independence, accountability and legitimacy has to be maintained in order to ensure that no one vested interest dominates the process.