

Appointments and Diversity: A Judiciary for the 21st Century

Submission on behalf of the Equal Justices Initiative (EJI) by:

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The EJI welcomes the Ministry of Justice consultation on the judicial appointments process. We have two general observations about this consultation paper. The first is that the proposals are quite piecemeal and narrowly focused. They do not appear to be informed by any overarching philosophy or objective. The aims of achieving an appropriate balance between executive, judicial and independent roles and responsibilities, improving diversity, and ensuring an efficient and cost-effective selection process are treated separately, as if they did not interact with each other or operate cumulatively. We suggest it would be preferable to formulate an overall position incorporating all three aims, and then the answers to the specific questions would flow from that position. This position might be:

- All judicial appointments should involve a selection panel that is gender-balanced, and that includes adequate provision for all other protected characteristics, as well as lay representation.
- Where multiple appointments are to be made, the list of recommendations must include at least 40% of each sex and at least 10% BME and 10% disabled members.
- Where a single appointment is to be made, the selection panel must present a shortlist of 3 names, which must contain the names of at least one man and at least one woman, to the Lord Chancellor, who shall make the ultimate decision on the appointment.

Our second observation is a concern that the consultation paper presents a rather bleak, and inaccurate, picture of the existence of academic research relating to judicial diversity. There is in fact a substantial amount of academic writing on this issue, much of which is available on or referred to on the Equal Justices Initiative's website (<http://www.law.qmul.ac.uk/eji/index.html>). In fact, the Equal Justices Initiative represents the single greatest concentration of academic expertise on judicial diversity in the country. We have corresponded with the Lord Chancellor and other Ministers, and met with Departmental officers and the Chair of the JAC on these issues, and would be happy to discuss these with members of the Ministry of Justice if this would be helpful.

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?

If the above proposal about multiple appointments is accepted, there would be no harm in transferring the decision-making power in such cases to the Lord Chief Justice. However it needs to be remembered that lower-level appointments become the pool of those

considered eligible for appointment to the High Court and Court of Appeal. Thus, if the above proposal is not followed, then it would be important for the Lord Chancellor to retain oversight and accountability for the diversity of lower-level appointments. Otherwise, there may be no capacity to achieve diversity at higher levels in the future.

2. Do you agree that the JAC should have more involvement in the appointment of Deputy High Court Judges?

1. Yes: DHCJs should be subject to the same transparent selection process as all other judicial positions. It is clear that having served as a Deputy High Court judge is an important – possibly a necessary – step in securing salaried appointment to the senior judiciary. As such, this vital position should be actively used as a means of ensuring a more diverse pool of potential High Court candidates, in particular by enabling tribunal and district judges, qualified academics, recorders and Circuit judges to be appointed to this role.

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)?

No: as suggested above, the Lord Chancellor's role should be to decide between the names on the shortlist provided by the selection panel. The same should apply to Supreme Court appointments – the current provision for the Lord Chancellor to be consulted should be removed.

4. Should selection panels for the most senior judicial appointments be comprised of an odd number of members?

Yes: and should be constituted as above.

5. Should the Lord Chief Justice chair selection panels for Heads of Division appointments in England and Wales?

We think this is a good idea.

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?

There should not be two Supreme Court Justices on the selection commissions. Neither should there be an over-representation of territorial jurisdictions (through both JAC membership and judicial membership). The principles for selection panels suggested in our opening statement above should be observed. In addition, there is an opportunity here to widen the appointments panel more broadly to include political or parliamentary nominees, representatives from the legal professions and legal academics.

7. Do you agree that the Lord Chancellor should participate in 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?

No: this would lose the separate element of political accountability. We would prefer the model set out above.

- 8. Do you agree that as someone who is independent of the executive and the judiciary, the Chair of the JAC should chair the selection panel for the appointment of the Lord Chief Justice?**

This would make sense.

- 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, lost the right to a veto?**

No: see answer to question 7.

- 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?**

See proposed model and answers to questions 6 and 9.

- 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?**

Yes. This would be consistent with the proposal in relation to the appointment of the Lord Chief Justice (question 8).

- 12. Should the Lord Chancellor make recommendations directly to HM the Queen instead of the Prime Minister?**

This is a political question. The extent to which and the mechanisms by which a Lord Chancellor consults with Cabinet colleagues on judicial appointments is a matter for each government to determine.

- 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 the numbers of judges should be removed in order to facilitate this?**

Yes to both questions. This would be an effective way of encouraging and facilitating diversity by enabling greater participation of people with family/caring responsibilities.

- 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?**

Yes. It would be useful for the JAC to have this option available to it. In particular, the provisions could be significant and have impact at the first sift early stages of the selection process. At the later stages the provisions will be less relevant, particularly if the proposal for shortlists is adopted.

- 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?**

No. While this 'up or out' proposal was intended by the Advisory Panel on Judicial Diversity to enable regular refreshment and hence increasing diversification of fee-paid appointments, in order to create a more diverse pool to be drawn upon for full-time appointments, it ignores the fact that practitioners accept fee-paid appointments for a variety of reasons other than an ultimate ambition to join the salaried judiciary. It is likely to have a particularly disadvantageous effect on those for whom part-time appointment operates as a form of flexible working – that is, it enables them make a judicial contribution while meeting other commitments, such as women with child care or elder care responsibilities, and academics (which include a higher proportion of women than the judiciary) with teaching and research responsibilities. Indeed, it is possible that limiting fee-paid appointments to a maximum of three renewable 5 year terms might result in a contraction of the range of practitioners willing to take up part-time appointments. We would urge that the deleterious effects of this proposal are likely to outweigh its perceived benefits and thus it should not be adopted.

16. How many Judicial Appointments Commissioners should there be?

Whatever number is decided upon, there needs to be a gender balance among Commissioners together with appropriate representation of all other protected characteristics.

17. Should the membership of the Commission be amended as proposed above?

See answer to previous question. These specifications should also be included in the legislation, i.e. in addition to the other requirements specified, the Lord Chancellor must ensure that the Commission is constituted of equal numbers of women and men, and must include at least one Commissioner from a BME background and one with a disability.

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

The key point here is that there still needs to be attention to diversity in selection exercises for non-legally-qualified judicial offices just as much as for offices requiring legal qualifications. If the principles set out at the beginning are followed for multiple and single appointments, the identity of the decision-maker is less important, although political accountability still needs to be retained.

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

Yes: It seems appropriate to incorporate details of appointments processes in secondary rather than primary legislation.

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?

A coherent, joined-up approach to promoting political accountability, diversity and efficiency in all judicial appointments, specifically the model suggested at the beginning of this paper.

Re-definition of merit

A more robust approach needs to be taken to giving statutory force to the goal of ensuring that the judicial family is diverse at all levels while retaining the commitment to appointment on merit. Diversity and merit are not mutually exclusive. Article 174 of the South African Constitution, for example, brings together merit and diversity as co-existing constitutional obligations. With that example in mind, and with the objective of giving due regard to the range of identity groups in society, we recommend that section 63 of the Constitutional Reform Act 2005 be redrafted to ensure that 'merit' incorporates recognition of the need for the judiciary broadly to reflect the diversity of the UK population, including traditionally un- or under-represented groups.

We endorse the suggestion made by Lord Phillips to the House of Lords Constitution Committee that the statutory obligation of those responsible for selecting members of the UK Supreme Court be revised to read:

'The members of the Commission must select that candidate who will best meet the needs of the Court having regard to the judicial qualities required of a Supreme Court Justice and the current composition of the Court'.

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?

There is a wealth of evidence that the current structure and functioning of the bar and the solicitors' profession, disproportionately and unjustifiably exclude those from under-represented identity groups from either entry into, or success within, the legal profession, with knock on effects on the composition of the judiciary. A valuable recent example is H Sommerlad, L Webley, L Duff, D Muzio & J Tomlinson, *Diversity in the Legal Profession in England and Wales: A qualitative study of barriers and individual choices* (Legal Services Board, 2011).