

**JUDICIAL APPOINTMENTS FOR THE 21ST
CENTURY: INDEPENDENCE,
RESPONSIBILITY AND ACCOUNTABILITY**

**RESPONSE OF THE JUDICIAL APPOINTMENTS
COMMISSION TO THE MINISTRY OF JUSTICE
CONSULTATION PAPER “THE GOVERNANCE OF
BRITAIN: JUDICIAL APPOINTMENTS”**

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Judicial Appointments for the 21st Century: Independence, Responsibility and Accountability

Introduction

1. This is the response of the Judicial Appointments Commission (JAC) to the Government's Consultation Paper on Judicial Appointments. The Commission welcomes this opportunity to set out its views on the important issues of independence, responsibility and accountability raised by the Consultation Paper and on ways in which both legislative and management changes would enable it to provide a better service without compromising the quality of its selection processes. Its response to the specific questions posed in the Consultation Paper is provided in the Annex to this paper.
2. The establishment of the JAC was indeed nothing less than a quiet revolution. Throughout the modern period, judges had been appointed by the Lord Chancellor, a system which resulted in appointments of judges of high quality, but which historically embodied none of the features of openness and accountability which have come to be taken for granted in virtually all other types of public appointment. It is some years since the first moves were made to open up the system of appointments to the tribunals and courts judiciary to fair competition, but the system remained under the day-to-day management of the Lord Chancellor. Radical change came only with the passage of the Constitutional Reform Act 2005 and the establishment of the JAC as an independent Non-Departmental Public Body responsible for making selections for the vast majority of posts in the tribunals and courts judiciary. As Lord Woolf said during the passage of the Bill, these changes marked "a gigantic step forward in our constitutional arrangements ... the future independence of the judiciary will be safer than it has ever been".

3. In addition to enshrining the principle of **selection on merit** through open procedures, the JAC is also required by the legislation that establishes it to have regard to the need to encourage **diversity in the range of persons available for selection for appointments**. This is a fundamental part of its remit, which it seeks to fulfil by taking active steps to encourage applications from under-represented groups so that the pool from which candidates of merit can be drawn is widened.

The Commission's Independence, Responsibility and Accountability

4. The JAC is an executive Non-Departmental Public Body sponsored by the Ministry of Justice. Its relationship with the Ministry is defined both in legislation and in the Framework Document produced following its establishment. That relationship reflects the careful balance of responsibilities between the JAC and the Ministry in the judicial appointments process that was set out in the Constitutional Reform Act. A significant change to the present balance of responsibilities between the Lord Chancellor, the judiciary and the JAC itself in the selection and appointment of judges might require reconsideration of the accountability arrangements for the JAC. The Commission is of the view that there should not be a series of small changes whose cumulative effect is to change the balance achieved in the Act without consideration of their accountability implications when taken together.
5. The Constitutional Reform Act came into effect less than 2 years ago and there is not yet sufficient evidence to support significant change. The Commission therefore does not intend at this stage therefore to set out or to support proposals for significant change; but rather to focus its response on improving current arrangements with a view to providing a better service to candidates and to the justice system. The effective implementation of the thinking behind the Constitutional Reform Act will enable a later assessment to be fully informed by a body of evidence on its consequences. In the constitutional context it is important for every significant change to be carefully weighed and all its implications

assessed. The Commission would wish therefore for a full public and Parliamentary assessment to be made of the right accountability arrangements following any decision to make significant changes to its own responsibilities either now or in the future.

6. The Commission notes that there are fundamentally three possible models for its responsibilities. First, that it should be a body that selects judges for appointments but does not have the responsibility for making those appointments – the **selecting model**. This is the model enshrined in the Constitutional Reform Act and the Commission makes below some suggestions for improving its smooth running. Second, that it should become a body responsible for selecting and appointing judges: this could be called the **appointing model**. Third, there is also what might be called a **hybrid model** whereby the Commission would be responsible for appointing some but not all judges.

7. The **appointing model** raises some accountability issues. The status of the JAC itself might need further examination. It might be thought appropriate that the JAC's links with the Ministry of Justice should be reviewed. One alternative model would be to introduce direct Parliamentary funding and accountability along the lines of the Electoral Commission, which reports to a Speaker's Committee rather than to any government Department.

8. In relation to the **hybrid model**, the same issues of accountability might also arise. The Commission considers that there are further concerns about the rationale for a hybrid model. In particular, the Commission is very aware of the importance for members of the public of the decisions made by judicial office-holders at the less senior levels of the judiciary. These include employment and asylum decisions and entitlement to some benefits. The rationale for treating the appointment of these judges differently from those at the more elevated levels is not clear to the Commission. It considers that it might send the wrong

signal about the importance of these roles and would not contribute to public understanding of the judicial appointments process.

9. The Commission is currently a **selecting body**. Among the statutory powers enjoyed by the Lord Chancellor in relation to the JAC, in addition to the power to reject or require reconsideration of a person selected by the Commission, are the power to issue guidance to the JAC on the exercise of its functions; the power, in strictly defined circumstances, to remove a Commissioner from office; the power to set the JAC's budget; the power to hold the JAC to account for the efficient expenditure of that budget; the power to determine the remuneration of Commissioners; and the power to appoint members of the panel which is to select Commissioners. The Framework Document supplements these mechanisms with a 40-page statement of requirements and prohibitions relating in large part to financial and accounting matters.
10. The Commission of course recognises the need to be held to the highest standards of financial propriety. At the same time, it also believes that it is important not to undermine the independent role that Parliament intended for it by a control regime which savours of micro-management. Suggestions, for instance, that the Ministry of Justice should have more clearly defined powers to set targets for the Commission would seem to us to go too far in the direction of compromising its independent position.
11. The Commission proposes that five changes to improve the current arrangements should be considered.
 - First, the Commission would be open to a Parliamentary hearing for its Chairman following selection, but if this were to be done it would be important to be clear about its purpose and for the arrangements not to deter suitable candidates from applying for this post.

- Second, the Commission suggests that the requirement for the JAC to concur with the appointment of Deputy High Court Judges should be replaced by a requirement for the Commission to approve the processes for their appointment.
- Third, the power under section 65 of the CRA to provide guidance to the Commission on the conduct of its functions has not been used, nor, so far as the Commission is aware, has its use been considered. The JAC has developed, after wide discussion, its own framework of procedures, which command wide acceptance, and it is hard to envisage circumstances under which use of the power under section 65 is likely to be helpful. The JAC therefore suggests that it should be withdrawn.
- Fourth, the Commission accepts that there may be scope for a review of the arrangements for the selection of Court of Appeal judges and Heads of Division.
- Fifth, the ability of the JAC to fulfil its statutory functions to widen the pool of those available to become judges and to select solely on merit is dependent on sufficient funding. The public interest requires that the judicial selection process is conducted to the highest standards. It is important that the independence of the JAC should be safeguarded by an acceptance, possibly even in legislation, by the Government of the obligation to provide the JAC with sufficient resources to enable it to comply with the vacancy requests it receives in a fair, timely, and thorough fashion, and in full compliance with its statutory duties. The general duty on the Lord Chancellor in section 1 of the Courts Act 2003 to ensure that there is an efficient and effective system to support Courts business is relevant and helpful here. The Commission is aware of the pressures on public expenditure and conscious of the need to provide value for money. It is undoubtedly the case that the judicial selection process could be conducted more cheaply, if for

instance it were to be done with less regard to the need to widen the pool; but the JAC believes that to cut costs in this way would have damaging long-term consequences.

12. In addition to these changes, the Commission is clear that a number of improvements to the management of the current judicial appointments process would bring significant benefits, and these are discussed below.

Improving the Management of the Appointments Process

13. While the legislation governing judicial appointments is, in our opinion, sound in its essentials, **the management of the system urgently needs to be improved.** Candidates, courts and tribunals, and the public they serve, are still concerned about the length of the process for appointing judges. The JAC fully shares this concern. **In its view, the roots of the problem lie in the need for more effective strategic management of the judicial appointments system as a whole.** The JAC has itself managed to reduce the average time for the stages under its control - from closing date for applications to submission of selections to the Lord Chancellor – from 24 weeks under the former DCA to 19 weeks. But this is merely the middle segment in a long process. Vacancies must be forecast and vacancy notices finalised and sent to the JAC before a competition can begin; and once the JAC selection has been sent to the Lord Chancellor the successful candidates must be formally appointed, medical checks carried out for salaried posts, and training scheduled if necessary. Appointees may then need to relinquish current commitments in order to take up appointments. As detailed in the Commission's first annual report, the process from beginning to end may well take upwards of a year. It is important that those responsible for each segment of the process consider how best they could reduce delay without diminishing the robustness of their procedures.
14. **Improving the system's capability to forecast vacancies will be an essential step in any programme of improvement.** More accurate forecasting will make it possible for selection exercises to be undertaken in a more timely manner, with the Commission allocating its

resources more effectively. The Commission is very pleased that agreement has now been reached in principle to work towards a fixed, rolling programme of selection exercises, that will be known to candidates and others a year or more in advance. A further important development is agreement in principle for all the documentation for the exercises for the year ahead to be received by the Commission by the beginning of April. There will of course always be one-off competitions which cannot be predicted in advance, occasioned by promotions, unexpected retirements, or deaths in service, and the Commission would fit these into its forward programme on the basis of clear advice from the Courts and Tribunals Services as to where their priorities lie.

15. At present, most of JAC's larger competitions (though by no means all) are conducted at the request of the Courts and Tribunals Services under the terms of section 94 of the Act. This means that it is not asked to select candidates for immediate or confidently predicted vacancies, but rather to draw up a list of people who are suitable for selection as and when vacancies arise over the coming months. The consequence is that many of those who are selected in a section 94 competition will not in the event be appointed to a judicial post.
16. This situation is disruptive and frustrating for candidates. They are left in a professional limbo, with many months of uncertainty as to where their future career paths will lie, and many suffer disappointment at the end of the process. This is potentially a serious disincentive for people to apply in a section 94 competition. With better forecasting, section 94 lists could be abolished. The JAC could be asked to run competitions which result in a number of selections equal to the number of known or confidently anticipated vacancies. If further vacancies arose during the period between the end of the competition and the next anticipated competition for the same office, further candidates could be selected from the best placed of those who had not initially been successful. Such a change, which could be accomplished either by legislation or simply by refraining from requesting the creation of section 94 lists,

would have an enormously positive impact in allowing candidates to plan their careers and to avoid the burden of frustrated expectations.

RESPONSES TO SPECIFIC QUESTIONS POSED IN THE CONSULTATION PAPER

Questions 1-4: The balance of responsibilities in making judicial appointments

1. Perhaps the most fundamental changes discussed by the Consultation Paper relate to the balance of functions between the Lord Chancellor and the JAC in the appointments process. The arrangement enshrined in the 2005 Act is that the Commission, despite its name, does not itself make appointments: it provides the Lord Chancellor with “selections” or, in other words, nominations. The Lord Chancellor has the power to reject or require reconsideration of such nominations, but those powers are severely circumscribed - and in practice every selection made by the JAC since its establishment has been approved by the Lord Chancellor.
2. The Consultation Paper offers two alternatives. The first is that the JAC should become, in fact as well as in name, an appointing commission: the second, a hybrid option, is that it should appoint to the more junior judicial posts for which it currently selects, while continuing to make selections for the more senior posts.
3. The present balance of responsibilities in the appointment process was carefully calibrated in the 2005 Act. The existence of the Lord Chancellor’s powers to reject or require reconsideration of names submitted by the JAC, however infrequently used, is part of a balancing mechanism which requires the Lord Chancellor’s explicit concurrence with its selections. The existing arrangements for the JAC’s accountability were put in place on the express basis of this balance of

responsibilities. The JAC is of the view that it is too soon to change this balance. If the balance is changed, however, there will be questions with regard to its accountability.

4. There are improvements that can be made to the current arrangements for the Commission's operation as a selecting body. It expressed its agreement earlier in this paper with the suggestion that there should be a Parliamentary element in the appointment of the JAC Chairman. It also suggests that more information should be made available than at present about the details of the processes by which Commissioners are appointed. These changes would bring more openness and accountability to their selection.
5. Under section 65 of the Constitutional Reform Act the Secretary of State may issue guidance about procedures to the JAC. This power has not so far been used and the Commission believes that its use could impinge on the Commission's independent role of deciding on the selection procedures which it is appropriate to use. It would therefore suggest that this power be abolished.
6. The Commission also suggests that the arrangements for funding its work leave too much discretion in the hands of the executive. While the JAC fully recognises its responsibility to manage its resources efficiently, and to deliver savings at times of particular pressure on public expenditure, it believes that it would be proper for the Government to accept a statutory duty to ensure that the JAC is provided with sufficient funds to carry out its work effectively.

Question 5: Role of the judiciary

7. Under the current system the judiciary is involved in the selection of judges in a number of ways: principally in providing members of

interview panels, in writing references, and in statutory consultation. Five of the fifteen Commissioners must by statute be judicial members. Some commentators have suggested that the purpose of statutory consultation with the senior judiciary is vague: is it intended as a further opportunity for the judiciary to express an independent view on the person or persons who should be selected, or does it have a narrower, comparative purpose, to ensure that the JAC is aware of any specific information about candidates that it will be considering for selection that might affect their relative merits for a vacancy? The JAC is clear that the latter is the correct view and operates accordingly. It has kept the operation of statutory consultation under review and provided feedback on it to tribunals and courts judges. It is now preparing guidance on how the process of statutory consultation can be made more helpful, and intends to discuss with representatives of the senior judiciary shortly.

Question 6: Post-appointment hearings

8. The JAC sees force in the objections which have been made, in the Consultation Paper and elsewhere, to the idea of Parliamentary post-appointment hearings for senior judges. The risk of politicisation is too great. But there may be more merit in the idea of a Parliamentary element in the appointment of the Chairman of the JAC. This could be helpful in terms of increasing public understanding of the Commission's role and the views and concerns of Parliamentarians. If the idea were to be proceeded with it would be important to specify the purpose and scope of the hearings and set out clear ground rules accordingly, so that the process would not deter able candidates from applying. Under the current arrangements the JAC is accountable to Parliament in a number of ways. Its Annual Report is presented to Parliament by the Lord Chancellor. Commissioners and senior staff may be asked to appear before Parliamentary Committees to answer questions. And it is subject to audit on behalf of Parliament by the National Audit Office.

Question 7: Distinguishing between senior and less senior judicial posts

9. As discussed earlier in this paper, the Commission has no difficulty with the current arrangements under which the Lord Chancellor has (limited) powers to dissent from its selections. If, however, the current arrangements were to change it might create a need to reconsider the JAC's mode of accountability.
10. The suggestion that these powers should be abolished only for junior judicial appointments, however, is one with which the Commission disagrees. It believes that the constitutional considerations are the same whether the appointment is at Deputy District Judge or High Court level: either the executive should have a role in the appointment process or it should not. To make a distinction of this kind between tiers of the judiciary would create unnecessary divisions in the judiciary and perhaps reinforce perceptions of a glass ceiling inhibiting promotion to the higher levels. The Commission notes that many decisions of real importance for members of the public are taken by tribunal and court judges at less senior levels.
11. The Constitutional Reform Act creates different arrangements for appointments to the Court of Appeal and to the posts of Head of Division and Lord Chief Justice. These arrangements require the Commission to appoint a Selection Panel, the composition of which is specified in the legislation. The selection is effectively made by one of its own Committees upon which 2 Commissioners sit but without any further role being played by the Commission itself after it has been set up. Formally the selection is by the Commission. This raises questions of the Commission's responsibility and accountability for the decisions of its committee. The Commission accepts there may be a case for review of this system.

Question 8: Checks on recommendations from the JAC

12. Please see the comments under Questions 1-4 above.

Question 9: Decisions on authorisation, nomination, assignment and extensions of service

13. In addition to its responsibility for making selections for judicial appointments, the JAC's concurrence is also required for appointments as Deputy High Court Judges under section 9(1) and 9(4) of the Supreme Court Act 1981. In exercising this responsibility the JAC has been conscious that designation under section 9(1) and 9(4) is often perceived to be a step towards promotion to higher office, and it has worked with the senior judiciary to ensure that before these designations are made expressions of interest will be invited from among all those who might be eligible.
14. The Commission is conscious that there are other forms of designations and deployments which bring with them considerable additional responsibility. These include designations as Presiding Judges.
15. The fact that they are decisions of real significance to the administration of justice suggests that they should be made in an open way according to declared procedures to ensure the appointment of the best possible candidate from the full range of those eligible to apply. The Commission believes that this would bring greater understanding of the requirements of these important roles, as well as how they are filled.
16. The Commission suggests that the judiciary should be invited to propose, for each type of significant designation or nomination, a set of procedures which would satisfy the criteria of openness and accountability. The JAC should then be invited to approve these

procedures. When it has done so, they should be put into operation by the judiciary, and the JAC would have no role in concurring with individual decisions made as a result of processes which it had approved. This would include designations as Deputy High Court Judges which currently require its concurrence.

Questions 10-12: Delegation of functions by the Lord Chancellor to his junior ministers or senior officials

17. The JAC does not wish to express a view on these issues.

Question 13: Determination of eligibility criteria for specific judicial posts

18. The JAC attaches a great deal of importance to the question of eligibility criteria for judicial posts, recognising that restrictive criteria have the effect of reducing the diversity of the candidate field and could, in extreme cases, lead to concerns that the field is deliberately narrowed in favour of candidates with particular forms of experience. Accordingly, the JAC does challenge proposals by the Ministry of Justice that eligibility for particular posts should be narrowed in specific ways and asks for explanations of the restrictions. It does, for example, request a specific explanation why any salaried vacancy should not be open to part-time working. A strategic perspective is often required to see the benefits of opening up roles to a wider pool. This perspective is not always evident to those at local level seeking to fill a particular post. The JAC is ideally placed, in view of its statutory responsibility for widening the range of candidates, to balance the business needs outlined by the Courts Service or the Tribunal Service against the wider public interest. It therefore believes that it should have the legal responsibility for making the final decision on such issues and agrees that clarification of the legal position on this matter would be helpful.

Question 14: Medical checks

19. The JAC believes that the current arrangements under which it is required to arrange for successful candidates for salaried appointments to undergo medical checks is anomalous. It is the only function of the JAC which is not clearly related to the selection of candidates, being instead an aspect of their appointment. In the JAC's view the body which has responsibility for the appointments process – currently the Ministry of Justice – should take full responsibility for managing the confidential medical checks which are an essential part of it. It believes that it would be possible for these checks to be carried out concurrently by the MoJ with other aspects of their appointments process and therefore accelerate the arrival of judges in courts/tribunals.

Question 15: Should the JAC be allowed to take the preliminary steps in a selection process before a formal vacancy notice is received?

20. In order to manage its selection programme as efficiently as possible, the JAC needs to engage as soon as it can with its business partners, the Court Service and the Tribunals Service, to understand their anticipated requirements for appointments over the coming year. Concerns have been expressed that the drafting of the Constitutional Reform Act, under which the receipt of a vacancy notice triggers action by the JAC, might inhibit these necessary early discussions. These concerns have however now been allayed to a large extent. In consultation with key interested parties, broad agreement has been reached that all parties should ensure that, at the start of each financial year, the JAC is provided with full and accurate documentation on all the vacancies for which appointments will be sought over the coming year. All parties recognise that there will be unpredictable vacancies in the course of the year, arising perhaps from new business needs or from unforeseen retirements or deaths, and these will be incorporated into the programme as necessary and to the extent that resources permit. But the commitment to work together to ensure that the annual

programme is itself settled by September (except for unforeseen vacancies) and the essential documentation for the programme has been received before April each year will provide important efficiency dividends, allowing easier scheduling of exercises and more effective use of the staff and other resources available.

Question 16: Additional changes

21. The JAC wishes to argue for one additional change to which it attaches considerable importance. Under the Constitutional Reform Act, it runs two types of exercises: those held under section 87 for specific vacancies, and those held under section 94, under which the Lord Chancellor requests the JAC to draw up a list of people who are potentially selectable for vacancies for a specific type of appointment which may, or may not, arise later. Most of the JAC's larger competitions are of this latter type. This type of exercise has been regarded as convenient in circumstances where the number of vacancies required in a particular competition is difficult to predict. It has, however, very unfortunate consequences for many of the people on the list. Even after they succeed in the competition, they have no guarantee that they will in fact be appointed. This state of uncertainty may last for a year or more until the next exercise, and in the meantime their situation is often described as being in a professional limbo, unable to make firm plans for the future.

22. The JAC argues that it is wrong for candidates to be left in this uncertain position. After discussions with its key interested parties, the JAC believes that it should be possible to abolish the section 94 competition. All competitions would be held based on vacancy notices issued under section 87, which would specify the number of vacancies to which candidates were to be appointed. All successful candidates would therefore be guaranteed appointment. In order to do this, where uncertainty about the number of vacancies existed, it would be necessary for the Court Service and Tribunals Service to specify a

conservative figure; but if that figure proved to be inadequate there would be nothing to prevent the Commission, if appropriate, from responding to a further request for appointments by selecting the highest placed among the unsuccessful candidates in the previous exercise, provided that they were of sufficient merit, rather than carrying out a new exercise.

23. Ideally the abolition of the section 94 list would be effected by legislation; but even without legislation it could be achieved if the Courts and Tribunals Services simply decide not to ask the JAC to run such a competition.