

HOUSE OF LORDS  
HOUSE OF COMMONS  
JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

*Memorandum by the Judicial Appointments Commission*

Introduction

1. This is the response of the Judicial Appointments Commission to the Draft Constitutional Renewal Bill and the accompanying White Paper published by the Government in March 2008 (CM 7342). It responds only to those proposals which deal with the arrangements for making judicial appointments.
2. The views in this paper build on those made in our response on January 2008 to the Government's consultation paper on judicial appointments which was published in October 2007 (CM 7210). However, this evidence covers a number of additional points as the draft Bill and White Paper include proposals on which the Government had not previously consulted.
3. The JAC notes that these additional proposals have not been subject to formal consultation alongside the majority of the Government's proposals. A number of these new proposals have not been included in the draft Bill, but only in the White Paper, perhaps with a view to their being included in any legislation which may subsequently be introduced to Parliament.
4. We note that some of the proposals (such as a power for the Lord Chancellor to set targets for, and to direct the JAC), have far reaching implications, including for the independence of the JAC and hence the appointment of the judiciary. It is argued that these are necessary to fill the "accountability gap" left by the removal of the Lord Chancellor from part of the process. However, the additional powers proposed create run counter to the desire to reduce the role of the Executive, create an operational interface with the Lord Chancellor, and upset the delicate balance which was carefully crafted by the Constitutional Reform Act 2005. Without the benefit of full consultation, and without the benefit of seeing the proposals in the form of draft clauses, it is also difficult to assess fully and accurately the impact of these changes. The JAC hopes that the Joint Committee will give weight to this context and the importance of the proposals during its consideration.

5. The JAC does not consider there is sufficient evidence to support any significant change to the existing arrangements. The JAC has only been in existence since April 2006. We have implemented our own processes - the development of which was the subject of wide consultation - for only 19 months. While the JAC is responsible for the middle part of the selection and appointments process, we do believe there is scope for improvements which would enable the JAC to function more efficiently, including in the management of the end to end appointments process. We have drawn attention to these in our response to the Government's consultation paper of October 2007 (pages 7 and 8) and are working with our partners to achieve these.

#### Proposals set out in the Draft Bill

· Schedule 3, Part 1 - Selection of Supreme Court Judges.

6. The Constitutional Reform Act 2005 (CRA) currently provides for the Prime Minister to approve appointments to the Supreme Court.

7. The JAC recognises that the CRA gives the Prime Minister very little discretion in relation to his role in the appointments process and on that basis does not disagree with the Government's proposal to remove him from the process completely.

· Schedule 3, Part 2 - Basic provisions about judicial appointments etc.

Paragraphs 7 and 8 - seek to set out in legislation key principles for judicial appointments.

8. The JAC believes that there should be clarity about what is intended here. For example, it is not clear precisely what the Government has in mind in relation to "flexibility, proportionality, and effectiveness". For example, could the principle of flexibility be construed in such a way to require the JAC to accept late applications for selection exercises?

9. The JAC is already subject to the application of these principles by virtue of public law. Without any greater clarity of what the Government intends, the JAC is not persuaded of the need for additional principles in legislation, indeed, we consider that doing this could lead to confusion and increase the potential for challenge, possibly by unmeritorious application for judicial review.

10. The risk of challenge would be reduced if the key principles were not statutorily based, but any principles agreed would nevertheless need to be very clearly articulated if they are to be meaningful. However, in that regard, the Committee may be interested that the JAC publishes its principles in its Annual Report:

- Fairness - We are objective in promoting equality of opportunity and we treat people with respect.
- Professionalism - We are committed to achieving excellence by working in accordance with the highest possible standards.
- Clarity and openness - We communicate in a clear and direct way.
- Learning - We strive for continuous improvement and welcome and encourage feedback.
- Sensitivity - We are considerate and responsive in dealing with people.

11. Overall, the JAC remains to be persuaded that key principles, in whatever form, would improve the operation of the selection arrangements given that those arrangements are already highly prescribed in the CRA.

Paragraphs 9 to 12 - seek a power for the Lord Chancellor to specify particular business needs in Vacancy Requests.

12. The CRA sets out a number of criteria that should be used to determine the eligibility of potential candidates for judicial appointment. The Lord Chancellor has consistently sought to apply additional, non-statutory criteria, to Vacancy Requests which he sends to the JAC. Examples of the restrictions include a requirement that candidates should normally expect to have completed 30 sitting days since appointment in a fee paid judicial role or have two years' judicial experience.

13. The JAC regularly challenges the non-statutory criteria which the Lord Chancellor seeks to apply on the basis that it restricts the eligible pool of potential candidates and has the potential to restrict diversity. The proposals in the draft Bill give the Lord Chancellor very wide powers to apply additional non-statutory criteria. The JAC believes that the use of these powers will damage its ability to discharge its diversity duties and does not feel able to support them (see also paragraphs 77 to 79 below).

14. The one exception to this - which the JAC does support - relates to paragraph 10, which extends the diversity duty at section 64(1) of the CRA which applies to the JAC to both the Lord Chancellor and the Lord Chief Justice.

- Schedule 3, Part 3 - Panel to represent potential candidates for appointment etc.

15. Paragraphs 13 to 16 - propose the formation of a statutory Panel that will be formed of persons representing bodies that have an interest in the functions of the JAC. No member of the Commission or its staff will be permitted to be a member of the Panel.

16. The JAC actively engages with a wide range of individuals and groups that represent the interests of potential candidates. But we do not consider this is as an appropriate matter for primary legislation. Provisions in primary legislation are likely to result in a rigid arrangement which is unlikely to be flexible enough to be meet the needs of potential candidates, the JAC, or its partners. A statutory Panel is also likely to be much more formal and costly to operate.

17. The JAC has already established a number of groups involving key interested parties. For example, we have already established an Advisory Group which includes organisations (such as the Law Society) that represent potential candidates, and we maintain a Diversity Forum, and a Research Group which both include membership from our partners and key interested parties. The feedback we receive from the members of those groups is that they are working effectively.

- Schedule 3, Part 4 - Power to amend Schedule 14 to the Constitutional Reform Act 2005.

18. At Schedule 14 the CRA prescribes a number of posts which may only be filled following a selection by the JAC. The proposal would allow the Lord Chancellor to remove posts from that list following consultation with the Lord Chief Justice.

19. The JAC believes that the whole approach of removing posts from Schedule 14 of the CRA is defective and open to abuse. If posts are removed, some vacancies may be filled by deployment and some by new appointments or promotions, but all three categories will become appointable by the Lord Chancellor.

20. It is the JAC's view that the right approach is that where posts are to be filled by the deployment of an existing judge into another position at the same level such a post should be filled without a competition by the Lord Chief Justice, and that there should be no Henry VIII power for the Lord Chancellor to remove a post from Schedule 14.

· Schedule 3, Part 5 - Removal of some of the Lord Chancellor's functions in relation to selections under Chapter 2 of part 4 of the Constitutional Reform Act 2005 etc.

21. Paragraphs 20 to 31 - The CRA currently provides for the Lord Chancellor to accept, reject, or ask for reconsideration of all JAC recommendations. The Government proposes to reduce the role of the Executive in the appointments process by essentially removing the Lord Chancellor's discretion in respect of any JAC recommendation below that of the High Court.

22. The Lord Chancellor is - and presumably will remain - the Minister responsible for the justice system [Part 1 of the Courts Act 2003]. The JAC believes that for the Lord Chancellor to fully discharge that duty and properly account to Parliament for it, he should be involved in the appointments process for members of the judiciary.

23. There should be proper accountability to Parliament in making judicial appointments. Under the Government's proposals, while the JAC would, in effect, become responsible for appointments to all judicial offices below the High Court, it is difficult to see how it could become properly and directly accountable to Parliament for the exercise of that duty without more extensive changes.

24. The JAC questions the rationale for a dividing line at the High Court in terms of accountability for judicial appointments, especially given that judges at all levels can have a direct and profound impact on the public and business.

25. The JAC considers that the existing CRA arrangements are the result of a careful consideration by Parliament of all of the issues which emerged during the lengthy passage of the Constitutional Reform Act in 2004/5. They balance the responsibilities in the appointments process and appear to enjoy wide support. The JAC does not, therefore, support the current proposals for change.

26. Paragraph 32 - The proposal will allow the Lord Chief Justice to delegate some of his functions to a nominated judicial office holder. The functions include statutory consultation of the Lord Chief Justice by the Lord Chancellor prior to a vacancy request coming to the JAC, and statutory consultation of the Lord Chief Justice by the JAC as part of its selection process.

27. The JAC supports the streamlining of arrangements wherever this is appropriate and considers that if the Lord Chief Justice were able to delegate certain functions to other judicial office holders it should result in less bureaucracy. The JAC therefore supports this proposal.

· Schedule 3, Part 6 - Medical Assessments.

28. Paragraphs 33 to 35 - essentially transfer the responsibility for carrying out medical checks from the JAC to the Lord Chancellor.

29. The JAC does not consider that medical checks should be a consideration in the selection of potential candidates - they are an appointment consideration. We therefore agree with the Government that it is more appropriate for the Lord Chancellor (as the appointing authority) to carry out these checks.

· Schedule 3, Part 7 - Powers of Lord Chancellor in relation to information.

30. This proposal appears to be intended to clarify the existing information provisions at sections 72, 75, 81 and 89 of the CRA. In effect it appears to go much further.

31. The JAC considers that any sensitive information on the selection process, particularly in relation to individual candidates, must be properly protected.

32. The Government's proposals appear to give the Lord Chancellor a wide-ranging power to seek any information. The JAC is not aware of any evidence of difficulty in this area and is not clear why these significant powers are being sought. On that basis the JAC does not feel able to support these proposals.

33. In the event that the Joint Committee decided to support the provision of these powers, the JAC hopes that any new powers would be constrained to the provision of specific information in specific circumstances.

· Schedule 3, Part 8 - Deployment authorisations, nominations etc

34. The Lord Chief Justice is currently required to consult with the Lord Chancellor, and in some cases obtain his concurrence, in relation to a wide range of deployments, authorisations and nominations.

35. The Government's Consultation received widespread support (including from the JAC) for the proposal to remove the requirement for consultation with the Lord Chancellor, leaving the Lord Chief Justice to make decisions on judicial deployments, authorisations, nominations etc. We therefore support the proposal that it should be for the Lord Chief Justice to decide on the deployment etc of judges and that it seems unnecessary for him to seek agreement from the Lord Chancellor.

36. In our response to the Government's consultation paper of October 2007 (CM 7210), we said that in addition to its responsibility for making selections for judicial appointments, our concurrence is also required for appointments as Deputy High Court Judges under section 9(1) and 9(4) of the Supreme Court Act 1981. We also noted that there are other forms of designations and deployments including designations as Presiding Judges.

37. We argued that these decisions are of real significance to the administration of justice and 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. We suggested 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 and that the JAC should then be invited to approve these procedures. This would then leave the judiciary to make individual decisions against that criteria with the JAC having no concurring in individual decisions. We therefore welcome the provision giving effect to this proposal for Deputy High Court Judges.

#### Proposals set out in the White Paper

· Paragraphs 120 to 121 - The JAC should be allowed to take preliminary steps in a selection process before a formal Vacancy Request is received.

38. The CRA is prescriptive in terms of the operation of the JAC. It allows the JAC to begin a selection exercise on receipt of a formal Vacancy Request from the Lord Chancellor. The Government has indicated that it wants to allow the JAC to take the preliminary steps in a selection exercise prior to the formal issue of Vacancy Request.

39. Our response of January 2008 to the Government's consultation paper on judicial appointments (CM 7210) highlighted the need for the JAC to engage as soon as it can with the Court Service and the Tribunals Service, to understand their anticipated requirements for appointments over the coming year. And we mentioned that concerns had been expressed that the drafting of the CRA,

under which the receipt of a vacancy notice triggers action by the JAC, might inhibit these necessary early discussions.

40. As we said at the time, these concerns have 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.

41. Despite the unpredictable nature of some vacancies 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. In view of these changes, the JAC does not consider any legislative change is necessary.

· Paragraphs 123 to 130 - Providing additional accountability mechanisms.

42. The Government is seeking to provide the Lord Chancellor with wide-ranging powers that would allow him to direct the JAC and to set performance targets in order that he may satisfy himself that the JAC is working efficiently and effectively.

43. These new powers are justified on the basis that, as it is intended to remove the Lord Chancellor's discretion to reject, or ask for reconsideration of any JAC recommendation for appointment below the High Court. The JAC does not support that initial proposition - see comments in relation to Schedule 3, Part 5 of the draft Bill. But in any event, we note that the Government does not intend these new powers to apply only to activities of the JAC that relate to appointments below the High Court - i.e. where the imputed accountability gap would arise.

44. In relation to the power of direction, the JAC notes that the Government did not consult on this potentially significant power along with its other proposals in October 2007. This proposal is discussed in the White Paper, but it does not appear in the draft Bill. Consequently there is a lack of detail about the precise nature of the power and the way it would operate. The JAC believes this power may have implications for its independence from the Executive.

45. In relation to the power to set targets for the JAC, we believe this proposal also has the potential to compromise the JAC's independence and the quality of selections made. For example, externally imposed targets create an operational interface between the Lord Chancellor and the JAC and it is not entirely clear how this would sit with the JAC's duty to select candidates solely on merit



[section 63(2) CRA], and the extent to which it might impact on the JAC's independence from the Executive.

46. The JAC remains to be convinced of the value of targets in relation to judicial appointments. By discussion of potential targets, seeking to meet targets, or explaining why they have not been met, can be a very resource intensive process, and divert an organisation from its true purpose. There appears to be some evidence to this effect where they have been used in other sectors where the quality or nature of the work is fundamental to the success of the organisation as in the case of the JAC's role in selection candidates for judicial appointment.

47. For example, the target suggested in the Government's White Paper [paragraph 126] to increase the proportion of applications for appointment from certain groups is meaningless - it might well be possible for the JAC to meet this target by generating applications from candidates who are unlikely to be successful in the selection process. This would be both unfair to the candidates themselves and potentially off-putting to other candidates from under represented groups in the judiciary in the future. Moreover, achievement of mis-directed targets might result in inefficient use of resources, as well as affecting candidates.

48. The JAC believes that a better way of judging its performance, particularly in relation to diversity, is to compare the selections made for each appointment against the eligible pool. We have been working with the legal professional bodies and others to determine the eligible pool for each selection exercise. We have found that the pool varies considerably given the statutory criteria set out in the CRA, or any non-statutory criteria applied by the Lord Chancellor. We have included data on the eligible pool for each competition in our published selection exercise statistics for 2007/8. We believe this will provide a much better basis on which to track our year on year performance.

49. In relation to judicial appointments, there is a further potential objection to targets that may not apply in other sectors. The purpose of the JAC is rooted in its independence. The imposition of targets acts to reduce its independence. An example might be helpful. The budget of the JAC is set by the Ministry of Justice. The imposition of targets in combination with a limited budget has the practical effect of reducing the JAC to a service provider for the Ministry of Justice by restricting its freedom to implement the selection process and outreach activity that it believes is appropriate in relation to judicial appointments.

50. We also oppose targets which set specific budgetary constraints, for example on research or our outreach work, with the 'knock on' implications for diversity as well as independence.

51. In their questions, the Joint Committee asked whether it would be more acceptable if the Lord Chancellor's power to set targets, or to issue directions, were subject to the approval of the Lord Chief Justice. While we agree that the formal consent of the Lord Chief Justice may be helpful in balancing the influence of the Executive, we note that a number of commentators have also expressed concerns about the existing level of judicial involvement in the selection arrangements. The formal involvement of the Lord Chief Justice in this way is therefore likely to exacerbate the situation.

52. The JAC cannot support these proposals.

Paragraph 131 - Delegation of the Lord Chancellor's and Lord Chief Justice's functions.

53. We note that the draft Bill provides for the Lord Chief Justice to delegate his functions. Our comments in relation to paragraph 32 of Part 5 to Schedule 3 reflect this.

54. In relation to the earlier proposal for the Lord Chancellor to delegate certain of his functions, we note that the Government has not brought forward any proposals at this stage, but has sought views.

55. While it is difficult for the JAC to provide a view in the absence of more specific information about the nature of any delegation, we note that by reason of the Lord Chancellor's oath of office and the Constitutional Reform Act 2005, he has a range of unique duties and responsibilities not shared by other Ministers. Included in those are,

"the need for the public interest in regard to matters relating to the judiciary or otherwise to the administration of justice to be properly represented in decisions affecting those matters".

The Lord Chancellor must be qualified by experience in law or Parliament, and has a duty to respect the rule of law.

56. These unique duties carry great weight and are significant in the way in which the Lord Chancellor approaches his responsibilities in relation to the appointment of the judiciary. It is clearly important that any future arrangements do not harm these important safeguards.

Paragraphs 132 to 133 - A role for Parliament.

57. The JAC has already indicated its support to the proposal that the appointment of any future Chairman of the JAC should be subject to pre-appointment scrutiny by the relevant select committee.

58. The Government also suggests that there might be merit in an annual meeting of members of both the Commons Justice Committee and the Lords Constitution Committee to hold the system to account.

59. While we welcome any proposal that will lead to more effective accountability, we do not consider it would be appropriate to comment on the workings of Parliament or how individual Committees should discharge their functions.

Paragraph 134 - A JAC panel representing potential applicants.

60. The JAC does not support this proposal. Our comments on paragraphs 13 to 16 of Part 3 of Schedule 3 of the draft Bill reflect this.

Paragraph 135 to 136 - Size and composition of the JAC.

61. The size and composition of the JAC, which is clearly prescribed by the CRA, represents a complex settlement of issues raised during lengthy parliamentary debates just three years ago.

62. Our experience to date illustrates that the existing membership of the Commission, which comprises lay, judicial, professional, lay justice, and tribunal members, has worked very well in practice, and represents an invaluable range and depth of knowledge and experience. These members do not view themselves as representatives of other organisations, but act corporately in promoting the objectives of the JAC.

63. The JAC does not support any proposal for review.

Paragraph 137 - Statutory salary protection for certain tribunal judges.

64. The JAC does not have any views on this proposal.

Paragraph 138 - Power to amend Schedule 14 to the Constitutional Reform Act 2005

65. The JAC has commented above on the provisions at Part 4 of Schedule 3 to the draft Bill.

Paragraph 139 - Reappointment of JAC Commissioners.

66. The Government proposes to simplify the re-appointment of Commissioners who do not hold senior judicial office.

67. The JAC welcomes this proposal. However, we would like to see more detail of the proposed procedures in relation to any decision of the Lord Chancellor not to reappoint a particular Commissioner.

Paragraph 140 - Disclosure of confidential information to the police.

68. The Government proposes to introduce legislation to allow information relating to judicial appointments and discipline to be disclosed to the police for the purposes of investigating crime.

69. The JAC recognises that under the CRA difficulties can arise if information is revealed which might indicate criminal activity.

70. The JAC accepts the Government's argument that the CRA should be brought into line with other similar legislation to enable any such information to be provided to the police solely for the purposes of investigating crime.

Additional proposals from the JAC requiring legislative change

- Repeal of section 65 of the CRA - Lord Chancellor power to issue guidance to the JAC.

71. 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 in the event that legislation is taken forward, the Government should take the opportunity to repeal section 65 of the CRA.

- To guarantee appropriate resourcing of the JAC

72. 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 Notices it receives in a fair, timely, and thorough fashion, and in full compliance with its statutory duties.

73. 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.

74. We note that at paragraph 4.29 of his Review of Administration of Justice in the Courts of March 2008, the Lord Chief Justice made a similar observation:

"The new Commission started in April 2006 without any shadow operation and subject to a process which, in some respects, was unduly cumbersome. The administrative and staffing implications of the creation of the JAC and in particular the need to identify requirements further in advance than had been the case under the previous system, were underestimated. The Commission's resources are limited and in the light of our experience clearly require review. It has had to face competing demands from both HMCS and the Tribunal Service upon those limited resources."

- Repeal of section 94 of the CRA

75. Under the CRA, the JAC 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.

76. Most of the JAC's larger selection exercises have been of this latter type. This type of exercise has been regarded as convenient in circumstances where the number of vacancies required in a particular selection exercise is difficult to predict. It has, however, very unfortunate consequences for many of the people on the list. Even after they succeed in the selection exercise, they have no guarantee that they will in fact be appointed.

77. 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.

78. The JAC argues that it is wrong for candidates to be left in this uncertain position. After discussions with its key interested parties, it has been agreed that the section 94 arrangements should not generally be used. However, in the event that legislation is introduced, the JAC considers that the opportunity should be taken to repeal section 94 of the CRA.

· Responsibility to be given to the JAC for application of any non statutory eligibility criteria (see also paragraphs 12 to 14 above)

79. In its response to the Government's consultation of October 2007, the JAC argued that it should have the final decision on the determination of eligibility criteria for specific judicial posts. It may be helpful to give a specific example of a criterion. The analysis of the JAC is that a key limiting factor on our being able to make a significant contribution towards improving diversity is the usual requirement for the Lord Chancellor to stipulate in Vacancy Requests to the JAC that candidates for salaried judicial posts should normally have had previous fee-paid experience.

80. They say this is a real barrier to large numbers of potential candidates. For example, we have heard from members of the Employed Bar who represent over 3000 employed barristers (over half of whom are female and around a quarter of which are from BME backgrounds) that because of the terms of their employment, it simply is not possible for their members to consider part time judicial posts on a fee paid basis.

81. This not only reduces their prospect of success but also, and importantly, deters many from making an application. The same constraints are reported many solicitors - particularly those working in large, high-pressured and high-profile firms. The JAC has asked the Lord Chancellor to review the criteria that he applies. It continues to believe that the JAC should have the final decision on the determination of eligibility criteria for specific judicial posts.

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