

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

*Memorandum by the Law Society of England and Wales*

Background

1. The Law Society is the professional body for solicitors in England and Wales. The Society regulates and represents the solicitors' profession, and has a public interest role in working for reform of the law. The Law Society's interest in the Constitutional Renewal Bill is focussed on Part 3 Courts and Tribunals which deals with judicial appointments.
  2. The Law Society's interest in judicial appointments is guided by two principles: appointments should be made independent of the Government; and action needs to be taken to encourage a more diverse judiciary. The Society considers the Constitutional Reform Act 2005 to be a disappointment. While establishing the Judicial Appointments Commission, the Act has not secured independence from the executive. Although the Act requires the Commission to "have regard to the need to encourage diversity in the range of persons available for selection for appointments" progress has been inadequate.
  3. The Society believes that the Constitutional Renewal Bill should be used to achieve independence for the Judicial Appointments Commission in the selection of candidates for judicial appointment and to reinforce the duty of the Commission to strive for a more representative judiciary. In the absence of those two measures, public faith in the judiciary may be undermined.
- Clause 20: Salary protection for members of tribunals

4. The Law Society supports clause 20 which provides that the salaries of certain Tribunal office-holders once determined may not be reduced. This will provide the same protection for these officeholders as is already available to office holders in the courts.

Clause 19: Judicial appointments etc and Schedule 3

5. This clause gives effect to Schedule 3: Judicial appointments etc which sets out a series of amendments to existing statutes relating to judicial appointments. Our comments on each part of Schedule 3 are set out below.

Part 1: Selection of Supreme Court judges

6. These provisions will amend Sections 26, 27, 29, 60 and Schedule 8 of the Constitutional Reform Act 2005 to remove the Prime Minister from the process for the appointment of the President, Deputy President and judges of the Supreme Court. In future when presented with a candidate chosen by a Selection Commission, recommendations to the Queen for appointment will now be made by the Lord Chancellor instead of the Prime Minister. At present the Lord Chancellor notifies a selection to the Prime Minister who submits a recommendation for appointment to the Queen. In addition the Lord Chancellor will be required to consult the devolved administrations and the senior available judge of the Supreme Court before giving guidance on procedure regarding selection for Supreme Court appointments, any such guidance being laid before Parliament.

Law Society View

7. The Law Society remains of the view that Government retains too much influence over the Judicial Appointments Commission. The Commission is under the sponsorship of the Ministry of Justice and a substantial proportion of all Commission staff is on secondment from the Ministry or other branches of the Government. The Law Society believes that in accordance with the principle of the separation of powers, the executive should be removed entirely from the judicial appointments process.

8. Since the creation of the Judicial Appointments Commission, the Lord Chancellor has retained a residual but important role in appointments, either in accepting the Commission's selection, or rejecting a name, or asking for it to be reconsidered. We believe that the role of the Lord Chancellor in judicial appointments is incompatible with the demands of judicial independence - and creates the continued perception of appointments as a source of patronage by ministers.

9. The Law Society considers that, after running the appointment process and assessing the candidates, the Commission should itself make the decision whom to appoint, with no involvement by Ministers at any stage. This would require the Judicial Appointments Commission to recommend names for appointment directly to the Queen and therefore take over the full powers of both the Lord Chancellor and the Prime Minister in this area. All judges would therefore be appointed in an open and transparent way and it would remove any potential for allegations that particular judicial appointments were made according to a Minister's personal preference or party affiliation.

10. The Law Society therefore regrets that these provisions have only gone so far as to excise the Prime Minister from the judicial appointments process: they should also delete the continued involvement and powers of the Lord Chancellor.

## Part 2: Basic provisions about judicial appointments etc

11. These provisions will amend sections 63, 63A, 64, 95 and 98 of the Constitutional Reform Act 2005 to make it clear that the Lord Chancellor may set out additional criteria relating to particular business requirements to be used by the Judicial Appointments Commission when making selections for judicial appointments and create new duties to be followed by all those with responsibilities in the appointments processes.

## Law Society View

12. The Society would wish to see the remaining powers of the Lord Chancellor in relation to the judicial appointments process removed completely in order to secure the complete separation of the Judicial Appointments Commission from the executive and completely independent decisions on appointments by the Commission. These provisions would give the Lord Chancellor the power to attach criteria for candidates for a particular judicial appointment over and above the usual statutory requirements as to, for example, length of professional experience.

13. The provisions specify the business requirements that would justify intervention by the Lord Chancellor to dictate additional criteria being attached to the recruitment for a judicial post as being qualifications, experience or expertise of the person to be selected, or to the office currently held by that person; requirements as to where the person selected is to carry out his functions; and requirements as to how soon a selection should be made. The Lord Chancellor would be able to withdraw or modify any requests which he has previously specified to the Judicial Appointments Commission as regards any business requirement or to add a new one. Conversely the Lord

Chancellor would be able to allow the selecting body in certain circumstances to dispense with those requirements. The Lord Chancellor would be able to require the Judicial Appointments Commission to notify him, or obtain his consent, before dispensing with a particular requirement.

14. Such powers clearly infringe the independence of the Judicial Appointments Commission and, in the view of the Law Society, are likely to lead to discrimination against those who are already under-represented among the judiciary - solicitors, women, BMEs. As the Explanatory Notes to the draft Bill suggest, one example of a requirement that could be specified under the new provisions could be that candidates for some senior tribunal positions are required to be existing holders of senior judicial office, for example High Court judge, or Circuit judge. The criteria for a judicial appointment should be framed by the Commission in the light of the details of the request for a competition exercise to be undertaken and should not thereafter be changed.

15. The Law Society supports the revision of the duties on those who have responsibilities in relation to judicial appointment procedures and the extension of those duties to other participants in that process. The Society does believe that there need to be new duties to ensure that the selection processes are fair, transparent, efficient, flexible, proportionate and effective and supports the insertion of those principles into the statutory framework for the judicial appointments system.

#### Part 3: Panel to represent potential candidates for appointment etc

16. These provisions amend sections 64A, 66 and schedule 12 of the Constitutional Reform Act 2005 to require the Judicial Appointments Commission to establish a panel of persons representing bodies which have an interest in how it carries out its functions. The Panel must have regard to the new duties to ensure that the selection process is fair, transparent, efficient, flexible, proportionate, effective and independent. The Panel will be independent of the Commission and will make representations to the Commission on any of its functions. The Commission will have to respond to those representations within a reasonable time. The Panel will be entitled to see and comment upon the Commission's Annual Report before it is submitted to the Lord Chancellor. The Lord Chancellor will be required to consult the Panel as well as the Lord Chief Justice before issuing, amending or withdrawing statutory guidance to the Judicial Appointments Commission.

#### Law Society View

17. The Society welcomes the institution of such a Panel and would be pleased to represent the profession on it. The Law Society does not regard the new Panel as a replacement either for the professional Commissioners or the existing liaison arrangements with stakeholders. The Panel should prove to be the medium through which the experiences of the consumers of the judicial appointments process can be fed into the JAC and thereby achieve improvements.

#### Part 4: Power to amend Schedule 14 to the Constitutional Reform Act 2005

18. These provisions amend sections 85 and 144 of the Constitutional Reform Act 2005 to enable the Lord Chancellor, after consultation with the Lord Chief Justice, to make an order to remove statutory references in order to remove the requirement for candidates to be selected by the Judicial Appointments Commission before they can be appointed. Such orders would require the approval of both Houses of Parliament.

#### Law Society View

19. The Society opposes these provisions as they retain the scope for interference by the Government in the process for the appointment of members of the judiciary. In particular they would provide the Lord Chancellor with the ability to override statutory requirements as to holding open competition or encouraging diversity to facilitate the appointment of the archetypal white male barrister.

#### Part 5: Removal of some of the Lord Chancellor's functions in relation to selections

20. These provisions amend sections 85, 87, 88, 89A, 90, 91, 92, 93, 94A, 95, 96 and 96A of the Constitutional Reform Act 2005 to remove the Lord Chancellor's powers to reject, or require reconsideration of, selections made by the Judicial Appointments Commission for all judicial offices below the High Court. Those options are preserved in relation to the High Court, the Lord Chief Justice, the Heads of Divisions, Lords Justices of Appeal and the Senior President of Tribunals.

#### Law Society View

21. The Society would wish to see the remaining powers of the Lord Chancellor in relation to the judicial appointments process removed completely in order to secure the complete separation of the Judicial Appointments Commission from the executive and completely independent decisions on appointments by the Commission. To the extent that these provisions remove the scope for the Lord Chancellor to second guess the recommendations of the Commission for all appointments below the High Court the Law Society supports the proposals. However the Society sees no justification for distinguishing between judicial offices below and above the High Court. The role of the Lord Chancellor should be removed from approving all appointments to judicial office.

22. The provisions in Part 5 would enable the Lord Chancellor to interfere in an appointments process being undertaken by the Commission for the High Court and above. He would be able to require the Judicial Appointments Commission to reconsider a decision that no candidate of sufficient merit had been identified by a particular selection process. He would be able to refuse an appointment on medical grounds. The Lord Chancellor would not be required to make an appointment recommended by the Commission if the person selected declines it or does not accept within the time specified or is not available for the appointment within a reasonable time. He would be able to modify or withdraw a request for a competition to make an appointment to a vacant senior judicial post if the Lord Chief Justice agrees or if he considers that the process for identifying candidates by the Commission or the selection panel had not conducted an exercise satisfactorily. He would not be required to proceed with an appointment where there has been a change in the business need since the request was sent.

23. In the view of the Law Society all of these functions could be undertaken by the Judicial Appointments Commission acting on its own initiative.

#### Part 6: Medical assessments

24. These provisions amend sections 96 and 97 of the Constitutional reform Act 2005 in relation to medical assessments of those who have been selected for appointment to salaried posts. At present the Judicial Appointments Commission requests successful applicants to undergo a medical check up with a GP. In future when the Ministry of Justice writes to a successful applicant offering a judicial appointment, the letter will be accompanied by a form detailing the candidate's medical health for completion and return to the Ministry. On receipt of the completed form the Ministry will send it to its medical assessor and it is only if the assessor identifies a possible health condition or

problem that the candidate will be asked to visit their GP for a detailed examination. If a candidate does not comply with the request to provide information or to undergo a medical assessment, or if the medical report is unsatisfactory, the Lord Chancellor will be able, after consultation with the Lord Chief Justice, to notify the Judicial Appointments Commission that he is not proceeding with that appointment.

#### Law Society View

25. The Law Society supports transferring responsibility for conducting medical check ups of successful candidates from the Judicial Appointments Commission to the Ministry of Justice. It should help to expedite the appointment process which is notoriously protracted, not least by removing the need for every successful candidate to seek an appointment with their GP. The Law Society would like to see further action to expedite the appointment process which in most cases takes over a year from application to taking up an appointment on the bench. However in the main these will be operational matters for the Judicial Appointments Commission rather than issues which can be prescribed by statute.

#### Part 7: Powers of Lord Chancellor in relation to information

26. These provisions amend sections 72, 75D, 81, 89 and 97A of the Constitutional reform Act 2005 to empower the Lord Chancellor to require the Judicial Appointments Commission to provide information or documents in connection with his functions in relation to judicial appointments.

#### Law Society View

27. Notwithstanding the Society's opposition to the continuation of the involvement of the Government in the person of the Lord Chancellor in the judicial appointments process, it does accept these provisions. It is necessary for there to be the power to require the Commission to provide information on the performance of its functions. Ideally the Law Society would like that power to rest with Parliament rather than the Lord Chancellor.

#### Part 8: Deployment, authorisations, nominations etc

28. These provisions remove requirements in the Constitutional Reform Act 2005 and other statutes for the Lord Chief Justice to consult the Lord Chancellor or obtain his concurrence before exercising certain functions such as deploying serving members of the judiciary to particular posts (usually leadership ones) or nominating them or authorising them to carry out certain functions.

#### Law Society View

29. In the view of the Law Society the deployment of members of the judiciary should be decided independent from Government and would therefore like these provisions to be taken further to excise the continued involvement of the Lord Chancellor.

30. Furthermore the Society does not support powers which enable the usual process for judicial appointment to be circumvented by, for example, enabling a Circuit judge or Recorder to act as a judge of the High Court. Such a course of action only allows the replication of the existing members of the judiciary - predominantly white, male and barristers.

#### Additional issues

31. At the conclusion of the oral evidence before the Joint Committee on 20 May the Law Society was invited to submit any additional points which it would like to see included in the Bill. The Society would request the Joint Committee to give consideration to the following issues:

#### Funding

32. The Law Society would like to see a statutory obligation on the government to provide sufficient resources to the Judicial Appointments Commission to ensure that it is able to carry out its functions effectively.

#### Targets

33. The Government's response to the Judicial Appointments White Paper Government Policy Proposals referred to the possibility of the Government imposing targets on the Commission. The Law Society opposes targets for the Commission. Targets in the public sector have proved to be counter productive. More seriously in the case of the Judicial Appointments Commission they would undermine its independent status.

#### Guidance

34. The Law Society would like to see revoked the power of the Lord Chancellor to issue guidance to the Judicial Appointments Commission on the way it should conduct its functions under sections 65 & 66 of the 2005 Act.

#### Eligibility criteria

35. The Judicial Appointments Commission should have the final decision on the eligibility criteria for any appointment not the Lord Chancellor. Having set up an independent body to operate the judicial appointment system, it should be able to do so independently without the risk of intervention from the Government. The Society is particularly concerned that the exercise of this power could impair the diversity objective.

#### Transparent appointments process

36. The Government's response to the White Paper included the new proposal that the Lord Chancellor should be able to remove a specific judicial office from list of appointments requiring a selection process to be undertaken where it can be filled by the deployment of a serving judicial office holder. This would undermine the diversity objective in enabling a serving member of the judiciary to obtain a more senior appointment without undergoing competitive selection and appointment on merit.

#### Length of appointments process

37. While the length of the appointments process is an operational rather than statutory issue, the Law Society remains concerned about the performance of the Judicial Appointments Commission. There can be an interval of up to two years between the initial advertisement and the successful candidate taking a place on the bench. It is unreasonable to expect an individual to put their professional career on hold for that length of time and it may be a factor in deterring some lawyers from applying for judicial office. The Law Society is therefore strongly supportive of the efforts of the Commission to expedite the selection process. Better forecasting of impending vacancies and a

rolling programme of recruitment have been implemented by the Commission and should produce an improvement.

38. If that reduction in the length of the appointment process can be achieved, then there are two legislative amendments which the Law Society would request. Firstly section 94 lists. Section 94 of the 2005 Act enables the Lord Chancellor to request the Judicial Appointments Commission to provide a list of suitable candidates for appointment to a particular level of judicial office, for example Recorder. The Commission undertakes the selection process, the successful candidates are notified, but they do not proceed to immediate appointment. Instead their names are placed on a list to await appointment as and when an appropriate vacancy occurs in the area in which they have specified that they would wish to sit. An individual can remain on the list for in excess of 18 months. There would be no need for section 94 lists if the selection process was more responsive to the needs of the Courts Service.

39. Secondly, an efficient selection process completely removes any justification for the continuation of the power of the Lord Chancellor under section 9 of the Supreme Court Act 1981 to authorise a Recorder or Circuit Judge to sit as a High Court Judge without having had to go through the normal recruitment process operated by the Judicial Appointments Commission. Section 9 authorisation does not conform to the requirement for the appointment process to be open and transparent and is likely to favour the traditional model for a judge - a white male barrister.

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