

Title: Judicial Appointments: Changes to the statutory framework IA No: MOJ139 Lead department or agency: Ministry of Justice Other departments or agencies: Judicial Appointments Commission	Impact Assessment (IA)		
	Date: 11/05/2012		
	Stage: Final		
	Source of intervention: Domestic		
	Type of measure: Primary legislation		
Contact for enquiries: Graham Mackenzie			
Summary: Intervention and Options			RPC Opinion: Not required

Cost of Preferred (or more likely) Option			
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, One-Out? Measure qualifies as One-Out?
NQ	n/a	n/a	No NA


What is the problem under consideration? Why is government intervention necessary?
 We believe that much could be done to make the process more open and transparent, and efficient and responsive to the needs of the justice system. In addition the Government is of the view that public confidence in the justice system can be enhanced by a diverse and representative judiciary.

What are the policy objectives and the intended effects?
 The aim of these proposals is to create a statutory framework for a process that is efficient, effective, and responsive to the needs of the courts and tribunals, and reflective of the proper constitutional balance of responsibilities between the Government, the judiciary, and independent elements of the process. These proposals also aim to remove some of the barriers to the creation of a more diverse judiciary.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)
 Upon completion of the Ministry of Justice consultation 'Judicial Appointments and Diversity: A judiciary for the 21st Century'¹ the following policy proposals are being taken forward within the Crime, Communications and Courts Bill:
 Policy 1 – Amend the appointments process for the UK Supreme Court and judicial appointments, including those that fall within the remit of the Judicial Appointments Commission, to reflect the proper balance between executive, judicial and independent roles;
 Policy 2 – Amend the appointments process to enable the development of a more diverse judiciary;
 Policy 3 – Amend existing legislation to enable improvements in the quality and speed of service of the current appointments process, ensuring delivery of improved value for money.
 In addition to the above proposals, the following proposals which were not included in the consultation will also be taken forward:
 Policy 4 – Amend existing legislation relating to the number of UK Supreme Court Judges' and;
 Policy 5 – Allow for more flexible judicial deployment between courts and tribunals.

Will the policy be reviewed? It will be reviewed. If applicable, set review date: 04/2016					
Does implementation go beyond minimum EU requirements?				N/A	
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.		Micro No	< 20 No	Small No	Medium No
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)		Traded: N/A		Non-traded: N/A	

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.

Signed by the responsible Minister:  Date: 4/5/2012

¹ <http://www.justice.gov.uk/downloads/consultations/judicial-appointments-consultation-1911.pdf>

Summary: Analysis & Evidence

Policies 1-5

Description: Amending legislation to make changes to the judicial appointments process to achieve the appropriate balance of responsibilities, introducing measures to address the issue of judicial diversity, and ensuring speed and quality of service to key users.

FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate: NQ
COSTS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)		Total Cost (Present Value)
Low					
High					
Best Estimate	NQ		NQ		NQ
Description and scale of key monetised costs by 'main affected groups'					
None.					
Other key non-monetised costs by 'main affected groups'					
<p>There may be some additional costs and time arising from increased JAC involvement in the selection exercises for judges that may be appointed to a pool and requested under section 9(1) of the Senior Court Act 1981 and the appointment of deputy judges of the High Court under section 9(4) (Policy 1).</p> <p>There may be some additional costs to the relevant selecting body if selection exercises for particular judicial offices are transferred from the JAC (Policy 3). These costs may be offset by reciprocal savings to the JAC.</p>					
BENEFITS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)		Total Benefit (Present Value)
Low					
High					
Best Estimate	NQ		NQ		NQ
Description and scale of key monetised benefits by 'main affected groups'					
None.					
Other key non-monetised benefits by 'main affected groups'					
<p>Increased public confidence in the judiciary and the judicial appointments process from introducing measures to increase the transparency and fairness of the appointments process and remove barriers to progression for under-represented groups (Policies 1 and 2).</p> <p>Increased flexibility in responding to business needs, and reduced delays in appointments. This will allow for more efficient resourcing of court vacancies by HMCTS, in turn enhancing the public's experience of the court/tribunals system and improving cost efficiency (Policies 1, 3 and 4 and 5).</p>					
Key assumptions/sensitivities/risks					Discount rate (%)
<p>Our proposals will not lead to any changes in the quality of judicial appointments. No significant impacts are expected on legal service providers. It has been assumed that there will be no significant impacts on case outcomes, public confidence in the rule of law, the development of case law, case delays and case duration. HMCTS court fees and operational costs are not expected to change as a result of these policies.</p>					

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: n/a	Benefits: n/a	Net: n/a	No	NA

Evidence Base (for summary sheets)

References

No.	Legislation or publication
1	http://jac.judiciary.gov.uk/static/documents/JAC_AR10.pdf
2	www.judiciary.gov.uk/NR/rdonlyres/15964649-4DE8-4066-A3F4-F28132E4CFC0/0/response_governance_britain_jud_appts_jeb_jc_170708.pdf
3	www.judiciary.gov.uk/NR/rdonlyres/B280F4B1-3103-47ED-BD88-1D95331FB6AE/0/response_governance_britain_jud_appts_adj_170708.pdf
4	www.official-documents.gov.uk/document/cm72/7210/7210.pdf
5	www.official-documents.gov.uk/document/cm73/7342/7342_iii.pdf
6	www.legislation.gov.uk/ukpga/2005/4/contents
7	www.legislation.gov.uk/ukpga/2010/15/contents
8	http://www.legislation.gov.uk/ukpga/2007/15/contents
9	www.legislation.gov.uk/ukpga/2010/15/contents

1. Introduction

- 1.1 These policy proposals concern a number of measures to improve the end-to-end process for selecting and appointing members of the judiciary.
- 1.2 The current process for judicial appointments was established under the Constitutional Reform Act 2005 (the "CRA"). While the Lord Chancellor continues to make appointments and recommendations for appointment to the Queen, responsibility for the selection of various judicial office holders (other than those of the Supreme Court of the United Kingdom) was moved to an independent Judicial Appointments Commission (JAC). The JAC began operation on 4 April 2006.
- 1.3 The Government reviewed the judicial appointments process in 2010. The review found that the JAC is a well-respected body which has brought openness to the process, and recommended that the JAC be retained. The review made recommendations for changes to the process, many of which could, and will, be implemented within the current statutory framework. A number of other recommendations concerned constitutionally significant issues, which would require legislative change to address.
- 1.4 The Government is committed to increasing the diversity of the judiciary and removing barriers to progression for under-represented groups. A judiciary which is visibly more reflective of society will enhance public confidence in the judiciary and in the justice system as a whole. Minister of State for Justice, Lord McNally, has written²: "Public confidence will be strengthened by having a judiciary drawn from across our communities. Those who sit in judgment in our courts, from the Supreme Court to the magistracy, should be felt to bring a wider breadth of social experience, as well as knowledge and prudence."
- 1.5 The findings of the Advisory Panel on Judicial Diversity³ published in 2010, included 53 recommendations for action which, if implemented, could accelerate progress towards a more diverse judiciary. In May 2011, the Judicial Diversity Taskforce reported that some progress has been made towards implementing the Panel's recommendations. In some cases, however, statutory barriers exist.
- 1.6 A MoJ consultation on delivering changes to the process for appointing judicial office holders and measures to increase judicial diversity was published on 21 November 2011 and closed on 13 February 2012. It invited comments on the Government's proposals for amending the statutory and regulatory frameworks for judicial appointments. The aims of the proposals included:
 - Achieving the proper balance between executive, judicial and independent responsibilities;
 - Creating a more diverse judiciary that is reflective of society and appointed on merit; and
 - Delivering speed and quality of service to applicants, the courts and tribunals and value for money to the taxpayer.
- 1.7 This impact assessment covers a number of proposals that we intend to take forward following this consultation.
- 1.8 There will be no impacts on business from the changes. The implementation of the provisions will primarily affect those involved in running the appointments process, candidates for judicial offices (primarily existing judicial office holders and members of the legal profession) and the judiciary. These impacts are detailed below.

² www.guardian.co.uk/law/2011/may/09/judiciary-becoming-diverse-slowly

³ www.judiciary.gov.uk/Resources/JCO/Documents/Reports/advisory-panel-judicial-diversity-2010.pdf

2. Policy Problem and Policy Proposals

- 2.1 The CRA established in statute a new organisation, the Judicial Appointments Commission (JAC), and principles for the identification and appointment of judicial office holders for courts in England and Wales, for particular tribunals and the newly created Supreme Court of the United Kingdom. These new arrangements, which responded to the Peach report⁴, replaced a system of confidential and informal consultation with the judiciary, largely closed to independent or public scrutiny. This took responsibility for selecting candidates for judicial office out of the hands of the Lord Chancellor and made the appointments process clearer and more accountable.
- 2.2 The changes brought about through the CRA delivered progress in many areas particularly in respect of transparency and openness. However, the Ministry of Justice, JAC, judiciary and HMCTS have identified a number of issues which continue to attract criticism and should be addressed. These include the balance between executive, judicial and independent roles and accountabilities in the appointment processes, the speed with which the diversity of the judiciary is changing, the degree of transparency surrounding some senior appointments, and the length of time and amount of money it can cost to make a selection.

Delivering a proper balance between executive, judicial and independent roles

Transfer decision making role from Lord Chancellor

- 2.3 The CRA provided for a greater separation of powers between the executive and judiciary. It implemented substantial changes to the office of Lord Chancellor, bringing the role more squarely into the executive branch and transferring many of its judicial responsibilities to the Lord Chief Justice of England and Wales. The CRA changed the role of the Lord Chancellor so that the office holder was no longer a judge, nor exercised any judicial functions.
- 2.4 The Lord Chief Justice is now responsible for representing the views of the judiciary of England and Wales to Parliament, the Lord Chancellor and Ministers of the Crown generally. The CRA conferred upon the Lord Chief Justice the office of President of the Courts of England and Wales and Head of the Judiciary of England and Wales. He is also responsible, within the resources made available by the Lord Chancellor, for maintaining appropriate arrangements for the welfare, training and guidance of the judiciary of England and Wales, and for maintaining appropriate arrangements for the deployment of the judiciary of England and Wales and allocating work within courts. The Tribunals, Courts and Enforcement Act 2007 conferred comparable powers on the Senior President of Tribunals⁵.
- 2.5 In light of legislative changes to the partnership that exists between the Lord Chief Justice and Lord Chancellor we believe that it would be more appropriate for the Lord Chief Justice to decide whether or not to accept a recommendation from the JAC for particular judicial appointments below the High Court and for the Senior President of Tribunals to undertake a similar role for particular appointments to the First-tier Tribunal and Upper Tribunal, as they are better placed to understand the requirements of a particular judicial role.
- 2.6 Our proposal is therefore to transfer the Lord Chancellor's power to appoint particular courts-based judicial office holders to the Lord Chief Justice and to transfer the Lord Chancellor's power to appoint particular judicial office holders of the First-tier Tribunal and Upper Tribunal to the Senior President of Tribunals. The Lord Chief Justice and Senior President of Tribunals will therefore have a greater role in the selection process; however the Lord Chancellor will remain accountable to Parliament for the appointments process and will continue to be responsible for referring certain judicial appointments for recommendation to HM the Queen.

⁴ <http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/judicial/peach/indexfr.htm>

⁵ The Senior President of Tribunals' remit is UK wide

Increased JAC involvement in the selection and appointment of judges under section 9 of the Senior Courts Act 1981

- 2.7 Being requested to sit in the High Court by the Lord Chief Justice and in some cases the Criminal Division of the Court of Appeal (in the case of Circuit Judges) is considered an important stepping stone in being appointed as a puisne judge⁶ of the High Court. Under the current system, the JAC plays a limited role in these requests (they concur to a recommendation by the Lord Chief Justice) and they do not have any role at all in relation to a temporary appointment as a deputy judge of the High Court in accordance with section 9(4) of the Senior Courts Act 1981 (“SCA”). Therefore, currently there is not the same degree of openness and transparency for these requests and temporary appointments as there is for other judicial appointments. Considering the importance of section 9 in allowing judges to sit in the High Court and the ramifications for those judges that are able to sit, it is believed that the process would benefit from greater JAC involvement and being more transparent, open and independent.
- 2.8 We propose therefore to provide a more meaningful role for the JAC in the exercise of the Lord Chief Justice’s power to request judges to sit in the High Court (and Court of Appeal) in accordance with section 9(1) and make temporary appointments as a deputy judge of the High Court in accordance with section 9(4). The JAC will own the selection and recommendation process and will possess the power to determine how each exercise will be run. It is not believed that these exercises will require the same process as that utilised for an initial judicial appointment because the applicants will already hold a judicial office. We envisage a different process, the details of which will be determined by the JAC as these reforms are implemented. The JAC will however be required to collect and publish data on the diversity of applicants in the same way that they do for all other judicial appointments.

Composition of selection panels and Lord Chancellor role

- 2.9 In relation to senior judicial appointments the process is set out in detail in the CRA. We want to allow for more flexibility by allowing these processes to be determined by secondary legislation and also to make a number of specific changes to the existing processes to ensure the correct balance of roles between the executive, judiciary and independent appointment bodies, including making the Lord Chancellor’s role in senior appointments more significant. We also want to ensure that selection panels are sufficiently diverse to protect the process against accusations that judges select successors based on a likeness to their own image, and that selection panels consist of an odd number of members so that the Chair does not have a casting vote. In relation to appointments to the senior judiciary it is appropriate for the executive to have an input to provide accountability for the appointments to Parliament and to the public.
- 2.10 It is proposed therefore that:
- The Lord Chancellor will be consulted prior to the selection processes for appointments to the Court of Appeal and above (including Heads of Division);
 - The Lord Chancellor will be able to be a member of the selection panel for the appointment of the Lord Chief Justice and the selection commission for the appointment of the President of the Supreme Court;
 - The Lord Chief Justice will chair selection panels for Heads of Division;
 - In relation to the UK Supreme Court, only one Supreme Court judge will serve on a selection commission (rather than two);
 - The serving President/Deputy President of the Supreme Court will not participate in selecting their own successor, and
 - Selection panels will consist of an odd number of members.

⁶ A puisne judge is the title for a regular member of a Court.

Creating a more diverse judiciary reflective of society and appointment on merit

- 2.11 The available research suggests that the diversity of the judiciary is perceived to be an important influence on public confidence. Historical research evidence has indicated, for example, that low levels of representation may have a negative impact on public perceptions of the courts among BAME defendants and lawyers⁷. It is therefore important that improvements continue to be made.
- 2.12 The statistics on the diversity of the judiciary suggest that there has been gradual but slow progress in the percentage of women and Black and Minority Ethnic (BME) members of the judiciary, but that there are still low levels of representation of ethnic minority groups and women, particularly at the higher grades.

Gender of the Judiciary, April 2011

Appointment name	Male	Female
Justices of the Supreme Court	91%	9%
Heads of Division	100%	0%
Lords Justices of Appeal	89%	11%
High Court Judges	84%	16%
Judge Advocates	88%	13%
Deputy Judge Advocates	80%	20%
Masters, Registrars, Costs Judges and District Judges (Principal Registry of the Family Division)	71%	29%
Deputy Masters, Deputy Registrars, Deputy Costs Judges and Deputy District Judges (PRFD)	62%	38%
Circuit Judges	84%	16%
Recorders	84%	16%
District Judges (County Courts)	75%	25%
Deputy District Judges (County Courts)	67%	33%
District Judges (Magistrates' Courts)	72%	28%
Deputy District Judges (Magistrates' Courts)	71%	29%
Total	78%	22%

Source: Judicial database 2011

- 2.13 The above table shows that 22 per cent of the judiciary in 2011 were female. Within the most senior courts judiciary (High Court and above) the percentage of women was 14 per cent.

⁷ Hood, R., Shute, S. & Seemungal, F. (2003). Ethnic Minorities in the Criminal Courts: Perceptions of Fairness and Equality of Treatment. Department of Constitutional Affairs Research Series No2/03.

Ethnicity: Judiciary, April 2011

Appointment name	White	BME
Justices of the Supreme Court	100%	0%
Heads of Division	100%	0%
Lords Justices of Appeal	100%	0%
High Court Judges	95%	5%
Judge Advocates	100%	0%
Deputy Judge Advocates	100%	0%
Masters, Registrars, Costs Judges and District Judges (Principal Registry of the Family Division)	97%	3%
Deputy Masters, Deputy Registrars, Deputy Costs Judges and Deputy District Judges (PRFD)	93%	7%
Circuit Judges	97%	3%
Recorders	93%	7%
District Judges (County Courts)	95%	5%
Deputy District Judges (County Courts)	94%	6%
District Judges (Magistrates' Courts)	96%	4%
Deputy District Judges (Magistrates' Courts)	94%	6%
Total	95%	5%

Source: Judicial database 2011

- 2.14 The above table presents the available data on the ethnicity of the judiciary at April 2011. Percentage figures on the representation of ethnic groups have been presented excluding those where the ethnic group was unknown, and results should be treated with caution. Ethnicity is not known for 19 per cent of the judiciary. The above figures show that, of those who stated their ethnicity, 5 per cent of the judiciary were from a BAME background. Within the most senior courts judiciary (High Court and above) this percentage figure is 3 per cent.
- 2.15 Work is currently underway to update the judicial database, in order to be able to extract reliable information about the make up of the tribunals' judicial office holders. Initial assessment of the database indicates that over 67% of tribunals' judges are from a solicitor rather than a barrister background, that women make up around 42% of office holders, and that those identifying themselves as from a BAME background make up over 10% of the judicial workforce. As above, percentage figures on the representation of ethnic groups have been presented excluding those where the ethnic group was unknown, and results should be treated with caution⁶.
- 2.16 For further detail on judicial diversity and the equality impacts of these proposals see the Ministry of Justice's accompanying Equality Impact Assessment.
- 2.17 The Government committed to implementing all 53 of the Advisory Panel's recommendations and is working together with the Lord Chief Justice, the JAC, the Bar Council, the Law Society and the Institute of Legal Executives to do so. However, after careful scrutiny, recommendation 35 (fee paid judges not being appointed for more than three renewable terms) will not be taken forward for the reasons set out in our response to consultation.

⁶ www.judiciary.gov.uk/Resources/JCO/Documents/Reports/spt-annual-report-2012.pdf. The percentage of those who stated their ethnicity is unknown.

Remove barriers to salaried part-time working in the High Court and above

- 2.18 Part time salaried working is currently only practised by judicial office holders below the High Court. The Senior Courts Act 1981 places an upper limit on the number of puisne judges of the High Court and ordinary judges of the Court of Appeal which can only be changed with Parliamentary approval. The limit for puisne judges of the High Court, which currently stands at 108, and for ordinary judges of the Court of Appeal, which currently stands at 38 is expressed in terms of a headcount, rather than a full-time-equivalent (FTE) figure. This is seen as a barrier to the appointment of High Court judges on anything other than a full-time basis.
- 2.19 The Advisory Panel on Judicial Diversity considered the lack of support for flexible work patterns in judicial terms and conditions to be a barrier to judicial diversity. This lack of flexibility may deter candidates from applying for a judicial post due to difficulties in trying to balance their personal and professional responsibilities.
- 2.20 We propose therefore to facilitate flexible part-time salaried working in the High Court and above (including the UK Supreme Court). In relation to the Court of Appeal and High Court, we propose to express the statutory ceiling in the maximum number of puisne judges of the High Court and ordinary judges of the Court of Appeal in FTE terms rather than as a maximum number of judges. Similarly, for the UK Supreme Court, we propose to express the statutory ceiling on the maximum number of 12 judges in FTE terms.

Enabling the JAC to use positive action provisions

- 2.21 The Equality Act 2010 allows selecting bodies to take protected characteristics (such as, for example, race or gender) into account where two or more candidates are considered to be as qualified as each other for a post (the “tipping point” principle). The application of these provisions to judicial appointments where candidates are of equal merit may help to encourage a more diverse judiciary. However, as section 63(2) of the CRA requires that selection for judicial office must be solely on merit there is at present doubt over whether the tipping point can apply to these selections.
- 2.22 Our proposal is therefore to amend the CRA to enable the JAC to apply positive action provisions when two candidates are essentially indistinguishable on merit.

Improving the speed and quality of service to applicants, the courts and tribunals and value for money to the taxpayer

- 2.23 Moving the selection process to an independent Commission has delivered significant benefits with respect to the perceived openness of the selection process. While the new process has continued to produce high quality appointees, the Ministry of Justice review undertaken in 2010⁷ highlighted a number of concerns and in particular criticised the process as:
- being inflexible and unresponsive to the immediate needs of HMCTS;
 - being lengthy and bureaucratic, taking from 4 to 18 months from beginning to end;
 - lacking clear accountability and effective governance, and
 - Providing poor service to applicants.
- 2.24 Separate to the consultation, the Ministry of Justice has been working closely with HMCTS, the JAC and Judicial Office on non-legislative changes that will help to reduce the length of time and overall costs associated with identifying a need for a judicial office holder and appointing one. The JAC continues to look for and implement ways to shorten the appointments process without sacrificing the quality of selections made, fairness or transparency.

⁷ <http://www.justice.gov.uk/downloads/consultations/judicial-appointments-consultation-1911.pdf>

Size and Composition of JAC

- 2.25 The JAC is currently comprised of fifteen commissioners drawn from the judiciary, the legal profession and lay members. The number of commissioners, the detailed requirements relating to the composition of the JAC and the selection of Commissioners are currently contained in primary legislation. This creates an overly rigid structure. For example if, due to reduced workload, it was agreed that the number of commissioners could be reduced this could currently not be taken forward without primary legislation.
- 2.26 Our proposal therefore is to amend the CRA to remove the detailed requirements relating to the composition of the JAC and procedures regarding selection of Commissioners, and to introduce an enabling power within primary legislation to allow the composition of the JAC, including the numbers of commissioners, and selection processes to be provided for via secondary legislation subject to certain requirements set out in the Act.

Create more flexibility around the JAC's remit

- 2.27 Schedule 14 to the CRA lists the judicial offices for which the JAC is responsible. This includes some offices for which a legal qualification is not necessary. The application of the JAC's selection processes (primarily developed for selection to judicial offices which require a legal qualification) to selection for specific judicial offices not requiring a legal qualification (such as specialist members of tribunals) is seen by some involved in the appointments process as overly prescriptive and inflexible.
- 2.28 As the need for judicial office holders changes, it may not always be possible to accommodate selection exercises for emerging needs into the JAC's programme, which is agreed annually. Exercises to meet emerging requirements may need to be delayed until a slot is available, as the JAC's programme is matched to its budget allocation. This can add to the time taken between the identification and the filling of a vacancy. There is thus a need for this system to be more flexible in responding to demand. By removing selection exercises for offices that do not require a legal qualification from the JAC's remit, the JAC would have more capacity to accommodate emerging requirements.
- 2.29 We therefore propose to amend the CRA and introduce an enabling power to allow, through secondary legislation, selection for appointment to tribunals-based offices that do not require a legal qualification (for example appointment of hydrologists as fee-paid specialist members of the First-tier Tribunal) to be removed from the remit of the JAC, after discussion with the Lord Chief Justice, JAC and HMCTS. In such circumstances the selection process will be operated by another body, for example HMCTS, in conjunction with the relevant professional regulatory body where there is a clear business need (i.e. General Medical Council for appointments of General Practitioners).

Amending existing legislation relating to the number of UK Supreme Court Judges

- 2.30 Section 23(2) of the CRA provides that the Supreme Court of the United Kingdom consists of 12 judges appointed by Her Majesty. However, having a fixed number of judges makes for an inflexible system, and necessitates, where there are less than 12 judges, drawing upon judges from a supplemental pool made up of representatives from the territorial jurisdictions, even though the full complement of 12 judges are often not needed.
- 2.31 Our proposal is therefore to amend legislation to remove the requirement for a fixed number of 12 judges, replacing this with a provision for the Court to consist of a maximum number of 12 full-time equivalent judges. This would remove the obligation for the Lord Chancellor to fill all vacancies. However, the Lord Chancellor will have to agree with the President of the Court if it is decided to operate the Court with fewer than 12 FTE judges.

Amending existing legislation to allow for flexible judicial deployment

- 2.32 The ability of judicial office holders to work flexibly across the tribunals and courts is not currently reciprocal. A variety of judicial office holders in the courts can be assigned to sit and hear cases in the First-tier Tribunal and Upper Tribunal by the Senior President of Tribunals (SPT). However, this flexibility is not currently reflected within the tribunals. First-tier Tribunal and Upper Tribunal judges are not authorised to sit in the senior courts (i.e. the Court of Appeal, the High Court or the Crown Court) or the county courts. They are required to go through a specific court-based appointment process to be able to sit in courts.
- 2.33 Allowing judicial office holders to work flexibly would help to develop the concept of a judicial career and provide greater flexibility in managing judicial resources across courts and tribunals to meet business needs.
- 2.34 Our proposal is therefore to allow greater flexibility in the deployment of judicial office holders in both the courts and tribunals, by specifying in legislation that tribunal judges can be deployed to certain courts and courts-based judges can be deployed to certain tribunals.

3. Economic rationale

- 3.1 The conventional economic approach to government intervention to resolve a problem is based on efficiency or equity arguments. The Government may consider intervening if there are strong enough failures in the way markets operate (e.g. monopolies overcharging consumers) or if there are strong enough failures in existing government interventions (e.g. waste generated by misdirected rules). In both cases the proposed new intervention itself should avoid creating a further set of disproportionate costs and distortions. The Government may also intervene for equity (fairness) and redistributive reasons (e.g. to reallocate goods and services to the more needy groups in society).
- 3.2 Intervention in this case would be justified on equity and efficiency grounds. The proposals would strike a more appropriate balance between executive and judicial decision making in judicial appointments and could also lead to an improvement in judicial diversity. This would increase public confidence in the fairness and impartiality of the judicial process. Removing unnecessary bureaucracy from the appointment process would lead to efficiency gains; the same result could be achieved at lower cost and/or more quickly.

4. Cost and Benefits

- 4.1 This standard approach to impact assessments identifies both monetised and non-monetised impacts on individuals, groups and businesses in the UK, with the aim of understanding what the overall impact to society might be from implementing the options. The costs and benefits of each option are compared to the do nothing option. Impact assessments place a strong emphasis on valuing the costs and benefits in monetary terms (including estimating the value of goods and services that are not traded). However there are important aspects that cannot sensibly be monetised. These might include how the proposal impacts differently on particular groups of society or changes in equity and fairness, either positive or negative.
- 4.2 The policies considered in this impact assessment are predominantly changes to the governance of the process and to senior roles and responsibilities. It has not been possible to quantify any of the impacts. The impacts are all expected to be relatively small. No impacts on businesses are expected.

Policy 1 – Delivering a proper balance between executive, judicial and independent roles

Transfer decision making role from Lord Chancellor

- 4.3 The Lord Chancellor's power to appoint to particular courts-based judges will be transferred to the Lord Chief Justice and his power to make particular appointments to the First-tier Tribunal and Upper Tribunal will be transferred to the Senior President of Tribunals. The Lord Chief Justice and Senior President of Tribunals will therefore have a greater role in the selection process; however the Lord Chancellor will remain accountable to Parliament for the appointments process and will continue to be responsible for referring certain judicial appointments for recommendation to HM the Queen.

Increased JAC involvement in the selection and appointment of judges under section 9 of the Senior Courts Act 1981

- 4.4 The selection process for requests by the Lord Chief Justice for Circuit Judges and Recorders to sit in the High Court will be owned and operated by the JAC, but it is not envisaged that a full JAC selection exercise will be needed. Instead a more responsive process will be developed in partnership with HMCTS and the Judiciary that delivers the required transparency and yet meets the business need to provide flexibility, specifically the ability to fill vacancies in a timely manner so that Courts can continue to provide an effective and undisrupted service to users.

Composition of selection panels and Lord Chancellor role

- 4.5 The Lord Chancellor will be consulted prior to the selection process for the appointment of the Lord Chief Justice, Heads of Division, the Senior President of Tribunals and Lords Justices of Appeal as well as the appointment of the President of the UK Supreme Court.
- 4.6 The Lord Chief Justice will chair selection panels for Heads of Division and the Lord Chancellor will be able to sit on the selection panels for the Lord Chief Justice and selection commissions for the President of the Supreme Court. In relation to the UK Supreme Court, only one Supreme Court judge will be able to serve on a selection commission (rather than two) and the serving President/Deputy President will not participate in selecting their own successor.

Policy 1 – Costs

Increased JAC involvement in the selection and appointment of judges under section 9 of the Senior Courts Act 1981

- 4.7 This proposal will require the JAC to invest time in carrying out additional selection and appointment exercises. However, we do not expect any increase in expenditure to be large, as these exercises will not be subject to the same process as that used by the JAC for initial appointment selection exercises.
- 4.8 We do not anticipate any significant costs in relation to the other proposals documented within Policy 1.

Policy 1 – Benefits

Transfer decision making role from Lord Chancellor

- 4.9 The Lord Chief Justice and Senior President of Tribunals will be better placed to understand the requirements of a particular judicial role thus strengthening the legitimacy of the decision being made.

Increased JAC involvement in the selection and appointment of judges under section 9 of the Senior Courts Act 1981

- 4.10 It is anticipated that increased JAC involvement in the selection process for those judges that are able to sit in the High Court will strengthen candidates' confidence in the process in addition to increasing overall transparency. This will also reassure the public that all authorisations are made fairly by an independent body. We currently envisage a streamlined process but the detail of this process will be determined by the JAC at the implementation stage.

Composition of selection panels and Lord Chancellor role

- 4.11 These proposals could improve public confidence in the openness and fairness of the process, as they protect the process against accusations that judges select successors based on a likeness to their own image and ensure that there is no need for a casting vote. This could potentially benefit applicants to judicial offices and increase public confidence in the efficiency of the system by providing a more responsive and effective service to court and tribunal users.

Policy 1 – Risks and assumptions

Transfer decision making role from Lord Chancellor

- 4.12 It could be perceived that there is a risk in terms of accountability to Parliament. This is because transferring the final decision-making responsibility for many appointments to the Lord Chief Justice or Senior President of Tribunals would remove the executive from having a say in individual appointments. This could be seen as diminishing the extent to which Parliament is able to hold anyone to account for the impact made by appointments. However, the JAC conduct and have ownership of the selection processes, and the powers of the Lord Chancellor are in any case very restricted, being able to accept, reject or ask for reconsideration of a selection. The Lord Chief Justice and Senior President of Tribunals will inherit these same restricted powers. The Lord Chancellor will remain accountable for the overall process of judicial appointments, and will have even more involvement in the most senior judicial appointments, for judges dealing with the most serious and complex cases.
- 4.13 Moreover, we consider the fact that the Lord Chancellor will retain overall accountability for the process provides sufficient accountability. This oversight includes issuing the request to the Commission to select a person for appointment and for being responsible for the secondary legislation which will establish the selection process.

Increased JAC involvement in the selection and appointment of judges under section 9 of the Senior Courts Act 1981

- 4.14 There is a risk that greater JAC involvement will adversely impact on service provision. In effect, arguing that because the process for appointing candidates is potentially lengthened, HMCTS may be unable to manage High Court cases effectively because the Lord Chief Justice will have less judicial resources at his or her disposal to manage High Court business. We consider that a properly constituted JAC selection scheme can be implemented in such a way as to mitigate this risk, especially as it is not envisaged that the JAC will apply the same process which is used for initial judicial appointments.

Composition of selection panels and Lord Chancellor role

- 4.15 There is an element of concern that changing the composition of selection panels could be perceived as weakening the guarantee of fairness and impartiality provided by the certainty of the current framework, especially in relation to reducing the judicial presence on panels. This could reduce confidence in the process among affected groups such as the legal profession. We believe that the detail of the proposed panel compositions will mitigate any concerns surrounding a loss of impartiality.

- 4.16 There is a risk that the reduced Supreme Court judicial presence on Supreme Court selection commissions could carry a cost in terms of how the process is perceived among the judiciary. It could be argued that the ability of the judiciary to contribute their knowledge and experience to the selection of a high-quality appointee would be reduced by this change. However, we consider that a single judge of the Supreme Court is sufficient to provide an appropriate level of knowledge and experience to the selection commission. The commission will also include other members of the judiciary.

Policy 2 – Creating a more diverse judiciary reflective of society and appointment on merit

Remove barriers to salaried part-time working in the High Court and above

- 4.17 Part time salaried working is currently only practised by judicial office holders below the High Court. Flexible part-time salaried working will be facilitated in the High Court and above (including the UK Supreme Court), as the statutory ceiling in the size of the High Court bench and number of ordinary judges of the Court of Appeal will be expressed in FTE terms rather than as a maximum number of judges.

Enabling the JAC to use positive action provisions

- 4.18 The CRA will be amended to enable the JAC to use a provision similar to the Equality Act 2010 “tipping point” provision should a situation arise where two candidates are indistinguishable on merit.

Policy 2 – Costs

Remove barriers to salaried part-time working in the High Court and above

- 4.19 We do not anticipate any costs in relation to this proposal.

Enabling the JAC to use positive action provisions

- 4.20 We do not anticipate any costs in relation to this proposal.

Policy 2 – Benefits

Remove barriers to salaried part-time working in the High Court and above

- 4.21 The availability of salaried part-time working provides an opportunity to people whose personal circumstances prevent them from working full-time, particularly those with caring responsibilities. This change may lead to an increase in applications for High Court office from under-represented groups, although any increase is expected to be low.
- 4.22 Any increase in the diversity of appointments can create a more representative judiciary and therefore carries the potential benefit of improving public confidence.

Enabling the JAC to use positive action provisions

- 4.23 Any increase in the diversity of appointments can create a more representative judiciary, carrying the potential benefit of improving public confidence.

Policy 2 – Risks and assumptions

Remove barriers to salaried part-time working in the High Court and above

- 4.24 It is assumed that the change will have no impact on judicial decision-making or performance.
- 4.25 It is assumed that initial take-up will be low. If large numbers of existing High Court judges apply for part-time working, this would carry a transitional cost as additional selection exercises would be needed to fill those vacancies.

Enabling the JAC to use positive action provisions

- 4.26 The view may be taken that the JAC's duty to appoint solely on merit conflicts with any use of the positive action provisions provided for in the Equality Act 2010. Appointment on merit is a principle of paramount importance to the continuing quality and independence of the judiciary. The implementation of this change could therefore be seen as a threat to the quality of the judiciary. We consider, however, that this can be mitigated by maintaining the primacy of appointment on merit and only utilising the tipping point when candidates are of equal merit.
- 4.27 It is assumed that the circumstances in which these provisions could be used will be rare. This is because there is an assumption that two candidates are rarely assessed by the JAC as being equal in merit, and because the application of the 'tipping point' provisions are voluntary. However, in order to mitigate the likelihood of this scenario materialising, guidance will be produced and issued, in accordance with section 65 CRA that will support the JAC in the application of a 'tipping point' provision.
- 4.28 Where this policy leads to a candidate with a protected characteristic being appointed instead of a candidate without such a characteristic, then there will be costs and benefits to those individuals. It is assumed that there is no net cost across judicial candidates from this. It is also assumed that increased judicial diversity could lead to an increase in public confidence in the judicial system.
- 4.29 There is also a concern that those not selected as a result of the application of the tipping point because they did not hold a protected characteristic, could look to challenge the decision to appoint.

Policy 3 – Improving the speed and quality of service to applicants, the courts and tribunals and value for money to the taxpayer

Size and Composition of JAC

- 4.30 An enabling power will be introduced within primary legislation to allow the composition of the JAC, including the number of commissioners, and selection procedures for Commissioners to be provided via secondary legislation when necessary in line with business requirements.

Create more flexibility around the JAC's remit

- 4.31 An enabling power within primary legislation will be introduced to allow particular judicial offices (those not requiring a legal qualification) to be removed from the JAC's remit via secondary legislation if and when appropriate to do so, subject to agreement between the Lord Chancellor and Lord Chief Justice. The selection exercises will be operated by another body, for example HMCTS, in conjunction with the relevant professional regulatory body where there is a clear business need.

Policy 3 – Costs

- 4.32 Costs will only be realised where the enabling power is used and will depend on how it is used. The costs of using the enabling power will be assessed each time it is used. Possible costs of using the enabling power are described below.

Size and Composition of JAC

- 4.33 We do not anticipate any costs in relation to the introduction or the use of the enabling power.

Create more flexibility around the JAC's remit

- 4.34 Any proposal to use the enabling power to remove offices from the JAC's remit would not carry any costs to the JAC. It is likely however that HMCTS (or the chosen selecting body) will attract costs as a result of these selection exercises being transferred to them. It is anticipated that these additional costs may be off-set by savings to the JAC programme of selection exercises. It should be noted that exercises vary considerably in terms of size and cost. A small exercise can cost less than £10,000, while a large exercise can cost more than £300,000 (excluding JAC staff costs to run the exercise). Any cost would need to be assessed before the power is used to transfer any appointment processes.

Policy 3 – Benefits

- 4.35 Benefits will only be realised where the enabling power is used and will depend on how it is used. The benefits of using the enabling power will be assessed each time it is used. Possible benefits of using the enabling power are described below.

Size and Composition of JAC

- 4.36 Greater flexibility in the future could lead to efficiency savings for the JAC, the level of which would depend on the change in number of commissioners.

Create more flexibility around the JAC's remit

- 4.37 Introducing more flexibility should enable the system to respond more rapidly to emerging needs. Reducing delays would increase confidence in the system among key affected groups (including the legal profession and the judiciary).
- 4.38 This will potentially benefit HMCTS and the Judiciary in relation to their ability to resource court and tribunal vacancies more quickly in order to ensure that cases are dealt with in a more timely fashion, providing a more responsive and effective service to court/tribunal users.

Policy 3 – Risks and assumptions

Size and Composition of JAC

- 4.39 It is assumed that the changes will not affect the quality or impartiality of the commissioners' decision-making. The outcomes of the selection process will not be affected.

Create more flexibility around the JAC's remit

- 4.40 It is assumed that these changes would only be used to provide a degree of flexibility in the appointments programme. Sufficient safeguards would be put in place to ensure that there is no major or lasting shift in responsibility for large numbers of selections. It is assumed that an assessment of impact, including costs, will be carried out each time these powers are used.

Policy 4 – Amending existing legislation relating to the number of UK Supreme Court Judges

- 4.41 Existing legislation will be amended to remove the requirement for a fixed number of 12 judges of the UK Supreme Court, and replaced with a provision for the court to consist of a maximum of 12 FTE judges.

Policy 4 – Costs

- 4.42 We do not anticipate any costs in relation to this proposal.

Policy 4 – Benefits

- 4.43 If this power was used and the court operated with fewer justices, then some operating savings would be made by the Supreme Court as a result of a reduced number of salaries and other associated costs. Any such savings would only be realised once both a judge resigned or retired and the decision is taken by the Lord Chancellor and President of the UK Supreme Court not to fill the arising vacancy immediately.

Policy 4 – Risks and assumptions

- 4.44 There is currently a convention that of the existing 12 judges, two of those will have a working level knowledge and experience of the Scottish legal system, while one will have similar levels of knowledge and experience of the legal system in Northern Ireland. It is assumed that this agreement will be required to be honoured regardless of the agreed total number of judges unless agreed otherwise with the Devolved Administrations.

Policy 5 – Amending existing legislation to allow for flexible judicial deployment

- 4.45 To allow greater flexibility in the deployment of judicial office holders in both the courts and tribunals, it will be specified in legislation that tribunal judges can be deployed to certain courts and court judges can be deployed to certain tribunals.

Policy 5 – Costs

- 4.46 It is not anticipated that there will be any significant costs in enacting this proposal.

Policy 5 – Benefits

- 4.47 The policy will provide the opportunity for more efficient use of existing judicial resources. It will allow for the deployment of appropriate office holders in appropriate jurisdictions to meet business needs in courts and tribunals rather than necessitating, as now, tribunal judges to go through a separate JAC selection process to sit in the courts. This will provide greater flexibility in managing judicial resources across courts and tribunals and support business efficiencies. There may also be a reduction in the need for urgent JAC selection exercises, saving JAC time. In turn, a more fluid process could reduce delays in hearing cases, thus providing a better service for court/tribunal users and increasing confidence in the court and tribunals system.

Policy 5 – Risks and assumptions

- 4.48 Through more efficient use of existing judicial resources there is scope for some cost reductions. We will, however, need to ensure that the scheme operates in such a way that judicial resources are effectively utilised and there is not for example an overall greater use of fee-paid judges where currently salaried judges are used in such a way that additional costs are incurred.
- 4.49 It is assumed that through the introduction of flexible deployment between courts and tribunals there may be a gradual reduction in the necessity to undertake urgent JAC selection exercises as the judiciary will be able to utilise all of their judicial resources in order to meet business demands.
- 4.50 There is a risk that there will be an additional demand for appropriate training courses in order to address any identified knowledge or skills gap between courts or tribunals-based judicial office holders.

5. Overarching Assumptions Applying to Policies 1-5

1. No significant impacts are expected on legal service providers as a result of Policies 1 to 5.
- 5.2 No significant impacts are expected on case outcomes and on the development of case law as a result of Policies 1 to 5.

- 5.3 No significant change in public confidence in the rule of law is expected as a result of Policies 1 to 5, although if anything improvements to the appointments process and framework could improve public confidence.
- 5.4 It has been assumed that Policies 1, 3 and 5 would not affect case delays, although it is possible that case delays might be reduced. No significant impact on case duration is expected as a result of any of the policies.
- 5.5 HMCTS court fees and operational costs are expected to be largely unchanged as a result of these policies. As indicated in the main body of the impact assessment above, it is possible that Policies 3, 4 and 5 could lead to some small changes in HMCTS costs, but these are expected to be minor.

6. One-In One-Out

2. The proposals do not have any impacts on businesses. Therefore they are not within the scope of the One-In One-Out policy.

7. Enforcement and Implementation

3. It will be the responsibility of HMCTS, the Judiciary, the JAC and the MoJ to implement and enforce these proposals, the first of which is planned to take effect from April 2014.

8. Statutory equality duties

An Equality Impact Assessment, accompanying the response to consultation, will be published in May. Impacts on statutory equality duties are explored in the Equality Impact Assessment.

Competition Assessment

We do not consider these proposals to be pro or anti-competitive. There are no impacts on suppliers or providers.

Small Firms Impact Test

These proposals have no effects on small businesses.

Carbon Assessment

We do not anticipate any significant impact on emissions of greenhouse gases.

Other Environment

We do not anticipate any significant impact on the environment.

Health Impact Assessment

We do not anticipate any significant impact on human health. These proposals will have no impact on the lifestyles of any major subgroup of the population or on the demands for health and social care services.

Human Rights

These proposals are compliant with the Human Rights Act.

Justice Impact Test

The impacts of these proposals on the justice system are outlined in the evidence base of this Impact Assessment.

Rural Proofing

The impacts of these proposals will be no different in rural areas.

Sustainable Development

The proposed reforms are consistent with the principles of sustainable development. In particular, they are aimed at promoting good governance of the judicial selection process, through a more effective Judicial Appointments Commission.

Annex 1: Post Implementation Review (PIR) Plan

Basis of the review:

The principles that underpin the review are that the appointments process must: fully respect and maintain the independence of the judiciary; hold appointment on merit at the heart of the process; deliver openness and transparency throughout the process and create a more diverse judiciary that is reflective of society and appointed on merit.

Review objective:

Review of the success of these measures will take place as part of the ongoing wider monitoring of the cost, speed, quality and perception among key groups of the appointments process.

Review approach and rationale:

Time and cost data are collected as a matter of course. Views on the quality of the process and of the quality of appointments are obtained at a senior level through dialogue with key interested parties. These will be reviewed on a 6-monthly basis by an assurance board. The Judicial Diversity Taskforce is developing a baseline to monitor progress towards improving judicial diversity. This measure will be used to measure the success of our proposals.

Baseline:

The judicial appointments review concluded that the quality of appointments is good, but that the process costs too much and takes too long.

Success criteria:

The consultation will ascertain whether change is desired among key interested groups. The success of the changes will be measured primarily through dialogue. The cost and duration of the process should also be reduced.

Monitoring information arrangements:

Data on the cost and duration of appointments exercises are collected as a matter of course. An assurance board will be created to enable discussion of progress in terms of perceptions of the process among key interested groups.