



Ministry of  
**JUSTICE**

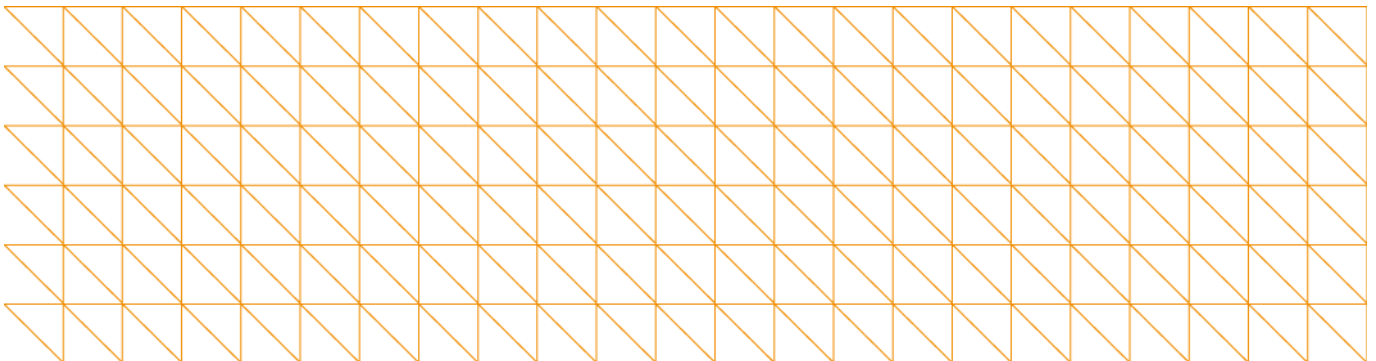
# **Appointments and Diversity** *'A Judiciary for the 21<sup>st</sup> Century'*

Response to public consultation

**Response to Consultation**

CP19/2011

11 May 2012





Ministry of  
**JUSTICE**

**Appointments and Diversity**  
***'A Judiciary for the 21st Century'***

Response to public consultation

**Response to consultation carried out by the Ministry of Justice.**

**This information is also available on the Ministry of Justice website:  
[www.justice.gov.uk](http://www.justice.gov.uk)**

## Contents

Ministerial Foreword	3
Executive Summary	4
Introduction	7
Responses to specific questions	9
Conclusion and next steps	26
The consultation criteria	33
Annex A – List of respondents	35

---



## Ministerial Foreword

The judiciary play a critical role in the administration of justice. It is therefore vital that we select candidates for judicial office on merit, through fair and open competition, from the widest range of eligible candidates. However, despite progress the composition of our judiciary still does not adequately reflect the society it serves.

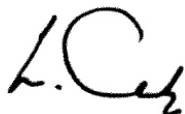
This issue matters for obvious reasons of fairness, efficiency and enhancing public confidence in the justice system. That is why in November last year I published a consultation which proposed a number of initiatives that aimed to address issues that had been identified with the current system of appointing judges.

We have considered carefully the responses received to our consultation and are particularly grateful to the House of Lords Constitution Committee for their own inquiry into judicial appointments, which ran concurrently to our own consultation, and provided additional insight and suggestions surrounding our policy proposals.

We propose to take forward a number of the proposals, and these will be included within the Crime and Courts bill, which has been introduced today. The proposals being taken forward include the introduction of part-time working to the High Court, Court of Appeal and the UK Supreme Court, as well as provisions that will enable the application of the positive action provisions to judicial appointments. These proposals will definitely not however undermine the principle that all appointments will be made on merit.

The overall effect of these changes will be to achieve **the proper balance** between executive, judicial and independent responsibilities; improve **clarity, transparency and openness**; create a more **diverse judiciary** that is reflective of society; and deliver **speed and quality of service** to applicants, the courts and tribunals and value for money to the taxpayer, ensuring that our judiciary, which is already a byword for integrity, independence and excellence, evolves into a modern, outward-facing institution that is fit for the 21<sup>st</sup> century and beyond.

The House of Lords Constitution Committee report made reference to a majority of our consultation proposals and the comments of the Committee have been referenced within our consultation response. However, their report also made comment on a number of issues that were not included within our consultation and as such I will be bringing forward a Command Paper towards the end of May to respond to these additional recommendations.



**The Right Honourable Kenneth Clarke QC MP**  
**Lord Chancellor and Secretary of State for Justice**

## **Executive Summary**

1. The Consultation paper 'Appointments and Diversity: A Judiciary for the 21st Century' was published on 21 November 2011 and closed on 13 February 2012. We received 96 responses to the consultation from a range of interested organisations and individuals. We have considered carefully these responses alongside the House of Lords Constitution Committee Report on Judicial Appointments and have developed a final package of reforms. These reforms will help achieve the proper balance between executive, judicial and independent responsibilities create a more diverse judiciary that is reflective of society and appointed on merit and will deliver speed and quality of service to applicants, the courts and tribunals and value for money to the taxpayer.

### **Achieve the proper balance between executive, judicial and independent responsibilities**

2. This section dealt with whether the Lord Chancellor's power of appointment for judges below the High Court should be transferred to the Lord Chief Justice, the selection process, and in particular the selection panel composition, for senior judicial posts and the role of the Judicial Appointments Commission ("JAC") in relation to the appointment of Deputy High Court judges.
3. Following an analysis of the responses, we have determined that there is general support for the overall framework of judicial appointments introduced by the Constitutional Reform Act 2005 but there is scope for the rebalancing of responsibilities in some areas, particularly by transferring the power to appoint persons to the less senior levels of the judiciary to the judiciary themselves, and by increasing the executive and lay roles in relation to senior judicial appointments. We will therefore: -
  - Transfer the Lord Chancellor's current role, in making the selection decision in relation to particular courts-based appointments below the High Court, to the Lord Chief Justice.
  - Transfer the Lord Chancellor's current role in making the selection decision, in relation to the First- tier Tribunal and the Upper Tribunal appointments, to the Senior President of Tribunals.
  - Provide for a JAC selection process to operate in relation to judges sitting in the High Court whether this is as a result of being appointed as a deputy judge of the High Court or, in the case of Circuit judges and Recorders, being authorised to sit in the High Court.
  - Provide that the Lord Chancellor should be consulted prior to the start of the selection process for appointments to the Court of Appeal and above, where he is not a member of the selection panel.
  - Enable the Lord Chancellor to be able to sit on the selection commissions for selection for appointment of the Lord Chief Justice and the President of the UK Supreme Court.

- Provide that the Chair of the selection panel for the Lord Chief Justice will be the lay chair of the Judicial Appointments Commission.
- Provide that the Chair of the selection commission for the President of the UK Supreme Court will be a lay member from one of the UK judicial appointment bodies.
- Provide that only one serving Supreme Court judge will be on the selection commissions for new judges of the Supreme Court, and that the President and Deputy of the Court will not be able to sit on the selection commission for their successors.
- Provide that the Lord Chief Justice will chair the panels for the appointment of Heads of Division.

#### **Create a more diverse judiciary that is reflective of society and appointed on merit**

4. This section dealt with introducing part-time working in the High Court and above, ensuring that section 159 of the Equality Act 2010 ('positive action' provisions) could apply to judicial appointments and limiting fee-paid judicial service to a maximum of 15 years.
5. There was extensive support for the proposed measures to create a more diverse judiciary, although there was some concern about the proposal to limit fee-paid judicial service to 15 years as a way of ensuring a turnover of judicial office holders in fee paid service.
6. A diverse judiciary that reflects the society which it serves is important to provide public confidence in the justice system. Whilst some progress has been made, particularly at lower levels of the judiciary, the diversity, most markedly at the level of the High Court and above, does not reflect wider society. The consultation responses and Lords Constitution Committee report all made clear that there is no single or straightforward solution to the issue, and as well as any legislative change there will need to be strong and clear leadership at all levels, both within the judiciary and the legal professions. There are a number of legislative changes that will support the aim of greater diversity. We will therefore:
  - Facilitate part-time working for judges in the High Court, Court of Appeal and UK Supreme Court.
  - Introduce a 'tipping point' provision that allows positive action to promote diversity when two applicants to judicial office are of equal merit.

#### **Deliver speed and quality of service to applicants, the courts and tribunals and value for money to the taxpayer**

7. This section dealt with the number of JAC commissioners and the detail of the selection panels' composition, as well as whether selection for appointment in relation to certain judicial offices could be removed from the auspices of the JAC.
8. Having considered the responses and House of Lords Constitution Committee report we consider that the JAC, as a relatively new organisation, has been increasingly successful over the period of its operation in refining and improving its way of working and building the trust of its key partners. In this context, we are not now persuaded that this is the right time to make changes to permanently reduce the number of

commissioners. We do, however, consider that in order to enable improvements to the effectiveness and efficiency of the Commission, it is important to incorporate changes that will allow the membership of the commission to be responsive enough in order to meet future business needs. We will therefore:-

- Enable the number of JAC commissioners and the composition of the JAC to be determined by the Lord Chancellor, in agreement with the Lord Chief Justice of England and Wales and provided for in secondary legislation subject to the affirmative resolution procedure<sup>1</sup>, whilst retaining key principles, such as the requirement for judicial, professional and lay commissioners on the face of the Act.
- Make provision to enable selection for appointment to particular judicial offices that do not require a legal qualification to be removed from the auspices of the JAC by secondary legislation, after consultation with the judiciary and subject to the affirmative resolution procedure.

### **Delivering the changes**

9. This section dealt with the proposal to deliver many of the reforms by removing detail of the selection and appointment process from primary legislation and instead providing for a power to make secondary legislation detailing matters of judicial appointment process.
10. The responses largely saw the benefit of removing much of the detailed process from the face of the Act, providing that important principles were retained on the face of the Act and there was no use of "Henry VIII" powers which would allow primary legislation to be amended by secondary legislation.
11. In summary, we will therefore:
  - Transfer elements of the judicial selection processes currently detailed in the Constitutional Reform Act 2005 to secondary legislation, subject to the affirmative Parliamentary procedure, whilst ensuring key principles are retained on the face of the Act.
  - In addition to the regulations concerning the JAC described above, the key elements that will be moved to regulations concern the specific composition of selection panels and commissions for the senior judiciary and matters of detailed appointment process.
  - In relation to regulations dealing with the UK Supreme Court, these will be subject to the agreement with the senior judge of the Court and consultation with judiciary and devolved administrations as specified in the Act. In relation to regulations concerning judicial appointments in England and Wales these will be subject to agreement with the Lord Chief Justice.

---

<sup>1</sup> <http://www.parliament.uk/about/how/laws/delegated/>



## Introduction

### Background

12. The consultation paper 'Appointments and Diversity: A Judiciary for the 21st Century' was published on 21 November 2011 (CP 19/2011). The consultation paper set out proposals for amending the statutory and regulatory frameworks for judicial appointments and invited comments. The consultation also requested views on a number of recommendations that arose from the report of the Advisory Panel on Judicial Diversity, which the Government has publicly committed to implement.
13. The consultation proposals covered all fee-paid and salaried judicial office holders (not magistrates) in the courts of England and Wales and various tribunals together with the UK Supreme Court, and were intended to:
  - Achieve the proper balance between executive, judicial and independent responsibilities;
  - Improve clarity, transparency and openness;
  - Create a more diverse<sup>2</sup> judiciary that is reflective of society and appointed on merit; and
  - Deliver speed and quality of service to applicants, the courts and tribunals and value for money to the taxpayer.
14. The consultation closed on 13 February 2012. This document summarises the responses, including outlining the agreed policy that will be taken forward. We have also updated the Equality Impact Assessment following the consultation, and completed an Impact Assessment for the policy proposals being taken forward in legislation. Both of these are published as separate documents with this response.
15. This response paper covers:
  - A summary of the responses received;
  - Reports on the responses to specific questions in the initiation document; and
  - Sets out the conclusions reached and the next steps.

### Summary of Responses

16. In total we received 96 responses to our consultation. Responses were received from a range of organisations and individuals including the judiciary, representative legal bodies, diversity groups within the professions and beyond and academics. The following table documents the type of person/organisation who responded to the consultation.

---

<sup>2</sup> Diversity within this consultation covers all of the protected characteristics detailed within the Equalities Act 2010, namely race, sex, disability, sexual orientation, religion and belief, age, marriage and civil partnership, gender reassignment, pregnancy and maternity.

<b>Category</b>	<b>Number of Respondents</b>
Judiciary (including representative bodies)	30
Academics	5
Organisations	40
Members of the public	5
Legal professions (including representative bodies)	14
Others	2

17. Although not a formal response to our consultation, the House of Lords Constitution Committee recently published its own report, following the conclusion of its inquiry into judicial appointments and diversity<sup>3</sup>. The terms of reference for the inquiry did not exactly mirror the focus of our consultation; however their report has addressed many of the proposals within our consultation and as such their views are reflected in our response. This document therefore also serves as the Government response to many of the issues raised in the Committee's report. However, their report also made comment on a number of issues that were not included within our consultation and as such the Ministry of Justice will be publishing a Command Paper towards the end of May documenting our response to these other recommendations.

---

<sup>3</sup> <http://www.parliament.uk/business/committees/committees-a-z/lords-select/constitution-committee/news/jap-report-publication/>

## Responses to specific questions

### The proper balance between executive, judicial and independent roles and responsibilities

**Question 1: Should the Lord Chancellor transfer his decision-making role and power to appoint to the Lord Chief Justice in relation to appointments below the Court of Appeal or High Court? (S67, 70 - 76, 79-85, 88 – 93 of CRA)**

18. Overall there were 35 responses to this question. Of those 24 were in favour with eight against, while a further three did not express a clear opinion. Consultees were generally clear that if a transfer did take place, the Lord Chancellor should retain responsibility for High Court appointments and that, therefore, the correct dividing line for transfer of appointments was below the level of High Court.
19. Those for the transfer argued that the transfer would, from a constitutional perspective, help delineate the separation of judiciary and executive. It was also considered that from a practical perspective, delay in the appointments system could be reduced.
20. The arguments put forward by those against the proposal included a concern about loss of Parliamentary accountability, concern about public perception of an increased judicial role and the creation of two tiers of judges. It was also thought by some, that from a constitutional perspective, the current arrangement was appropriate and from a practical perspective if a transfer of powers did take place that careful consideration would need to be given to consequential impacts on the appointment process (e.g. statutory consultation), including the principle that whoever made the decision would be constrained as the Lord Chancellor is currently required to accept a selection by the JAC, to reject it or to ask the JAC to reconsider a selection.
21. In their report, the House of Lords Constitution Committee made the following recommendation in relation to this proposal:

*In order to maintain public confidence in the system, there is a need for the legal framework for appointments to reflect both the extent to which the executive should be involved in individual appointments and the reality of that involvement. We agree that the power to request reconsideration or reject nominations should be transferred from the Lord Chancellor to the Lord Chief Justice in relation to appointments below the High Court. This will promote the independence of the judiciary and increase public confidence in the system. Whether the Lord Chancellor's powers in respect of High Court appointments should be transferred to the Lord Chief Justice should be reviewed in three to five years' time.*

Paragraph 34, 25th Report of Session 2010–12, **Judicial Appointments**

22. Based upon the analysis of the responses and the views expressed by the Constitution Committee **we will transfer the Lord Chancellor's current role, in making the selection decision in relation to particular courts-based appointments below the High Court, to the Lord Chief Justice.** The Lord Chancellor will retain his current role in recommending to HM The Queen those posts

where recommendation to HM The Queen is necessary following the selection decision.

23. The consultation proposal was predicated on the assumption that unification of the judiciary and devolution of the tribunals would be taken forward alongside these proposals and as a result the courts and tribunal judiciary for England and Wales would have been unified under the Lord Chief Justice. In that case the proposal was that the selection decision in relation to tribunal judiciary in England and Wales should also be transferred to the Lord Chief Justice; however the proposals on unification of the judiciary and devolution of the tribunals are not being taken forward at this stage. As a result, it is not possible to transfer any tribunal appointments (many of which are UK-wide or GB-wide tribunals) which are made by the Lord Chancellor to the Lord Chief Justice of England and Wales. Nevertheless, the same justifications for transferring the selection decision to the judiciary apply in these cases. Therefore, **we will transfer the Lord Chancellor's current role in making the selection decision in relation to appointments to the First-tier Tribunal and Upper Tribunal to the Senior President of Tribunals.** The Lord Chancellor will retain his current role in recommending to HM The Queen those posts where recommendation to HM The Queen is necessary following the selection decision.
24. In exercising these selection decisions the Lord Chief Justice and Senior President of Tribunals will be constrained in the same way as the Lord Chancellor currently is to accept a selection by the JAC, reject it or ask the JAC to reconsider a selection. We will also ensure that concerns around the impact of these proposals on statutory consultation responsibilities are addressed, and provide for the Lord Chief Justice to delegate his decision making power to another senior judge.
25. We are not proposing to transfer the overall ownership of the appointments process, and are of the view that it is important that the **Lord Chancellor retain accountability and ownership of the appointment system as a whole.** This will mitigate the concerns expressed by some during the consultation about the need to maintain executive accountability for judicial appointments.

**Question 2: Do you agree that the JAC should have more involvement in the appointment of deputy High Court judges? (Part 4, Chapter 2 of the CRA, s.9 Senior Courts Act 1981)**

26. Overall there were 35 responses submitted in relation to this question. Of those, there was near unanimous support for greater JAC involvement.
27. One response was not in favour of greater JAC involvement, and favoured operating under a recently agreed protocol on these appointments between the judiciary and JAC. The protocol will apply to regular recruitment processes but will not apply to urgent authorisations to meet business need. The protocol stipulates that there will be an expression of interest exercise that will be advertised to all of those eligible. Another response also favoured retaining the current system insomuch as the process is owned by the relevant Head of Division, but also argued that the process should be put on a more formal footing, the pool of applicants should be broadened and that data should be published.
28. All other respondents agreed that there should be more JAC involvement in the appointment and authorisation process. Many who advocated the change highlighted

that these roles are a key stepping stone to High Court appointment and that it should be seen as an open and transparent process. In their response, the JAC highlighted that '*It appears to be the case that experience as a Deputy is beneficial in applying for High Court positions. Of selections made by the JAC for High Court appointments over 80% have had this experience*<sup>4</sup>'. Many respondents argued that there was no basis for treating these section 9 judges differently from any other judicial appointments. There was also a view that the current multiple routes into sitting in the High Court under either 9(1) or 9(4) of the Senior Courts Act 1981 was unnecessarily complex and should be simplified, and that the process for authorisation of Recorders and Circuit judges under s.9 (4) should be amended in line with any legislative change to the process for authorisation under s.9 (1).

29. The House of Lords Constitution Committee considered evidence received during its inquiry on the question of authorisation to act in the High Court or temporary appointments as a deputy judge of the High Court and made the following recommendation:

*We agree that there needs to be flexibility in the deployment of judges. However, authorisation or appointment to act as a deputy High Court judge is an important step towards permanent appointment to the High Court and a significant aspect of the administration of justice. Such authorisations and appointments should therefore be conducted openly and transparently, in line with best appointment practices; in principle they should be a part of the independent appointments process conducted by the JAC. We consider that it would be helpful to see how the new protocol operates in practice as there is no need for an unduly elaborate system, but this should be reviewed in three years' time. Meanwhile, a list of those currently authorised or appointed to act as deputy High Court judges should be published, and those authorised or appointed under the new protocol should be monitored for diversity with the resulting data being made publicly available.*

Paragraph 169, 25th Report of Session 2010–12, **Judicial Appointments**

30. There was a clear recognition that these posts give very important experience for those aspiring to a High Court appointment. We do not consider that the current protocol provides a sufficient degree of transparency for these appointments and therefore, there is a strong case for providing the enhanced degree of transparency that greater JAC involvement would provide. **We will therefore ensure that Lord Chief Justice requests to Circuit Judges and Recorders to sit in the High Court and temporary appointments as deputy judge of the High Court are subject to a process determined by the JAC.**
31. In legislative terms the Lord Chief Justice will continue to be able to request Circuit Judges and Recorders to sit in the High Court under section 9(1) of the Senior Court Act 1981. However the pool from which he is able to make requests will be one where all judicial officeholders have been selected for that purpose by the JAC. Additionally temporary appointments of deputy judges of the High Court under section 9(4) will be required to undertake a JAC selection exercise.

---

<sup>4</sup> [http://www.judicialappointments.gov.uk/static/documents/JAC\\_response\\_to\\_MoJ\\_con\\_doc\\_02.12\\_\(2\).pdf](http://www.judicialappointments.gov.uk/static/documents/JAC_response_to_MoJ_con_doc_02.12_(2).pdf)

**Question 3: Should the Lord Chancellor be consulted prior to the start of the selection process for the most senior judicial roles (Court of Appeal and above)? (s70, 75B and 79 CRA)**

32. Overall there were 29 responses submitted in relation to this question. The responses were relatively evenly balanced with 14 in favour and 15 responses against the Lord Chancellor being consulted in this way. However, that analysis does not reflect the range of views underpinning these positions and the related position with respondents' answers to other related questions.
33. Those who were against the proposal were split between those who advocated the complete removal of the Lord Chancellor and the Executive from the appointments process so as to ensure that it was truly independent and those who actually wanted a greater executive involvement, but considered that could be better achieved in other ways, such as the Lord Chancellor selecting from a shortlist.
34. Of those who were in favour of the proposal, many highlighted how the process had operated effectively in relation to the selection process for judges of the UK Supreme Court and that this change could usefully give the executive a fuller role and as a result promote accountability. Some respondents also considered that it would be necessary to limit the basis of the consultation.
35. The House of Lords Constitution Committee did not specifically comment upon this proposal, however, they made reference to the Government's proposal within their proposal around the appropriate role of the Lord Chancellor

*He (Lord Chancellor) should be properly consulted before the start of each selection process and retain his right of veto.*

Paragraph 139, 25th Report of Session 2010–12, **Judicial Appointments**

36. We consider that the Lord Chancellor should have a clear role in the selection process for senior appointments and therefore accordingly, **the Lord Chancellor will be consulted prior to the start of the selection process for appointments to the Court of Appeal and Heads of Division.** In order to address the concerns identified regarding excessive influence by the Executive it is proposed to limit the nature of the consultation with the Lord Chancellor in a manner similar to that currently undertaken in the selection process for Supreme Court judges (section 27(2) of the CRA 2005).

**Question 4: Should selection panels for the most senior judicial appointments be comprised of an odd number of members? (S71, 75C and 80, of the CRA)**

37. Overall there were 32 responses submitted in relation to this question. Of those, there were 31 responses for the proposal; while only one did not advocate the change.
38. Many of those who supported the proposal highlighted that in order to assist with providing greater transparency, no one person should be provided with more than one vote when appointing senior judicial office holders.
39. The House of Lords Constitution Committee commented upon this proposal, and made the following recommendation:

*An odd number of members would avoid any need for a casting vote (which gives more weight to the views of one individual).*

Paragraph 147, 25th Report of Session 2010–12, **Judicial Appointments**

- 40. Therefore, selection commissions and panels for these roles will be comprised of an odd number and a minimum of five members so that the Chair does not have a casting vote.**

**Question 5: Should the Lord Chief Justice chair selection panels for Heads of Division appointments in England and Wales? (S71 CRA 2005)**

41. Overall there were 25 responses submitted in relation to this question. Of those, there were 22 responses that were for the proposal; while only three did not support the change.
42. Those who were in favour of our proposals highlighted the nature of the role of Heads of Division, both in terms of providing appropriate leadership and undertaking senior judicial office, and that given the vital working relationship between the Lord Chief Justice and the Heads of Division, the Lord Chief Justice was the most appropriate person to chair the selection panel.
43. Of those who did not support the proposal, some highlighted the level of impartiality that the current process provides, with a Supreme Court judge providing an independent perspective and less likely to appoint in their own image.
44. An important aspect of our proposals relates to selection panel composition and it is important to strike the appropriate balance between judicial and lay input in to the selection panels. For the selection for appointment as Heads of Division, we consider that a judicial chair is appropriate and therefore the Lord Chief Justice is in the best position to determine the leadership and judicial skills required for these offices. **Therefore the selection panel for Heads of Division will be chaired by the Lord Chief Justice.**
45. We accept that there is a concern that with the Lord Chief Justice chairing the selection panel there might be a perception of too little lay member influence on the selection panel. However, we are of the view that through the inclusion of at least two lay members on the selection panel that any concerns can be mitigated.
46. The composition of the selection panel will have five members, where two are judicial with at least two of the remaining three members being lay members. We also believe that there should always be a gender and, where possible, an ethnic mix on the selection panel.

**Question 6: Should only one serving judge of the Supreme Court be present on selection commissions, with the second judge replaced with a judge from Scotland, Northern Ireland or England and Wales? (Schedule 8, pt1 to the CRA 2005)**

47. Overall there were 32 responses submitted in relation to this question. Of those, there were 21 responses that were for the proposal; while 11 did not advocate the proposed change.

48. Those who were in favour endorsed the views of the Advisory Panel on Judicial Diversity<sup>5</sup>, in that removing one serving judge of the Supreme Court from the selection commission would reduce the potential for such judges to appoint in their own image. Some additionally commented that our proposals did not go far enough and that either the selection commission should be increased or that all members of the judiciary should be removed from the selection commission and replaced by legal academics.
49. Those who did not support the proposal, were of the view that more than one judge of the Supreme Court ensured that a greater breadth of understanding of the complexities of the role would be provided to support the selection and that out of a selection commission of five, two judges of the Supreme Court would be in the minority as against the other members.
50. The House of Lords Constitution Committee considered our consultation proposal, and noted its genesis from the Advisory Panel recommendations. However, they were of the view that a greater change needed to take place with regard to the composition of the selection commissions for judges of the UK Supreme Court. The Committee made the following observations:
- Having considered all the suggestions and arguments, and recognising that further consultation may be required on the detail of our proposal, we consider that selection commissions for the UK Supreme Court should consist of a lay chair and six other members. An odd number of members would avoid any need for a casting vote (which gives more weight to the views of one individual). A body of seven is the optimum size to balance the need to promote diversity with the need for efficient and effective decision-making.*
- Paragraph 147, 25th Report of Session 2010–12, **Judicial Appointments**
51. Upon consideration of the findings from the Committee and also the views expressed in response to our consultation, we do not currently propose to increase from five the number of members on the selection commission of judges of the UK Supreme Court (other than the President). In a panel of five we consider that the Advisory Panel recommendation that only one member of the Supreme Court should sit on the selection commissions is correct. We propose to replace the second Supreme Court judge with another senior member of the UK Judiciary to maintain the level of direct knowledge and experience of judicial work required to provide an effective selection commission.
- 52. Therefore, the selection commission for judges of the UK Supreme Court will comprise a panel of five, with the second judge of the Supreme Court being replaced by a judge from Scotland, Northern Ireland or England and Wales.**
53. However, further to our proposed approach for delivering the legislative change (see question 19) it is proposed that the detailed membership of selection commissions will be included in regulations. This approach will mean that the effectiveness of the process can be reviewed and allow for changes in the future if necessary.
54. We also believe that there should always be a gender and, where possible, an ethnic mix on the selection commission.

---

<sup>5</sup> <http://www.justice.gov.uk/publications/docs/advisory-panel-judicial-diversity-2010.pdf>



**Question 7: Do you agree that the Lord Chancellor should participate on the selection panel for the appointment of the Lord Chief Justice as the fifth member and in so doing, lose the right to a veto? (S 71, 73 and 74 of CRA)**

55. Overall there were 31 responses submitted in relation to this question. Of those, there were 15 responses that were for the proposal; while 16 did not advocate the proposed change.
56. Those in support believed that the involvement of the Lord Chancellor in the selection panel to appoint the Lord Chief Justice was preferable to the current arrangements where the Lord Chancellor could veto an appointment. There was also a view that the important role the Lord Chief Justice plays in the administration of justice, justifies this role for the Lord Chancellor in exercising his accountability to Parliament and the public.
57. Of those who did not support the proposal, many saw it as a blurring of the lines between the Executive and an independent judiciary, while some were concerned over the potential politicisation of the appointments process. This latter view was reinforced by the House of Lords Constitution Committee, who considered the proposal and made the following observation:
- The Lord Chancellor should not sit on selection panels for the appointment of either the Lord Chief Justice or the President of the Supreme Court. He should be properly consulted before the start of each selection process and retain his right of veto. Any closer involvement risks politicising the process and would undermine the independence of the judiciary.*
- Paragraph 139, 25th Report of Session 2010–12, **Judicial Appointments**
58. Our proposals are predicated on the view that the Executive has a legitimate role to play in providing accountability to Parliament and to the public in relation to judicial appointments. Given the significant influence in the administration of justice that these two senior judicial roles have, we believe that it is right that the Executive has a direct and real role in the process, but that this role is properly balanced against judicial and lay input. In the current system the Lord Chancellor has a right of veto at the very end of the process. This is in practice very problematic to exercise without raising questions of politicisation. Therefore, we consider that by sitting on the panel the Lord Chancellor can ensure that the Executive has a proper and meaningful input. **Therefore the Lord Chancellor should be a member of the selection panel for the appointment of the Lord Chief Justice of England and Wales.** In addition it is proposed that as a result **the Lord Chancellor will no longer be able to reject the decision of the selection panel.**
59. **We do not consider that this proposal will add a political element to the selection or undermine judicial independence as the selection will continue to be based solely on merit.**
60. We also believe that there should always be, where possible, a gender and an ethnic mix on the selection panel.

**Question 8: Do you agree that as someone who is independent from the executive and the judiciary, the Chair of the JAC should chair the selection panel for the appointment of the Lord Chief Justice? (S71 of CRA)**

61. Overall there were 35 responses submitted in relation to this question. There was strong support for the proposed change, with 27 responses supporting the change and only eight against the proposed change.
62. Of those who were against the proposal, some felt that a lay Chair would select a candidate who would not have the respect and confidence of the rest of the judiciary. Some questioned the view that the current Chair, the most senior Supreme Court judge from England and Wales, may not have a sufficient understanding of the experiences or leadership skills required for the role.
63. Those who supported the proposal highlighted the view that this change would provide a strong message regarding the independence of the process for appointing the judiciary and that the selection had been made without any political influence.
64. The House of Lords Constitution Committee considered and endorsed this proposal, concluding that:
- We agree that the Chair of the JAC should chair the selection panel for the appointment of the Lord Chief Justice.*
- Paragraph 141, 25th Report of Session 2010–12, **Judicial Appointments**
65. There is a requirement to strike the appropriate balance between judicial and lay member input in to the selection panels. The clear argument that was endorsed by the consultation is that for this very senior appointment it is necessary to demonstrate independence and transparency within the role of the Chair of the selection panel. As the Advisory Panel observed, there is a risk that selection panels will subconsciously recruit in their own image and we therefore are of the view that a lay Chair will help dispel any notion (real or perceived) of the judiciary making appointments in this way. Given the importance of the role the most appropriate lay person to Chair the panel is the Chair of the JAC. **Therefore, the lay chair of the JAC will chair the selection panels to appoint the Lord Chief Justice.**

**Question 9: Do you agree that the Lord Chancellor should participate in the selection commission for the appointment of the President of the UK Supreme Court and in so doing, lose the right to a veto? (S26, 27, 29, 30 of, and Schedule 8 to, the CRA)**

66. Overall there were 31 responses submitted in relation to this question. Of those, there were 12 responses that were for the proposal; while 19 did not advocate the proposed change.
67. Those who were in favour of the proposal highlighted that this approach to such a constitutionally important role was consistent with our proposed approach for the Lord Chief Justice selection panel and provided a proper balance between the Lord Chancellor being accountable to Parliament for judicial appointments and the principle of the separation of powers.

68. Similar to the views expressed in relation to question 7, of those who were not in favour of the proposal, many saw it as a blurring of the lines between the Executive and an independent judiciary, while some were concerned over the potential politicisation of the appointments process. This latter view was reinforced by the House of Lords Constitution Committee.
69. The same arguments as outlined above in question 7 also apply here. We consider that by sitting on the panel the Lord Chancellor will have a real and direct contribution to the process, balanced with judicial and lay input, in a manner which is wholly appropriate to provide the accountability to Parliament and to the public. In addition some questioned whether given the UK-wide nature of the office, the Lord Chancellor was the most appropriate politician to be involved in the selection process. Upon analysis of this point and the extant legislation, we have concluded that the Lord Chancellor, as the person who commissions the Supreme Court to start the selection process and recommends the candidate to HM The Queen for appointment, is the most appropriate person to represent the Executive on the selection commission.
70. Upon consideration, **we consider that given the nature of the office, the Lord Chancellor should have a direct role in the selection of the President of the UK Supreme Court. It is proposed to enable the Lord Chancellor to be a member, although not chair of the selection commission.** In those cases he will no longer be able to reject the decision of the selection commission.
71. Regulations will set out the selection process in detail, including the role of the Lord Chancellor, and the process by which devolved administrations will be consulted. The Lord Chancellor will consult with the devolved administrations, among others, before bringing forward draft regulations.
72. Again, we do not consider that this will proposal will add a political element to the selection or undermine judicial independence as the selection will continue to be based on merit.

**Question 10: What are your views on the proposed make-up of the selection commission for the appointment of the President of the UK Supreme Court? (S26, 27 of, and Schedule 8 to, the CRA)**

73. Overall there were 25 responses submitted in relation to this question and a diverse range of views were expressed. The majority reiterated their responses to other questions such as the role of the Lord Chancellor in relation to the selection commission and the appropriate Chair of the commission. There was also a general consensus that any selection commission should have a majority of lay representation in order to demonstrate transparency and independence and address any concerns of the judiciary appointing in their own image.
74. The House of Lords Constitution Committee considered these proposals and made the following overall observations on the composition of the selection commission for the President of the UK Supreme Court:
- The selection panel should consist of a lay chair (the Chair of the JAC), two Justices of the Supreme Court, the Lord Chief Justice of England and Wales (if not a candidate), and three lay members (at least one of whom is non-legally qualified) from each of the JAC, the Judicial Appointments Board for Scotland and the Northern Ireland JAC, nominated by the Lord Chancellor.*

Chapter 5, 25th Report of Session 2010–12, **Judicial Appointments**

75. They also concluded that 'a body of seven is the optimum size to balance the need to promote diversity with the need for efficient and effective decision-making.'
76. **We will introduce a seven member selection commission including the lay chair (see next question) a representative from each of the three territorial appointment bodies (in addition to the Chair and with at least one of these being lay and one judicial), the Lord Chancellor, a judge of the Supreme Court and another senior UK judge.**
77. We believe that there should always be a gender and, where possible, an ethnic mix on the selection panel.

**Question 11: Do you agree with the proposal that the Chair of the selection commission to identify the President of the UK Supreme Court should be a non-judicial member from either the Judicial Appointments Commission for England and Wales, the Judicial Appointment Board for Scotland or the Northern Ireland Judicial Appointments Commission?**

78. Overall there were 33 responses submitted in relation to this question. Of those, there were 23 responses that were for the proposal; while ten did not advocate the proposed change.
79. Those who supported the consultation proposal endorsed the justification documented within the consultation document and highlighted the need for the Chair to be independent as this would assist in addressing concerns over diversity and perceptions of political or judicial bias or influence.
80. Of those who were not in favour of our proposal, many advocated that only a senior member of the judiciary would be best placed to understand the nature of the role.
81. The House of Lords Constitution Committee considered the proposal and the evidence received and made the following observation on who should chair the selection commission for the President of the UK Supreme Court:

*We consider that the lay Chair of the JAC should chair all selection commissions for UK Supreme Court appointments.*

Paragraph 150, 25th Report of Session 2010–12, **Judicial Appointments**

82. For the same reasons outlined above in relation to the appointment of the Lord Chief Justice, for this very senior judicial role we consider it appropriate to have a lay Chair to ensure independence of the process and avoid any perception of judges appointing in their own image. We have therefore considered who is best placed to perform this role. Given the UK-wide nature of the office, we do not agree with the House of Lords Constitution Committee proposal that it should always be the chair of the England and Wales JAC.
83. Instead, as proposed in our consultation paper we consider the **chair of the selection commission to select a President of the UK Supreme Court should be a lay representative from one of the three territorial selection bodies, taken on rotation.**

**Question 12: Should the Lord Chancellor make recommendations directly to HM The Queen instead of the Prime Minister? (S26 and 29 CRA and convention)**

84. Overall there were 31 responses submitted in relation to this question. Of those, there were 22 responses that were for the proposal; while three did not support the proposed change and six were neutral.
85. The majority of those who responded in support of the proposal saw the role as a redundant additional layer to the process and that the Lord Chancellor could make these recommendations. However, some of those who did support the proposal advocated that if it was decided that the Lord Chancellor should sit on selection panels there may be a need to retain the role of the Prime Minister at least in relation to those roles where the Lord Chancellor was on the panel.
86. Those who supported the retention of the role considered it was important that the Executive was involved and that the Prime Minister role was a useful safeguard. A number of respondents suggested that they were neutral on the matter or that this was a matter for Government. The House of Lords Constitution Committee made no observation on this proposal.
87. Upon analysis of the responses received **we have concluded not to make any changes to the role of the Prime Minister at this time.** We agree with the observations around the role of the Prime Minister being useful in relation to those appointments where the Lord Chancellor is, in the future, on the selection commission or panel. Therefore, as we are proposing changes to the Lord Chancellor's role we do not consider it is the correct time to also make changes to the Prime Minister's role and will retain his current role in formally forwarding the recommendation to HM The Queen.

**Improving diversity**

**Question 13: Do you believe that the principle of salaried part-time working should be extended to the High Court and above? If so, do you agree that the statutory limits on numbers of judges should be removed in order to facilitate this? (Sections 2 and 4 of the Senior Courts Act 1981)**

88. Overall there were 47 responses submitted in relation to this question. There was unanimous support for the principle of part-time working although two respondents did query whether this could be operated effectively in the Court of Appeal or Supreme Court.
89. Those who advocated the proposal highlighted the point that many saw the extension of salaried part-time working to the higher courts as an enabler to encouraging a more diverse judiciary and also the removal of something many see as a barrier to applying to higher judicial office.
90. The House of Lords Constitution Committee heard from a number of witnesses who advocated this change as being one which they believed would have the greatest impact on increasing the diversity of the judiciary. The Committee observed that:
- We agree that the Senior Courts Act 1981 should be amended to remove the limits on the number of individuals able to serve as High Court and Court of Appeal judges*

*at any given time, to enable some appointments to be made on a part-time basis. We regard this as the minimum change necessary. For the number of women within the judiciary to increase significantly, there needs to be a commitment to flexible working and the taking of career breaks which we believe is currently lacking. This applies to both the judiciary and the legal professions. It is the responsibility of all those with a role in deployment and the appointments process to demonstrate that commitment.*

Paragraph 117, 25th Report of Session 2010–12, **Judicial Appointments**

91. Based upon the overwhelming support for this proposal and for the reasons outlined above, **it is proposed to amend the existing legislation so that the current statutory limits on the number of High Court and Court of Appeal judges contained within the Senior Courts Act 1981 are expressed in terms of 'full-time equivalent'**. 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. Expressing the number of office holders in terms of full-time equivalent is likely to have no impact on judicial decision-making or operational performance.
92. The consultation did not specifically refer to the possibility of part time working in the Supreme Court. However, this was supported by some respondents and we therefore intend to enable this by **amending the maximum number of judges of the Supreme Court, so that it is specified as 'full-time equivalents'**.

**Question 14: Should the appointments process operated by the JAC be amended to enable the JAC to apply the positive action provisions when two candidates are essentially indistinguishable? (S63 of the CRA)**

93. This question elicited the second highest number of responses – 57. Of those 34 were for the proposal and 23 against, although this masks nuances in response around how broadly the “tipping point” should be applied. For example, some who did not support the proposal argued for the retention of appointment being ‘solely on merit’, which would require a narrow application of the tipping point provision where people were essentially indistinguishable.
94. However, there was some support for wider interpretation of merit, e.g. some of those who responded suggested the use of the “tipping point” provision where applicants had reached the ‘required standard of eligibility’. Those who were against the application of the “tipping point” were concerned that it could lead to a dilution of the merit principle. There was also some concern that it would be detrimental for judges from diverse backgrounds if they are seen to have been appointed on the basis of their ethnicity, gender or other protected characteristic, rather than upon their merit as a judge.
95. The House of Lords Constitution Committee made the following observations on the proposal to incorporate section 159 of the Equality Act 2010 into judicial appointments:
- It seems likely that in large assessment exercises it will not always be possible to rank every candidate in strict order of merit and that a number of candidates may be considered to be of equal merit.*
- We agree that s 159 of the Equality Act 2010 should be used as part of the judicial appointments process. Though we cannot be certain how often it would be used, its*

*application could be the deciding factor in the appointment of a number of candidates from under-represented groups. Moreover, permitting its use would send out a strong signal that diversity in judicial appointments is important, without undermining the merit principle.*

Paragraphs 99 and 101, 25th Report of Session 2010–12, **Judicial Appointments**

96. We therefore intend to enable the use of a ‘tipping point’ provision, but not to dilute the merit principle. It is intended that a “tipping point” principle could be applied and the provision that appointments be based solely on merit also be retained in the Constitutional Reform Act 2005. This proposal will be developed in consultation with the JAC, and we will consider the concerns expressed during consultation around the problem of prioritisation of different protected characteristics.

**Question 15: Do you agree that all fee-paid appointments should ordinarily be limited to three renewable 5 year terms, with options to extend tenure in exceptional cases where there is a clear business need?**

97. This question elicited the highest number of responses – 73, including many from individual fee-paid judicial office holders. In total, twice as many respondents were against the proposal as in favour (49 to 24).
98. The arguments against were on the basis of the proposal impinging on the ability of courts and tribunals to meet their business need but also that the policy would detract from diversity in the judiciary. This is because the suggestion is that fee paid offices allow for more diversity as people can work for only short periods and therefore can more easily balance other responsibilities.
99. Support for the proposal was largely on the basis of ensuring an ongoing ‘churn’ of judges in fee paid positions to ensure the potential pool for salaried office is constantly refreshed.
100. The House of Lords Constitution Committee did not specifically make reference to this proposal, however they made a general observation concerning the recommendations arising from the report of the Advisory Panel on Judicial Diversity, not specifically discussed:

*We support all the recommendations of the Advisory Panel on Judicial Diversity and urge all those responsible to implement the recommendations more rapidly than hitherto.*

Paragraph 82, 25th Report of Session 2010–12, **Judicial Appointments**

101. The consultation responses received make a strong case that the proposed reform would significantly impact specialist tribunal posts and could affect a relatively more diverse group of judges. **Therefore, we do not consider that the policy should be taken forward at this stage.**
102. We do, however, consider that the more general point that we should ensure fee paid opportunities are available to a wide group of applicants is important and there may be other more targeted ways to address this. In particular some respondents suggested that there was an issue relating to fee paid opportunities, which are often populated by those retiring from salaried work in advance of their statutory retirement age.

### Quality, speed of service and value for money

**Question 16: How many Judicial Appointments Commissioners should there be? (Schedule 12 to CRA)**

**Question 17: Should the membership of the Commission be amended as proposed above? (Schedule 12 pt1 to CRA)**

103. In relation to questions 16 and 17, whilst, there was some support for the proposed reduction to eight Commissioners in addition to the Chair, several respondents were not persuaded that delivery of financial savings merited making the proposed change and many did not suggest an actual number of Commissioners as this should be based on an assessment of workload. There was also some concern about how the reduction in numbers of Commissioners would potentially reduce the amount of outreach work undertaken, as well as reducing the diversity of the Commission itself. However, some welcomed the prospect of greater flexibility. Additionally some of those who responded were against the introduction of less specific eligibility criteria for membership of the Commission.

104. The House of Lords Constitution Committee considered this proposal and heard from a number of witnesses on the wider ramifications that might arise:

*We stress that the JAC is an independent body. The Lord Chancellor should have no discretion to determine the membership; this would be damaging both to the independence of the JAC and to the perception of its independence.*

*We believe that there should not be significantly fewer commissioners than at present and that the number should be prescribed in primary legislation. The composition of the JAC must consist of a balance of lay and judicial members. In order to increase flexibility in making changes to the precise composition of the JAC, it would be appropriate for the composition to be set out in secondary legislation, subject to affirmative resolutions of both Houses of Parliament.*

Paragraphs 162 and 163, 25th Report of Session 2010–12, **Judicial Appointments**

105. Our original proposal in the consultation document to reduce the number of Commissioners to nine was based on the findings of the judicial appointments and judicial arms length bodies review undertaken in November 2010. Overall, based on the consultation responses, we do not consider that there is a strong argument to reduce the number of Commissioners now. We do, however, consider that to enable improvements to the effectiveness and efficiency of the Commission, it is important to incorporate changes that will allow the membership of the commission to be responsive enough in order to meet future business needs. **We will therefore amend existing legislation in order to provide an enabling power to set the number and composition of the JAC within secondary legislation, but that key principles (including the need for a balance of judicial, professional and lay members, a lay chair and a non-judicial majority) should be retained on the face of the Act.**



**Question 18 Should the CRA be amended to provide for selection exercises (such as judicial offices not requiring a legal qualification) to be moved out of the JAC's remit, where there is agreement and where it would be appropriate to do so? (S85 CRA)**

106. Overall there were 40 responses received to this question. Of those, 17 were against the proposal, while 23 were in favour.

107. A number of those who were in favour of the proposal, qualified their support through the expectation that any exercise removed from the remit of the JAC should be completed in a more cost effective and timely fashion and that if this proved not to be the case then the JAC should retain responsibility for selecting for all of the appointments, both those which require a legal qualification and those which do not.

108. Many of those who were against the proposal or were undecided questioned who would be taking over the responsibility for these appointments. There was also a concern that the quality of appointments may decrease if these processes were removed from the JAC.

109. The House of Lords Constitution Committee considered this proposal and heard from a number of witnesses regarding their particular concerns:

*We believe that the JAC should in principle remain responsible for the appointment of non-legally qualified tribunal members: such persons will be judges and should be appointed on that basis. If, with the agreement of the Lord Chancellor, the Lord Chief Justice and the JAC, particular selection exercises are transferred elsewhere, appointments must continue to be made according to standards determined by the JAC.*

Paragraph 172, 25th Report of Session 2010–12, **Judicial Appointments**

110. Upon consideration, we are therefore intending to amend the legislation to give the flexibility by **secondary legislation to remove certain offices, not requiring a legal qualification, from the remit of a JAC selection exercise. Such a power would be subject to the affirmative resolution procedure and could not be exercised without first consulting the Lord Chief Justice for England and Wales and the Senior President of Tribunals.** In practice the JAC would also be closely involved in any such decision.

111. However, in order to mitigate against the concerns raised, it is not proposed to utilise this power until all parties (the Lord Chancellor and the Senior President of Tribunals/Lord Chief Justice) are satisfied that any new system used for non-legal appointments, is in place and complies with the same selection standards that the JAC applies in its selection exercises.

## Delivering the Changes

<b>Question 19 Do you agree with the proposed approach to delivering these changes?</b>
---

112. Overall there were 34 responses received to this question. Of those, 22 were in favour of the proposal, while 12 were against.

113. Many of those who were against the proposal, and some who were in favour, raised the issue of 'Henry VIII' clauses and the potential for the Executive amending the processes arbitrarily.

114. Those in favour suggested that there would be benefit in the increased flexibility to make changes to the selection processes by way of secondary legislation. The House of Lords Constitution Committee considered this proposal in great detail and heard from a number of witnesses regarding their particular concerns over this proposed approach. The Committee were in favour of the approach, subject to the appropriate safeguards being in place:

*'..We agree that the detailed provisions of the CRA should be included in secondary legislation. We emphasise that:*

*(a) Henry VIII clauses should not be sought;*

*(b) Provisions of particular constitutional importance should continue to remain in primary legislation where they will continue to be subject to full parliamentary scrutiny. Upon introduction of a bill, the Government should publish draft secondary legislation; and*

*(c) The Lord Chief Justice and, where relevant, the President of the Supreme Court should be consulted before secondary legislation is laid before Parliament.*

Paragraph 12, 25th Report of Session 2010–12, **Judicial Appointments**

115. **We therefore intend that the majority of the procedural elements of the selection/appointments process will be moved from the face of the Constitutional Reform Act 2005, and replicated within secondary legislation that would be subject to agreement of the Lord Chancellor and Lord Chief Justice/President of the UK Supreme Court** (depending upon nature of judicial office) before being subject to the Parliamentary affirmative resolution procedure. We do not intend to take Henry VIII powers and will ensure that important elements of principle are retained in the Act.

116. In addition to the number and composition of the JAC as described in response to questions 16 and 17, the other major areas that will be dealt with by regulations are the composition of selection panels and commissions for the senior judiciary and other detailed elements of the selection process currently specified in the CRA. Key principles of the selection process such as having an independent JAC that can determine its own selection procedures, appointment being solely on merit and only having one name put forward for each vacancy, will, however, remain on the face of the Act.

## Other Issues

**Question 20: Are there any other issues/proposals relating to the process for appointing the judiciary or for improving the diversity of the judiciary that you believe the MoJ should pursue?**

**Question 21: We welcome your views on the EIA in terms of likely equality impacts. Are there other ways in which these proposals are likely to impact on race, sex, disability, sexual orientation, religion and belief, age, marriage and civil partnership, gender reassignment, pregnancy and maternity?**

**Question 22: We are particularly interested in understanding more about the barriers faced by people with protected characteristics. Are there any further sources of evidence of equality impact that you are aware of that would help better understand the impacts of the proposals?**

117. A range of other comments and ideas were raised including how to positively encourage applicants, how to tap into academics as a pool for judicial office, the non-statutory eligibility criteria for judicial office holders and the issue of retired judges sitting as fee-paid judges (see question 15).
118. The comments relating to the Equality Impact Assessment (EIA) have been fed into the development of the EIA, which has been published in support of this response. Other comments received will be analysed and fed into wider policy development. In particular we will need to consider wider issues of judicial terms and conditions.

## Conclusion and next steps

119. Following the consultation, and having considered the conclusions of the recent House of Lords Constitution Committee Report on Judicial Appointments, the Government will take forward a package of measures to reform elements of the judicial appointment process and to encourage greater diversity within the judiciary.

### **Achieve the proper balance between executive, judicial and independent responsibilities**

120. There is a general consensus, both in our consultation responses and in the House of Lords Constitution Committee report that the Executive has a legitimate and important role to play in the judicial appointment process. The Lord Chancellor as the Cabinet minister responsible for the judiciary provides important accountability to Parliament and to the public for the appointment of the judiciary. We are therefore not proposing any change to the Lord Chancellor's ownership and accountability for the selection process as a whole for all judicial posts.

121. We do, however, plan to make changes to the Lord Chancellor's role in relation to certain individual appointments. In relation to judicial appointments below the High Court, we do not consider that it is necessary for the Executive to have a role in relation to individual appointments. In effect this is often a rubber-stamping process as it is not feasible for the Lord Chancellor to have personal knowledge of the applicants across the range of courts and tribunals for which he has to make appointments. We consider that such appointments should be made by the judiciary themselves.

122. **Therefore, we will transfer the Lord Chancellor's current role, in making the selection decision in relation to particular courts-based appointments below the High Court, to the Lord Chief Justice of England and Wales.** Whilst the magistracy were not included explicitly in our consultation proposal, we consider that the same arguments apply in relation to the magistracy as for other judicial appointments below the High Court and we therefore intend to explore this matter further with the Magistrates Association, the Justices' Clerks' Society and the National Bench Chairmen's Forum.

123. **We will also transfer the Lord Chancellor's current role in making the selection decision, in relation to the First-tier Tribunal and the Upper Tribunal appointments, to the Senior President of Tribunals.** The decisions will be constrained in the same terms as the Lord Chancellor's current decision, so that the Lord Chief Justice and Senior President of Tribunals can either accept a selection by the JAC, reject it or ask the JAC to reconsider its selection. Equally, details of those recommendations where the selection has been rejected or the JAC has been requested to reconsider by either the Lord Chief Justice or Senior President of Tribunals will be published by the JAC.

124. This reform was largely supported in the consultation responses and is recommended by the House of Lords Constitution Committee. Whilst some respondents raised the issue that the Lord Chancellor should retain these appointments to retain a line of accountability for the appointments to Parliament, we

consider that the overall responsibility for the appointment process is retained by the Lord Chancellor and this provides sufficient accountability to Parliament and the public in these cases.

125. The Lord Chancellor will retain his existing power to make appointments to any UK wide tribunal (other than appointing judges and other members to the First-tier Tribunal and appointing other members to the Upper Tribunal) and his existing power to make recommendations of appointment to Her Majesty The Queen in relation to a variety of judicial offices.
126. In relation to appointments of more senior judges we consider that there is an important role for the Executive to play; to provide direct accountability to Parliament and the public. **We will therefore ensure that the Lord Chancellor is consulted prior to the start of the selection process for appointments to the Court of Appeal and Heads of Division** in the same way that he is currently consulted in relation to appointments to the UK Supreme Court.
127. **The appointment of the President of the UK Supreme Court and the Lord Chief Justice are particularly important** as these posts are crucial leadership roles in the judiciary and are vital to the administration of justice. Therefore, we consider that the Lord Chancellor should have an enhanced role in their selection; to provide effective accountability for the operation of the justice system to Parliament and to the public. **We will therefore make legislative changes for the Lord Chancellor to be able to sit as a member (but not Chair) of the selection commission/panel for appointments to these two roles. As a result the Lord Chancellor will no longer be able to reject the decision of the selection panel where he is a member of that panel.**
128. We have noted the concern of some consultation respondents and the House of Lords Constitution Committee that our proposal may lead to an increased politicisation of the selection process. We do not consider that this will be the case as selection will continue to be based on merit. We consider that this is an appropriate role for the Executive and does not carry the risk of politicisation that other options to give more direct accountability which were put to the Committee in evidence, such as selection from a shortlist of candidates or the use of Parliamentary hearings, may entail.
129. In relation to the selection of the President of the UK Supreme Court, in bringing forward our regulations on this matter, we will consult with the devolved administrations and seek to address concerns expressed during consultation that the process must ensure that there is effective input from the devolved administrations.
130. We will also make other changes to the composition of panels for the senior judiciary as were set out in our consultation document. These changes are to ensure a proper balance of lay and judicial member involvement for senior judicial appointments. This balance is important; it is necessary for the senior judiciary to have a role as they can contribute an understanding of the demands of the work of the senior judiciary. However it is also important to have a lay member element to potentially bring different perspectives and to counter any perception or possibility that senior judges appoint in their own image.
131. For appointments to the offices of Lord Chief Justice of England and Wales and President of the UK Supreme Court we consider that these two appointments are in a

category of their own for the reasons already outlined. Therefore, in these cases we consider that it is particularly important that any risk or perception that judicial-led selection commissions/panels will appoint in their own image needs to be countered. **For that reason we will ensure that the Chair of the selection commission/panel is a lay member. The appointment of the President of the UK Supreme Court will comprise a selection commission of seven members**, the detail of which is below. This will be chaired by a lay member of one of the Judicial Appointment bodies (from England and Wales, Scotland or Northern Ireland) in rotation. We note the comment received in consultation responses that a lay Chair who could represent all of the UK would be most appropriate. However we consider the approach taken to rotate the Chair between the different appointments bodies accompanied with representation from each of the bodies sufficiently reflects the UK-wide nature of the Supreme Court. For the appointment of the Lord Chief Justice of England and Wales, the same territorial issues do not apply. **The selection panel will therefore be chaired by the Chair of the Judicial Appointments Commission** (who is by statute a lay member). **The panel will consist of five members as detailed below.**

132. The arguments for a lay chair do not apply as strongly for other senior judicial appointments; therefore we do not propose that primary legislation should specify a lay chair in these cases, but lay representation on the selection panel will be required. **Therefore for Heads of Division and the Court of Appeal judges, there will be a selection panel of five members, chaired by the Lord Chief Justice of England and Wales.** We note the risks raised by a number of consultation respondents that the proposal that the Lord Chief Justice chair such selection panels could be seen as being too closed in terms of insufficient input from those outside of the senior judiciary. However we consider that the Lord Chief Justice is best placed given his leadership role and the need to ensure an effective leadership team. **Similarly for the appointment of judges of the Supreme Court, other than the President, selection commissions will be chaired by the President of the Supreme Court** as he is well placed to make an assessment of the demands of the office. However, to guard against any perception that the judges of the Supreme Court may appoint judges in their own image, **only one Supreme Court Judge will sit on selection commissions** rather than the current requirement of two.

133. Aspects of the detail of the membership of these selection commissions will be set out in secondary legislation (see section below on "Delivering the changes"). The regulation making powers to determine the composition of selection commissions/panels will be subject to certain principles that are contained on the face of the Act. This will, for example, ensure that there is a lay and judicial representation on these panels.

134. In relation to the role of the Prime Minister, we consider that due to the changes we are making to the Lord Chancellor's role in relation to membership of selection commissions and panels that now is not the correct time to also change the role of the Prime Minister. We will therefore retain the Prime Minister's current role in formally forwarding the recommendation to HM The Queen.

### Composition of selection commissions/panels for senior judicial offices

135. We intend to bring forward regulations that set out the following composition for selection commissions/panels which would be subject to agreement with the Lord Chief Justice or the President of the UK Supreme Court (depending upon nature of judicial office) and Parliament's affirmative resolution procedure. In relation to the UK Supreme Court, the regulations will also be subject to consultation with the devolved administrations as specified in the Act.

#### Selection Commission for President of UK Supreme Court

- Chair – lay representative from one of the three territorial judicial selection bodies;
- Representative from the JAC;
- Representative from the JAB (Scotland);
- Representative from the NIJAC;
- Deputy President of the UKSC (unless applying, then it would be the most senior ordinary judge of the Supreme Court);
- Senior UK Judge nominated by the outgoing President, and
- Lord Chancellor.

Of the four members from the territorial appointments bodies one of them must be a judicial office holder and at least two, including the chair, must be lay members.

#### Selection Commission for other UK Supreme Court Judges

- Chair - President of the UKSC;
- Chair of the JAC;
- Chair of the JAB;
- Chair of the NIJAC, and
- Senior UK Judge (non-UK Supreme Court office holder).

#### Selection Panel for Lord Chief Justice

- Chair – Chair of JAC;
- Lord Chancellor;
- Most senior English and Welsh Supreme Court judge or their nominee;
- Lay JAC member, and
- Lord Chief Justice Judicial nominee.

Panel for Heads of Divisions
<ul style="list-style-type: none"><li>• Chair – Lord Chief Justice;</li><li>• Most senior English and Welsh Supreme Court judge or their nominee;</li><li>• Chair of the JAC;</li><li>• Lay member of the JAC, and</li><li>• Nominee of the Lord Chief Justice (either judicial or lay).</li></ul>



For all panels there should always be, where possible, a gender and an ethnic mix on the selection panel.

136. In relation to judges requested or appointed under section 9 of the Senior Courts Act 1981, there was near unanimous support for a greater role for the JAC in their selection. Many respondents highlighted the importance of these roles as a stepping stone to High Court appointments. The current limited level of JAC involvement does not give sufficient transparency to these important roles. We need to be seen to be moving away from a system of perceived patronage to gain entry to the top judicial roles.

137. **We will therefore make the necessary legislative changes so that these requests or appointments are subject to a selection process determined and applied by JAC.** The details of the process will be for the JAC to determine, but it will be important to ensure that it is proportionate and is implemented in such a way as not to compromise operational effectiveness.

138. Currently, Circuit judges can be authorised to sit in the Criminal Division of the Court of Appeal, without any JAC process or oversight. Although this was not an issue that was raised in our consultation paper, there are some who believe that the arguments concerning the transparency of the process that apply to the section 9 request or appointment process in relation to the High Court also apply here because it also involves a judge being authorised to sit in a more senior court. However, in the absence of clear evidence to justify an identical approach, we have instead decided to amend the Senior Courts Act 1981 so that the JAC are required to provide concurrence to those authorised to sit in the Criminal Division of the Court of Appeal.

### **Create a more diverse judiciary that is reflective of society and appointed on merit**

139. There was unanimous support in the consultation responses and in the House of Lords Constitution Committee report to the proposal to facilitate part-time working in the High Court and Court of Appeal. **We will bring forward legislative changes so that the maximum number of judges in these courts is expressed in terms of “full-time equivalents”.** This will facilitate part-time working as, for example, two judges each working fifty percent of the time will count as one judge for the purposes of assessing the number of judges in these courts (rather than counting as two judges as they do under the current system).

140. Enabling more flexible working patterns is seen as being of fundamental importance to promote diversity. This legislative change will facilitate part-time working but will not, in and of itself, ensure that part-time working in these courts becomes a reality. In lower courts part-time working is already possible, but there is a suggestion that it



is not currently utilised very often. It will therefore be important to work with the judiciary to ensure that opportunities for part-time working are promoted and that any operational or cultural constraints are addressed.

141. In response to comments received during our consultation we intend to extend the principle of salaried part-time working to the UK Supreme Court by **amending the maximum number of judges of the Supreme Court, so that it is specified as 'full-time equivalents'**.
142. There was support in the consultation responses for applying the Equality Act 2010 "tipping point" provision to judicial appointments. **We will make legislative change to make clear that where two applicants for judicial office are assessed as being of equal merit, positive action can be taken to favour one of judges on the basis of improving diversity.** In response to consultation and in the House of Lords Constitution Committee Report there was concern that in applying "the tipping point" there should not be any diminishing of the primacy of appointment being based on merit. We will therefore make this legislative change in such a way as not to remove the current legislative provision that appointment be based solely on merit. In practice this will mean that the two candidates must be judged to be of equal merit before the "tipping point" can apply.
143. **We are not now proposing to take forward the consultation proposal to limit fee paid terms to three terms of five years.** The consultation responses highlighted a number of concerns with regard to the likely business impact of a 15 year limit on fee paid judiciary in particular in relation to some of the specialist judiciary where recruitment challenges exist. The responses also highlighted that fee-paid work can facilitate some judges from a more diverse background being able to take judicial roles, for example those with caring responsibilities can more easily juggle the demands of a fee-paid position than a full-time post. The purpose of the proposal had been to try and ensure that fee-paid positions were regularly refreshed to provide opportunities for new judges to gain experience before applying for salaried positions. This remains an aim and we will conduct further analysis of the use of fee-paid roles to determine how this can be achieved most effectively.

#### **Deliver speed and quality of service to applicants, the courts and tribunals and value for money to the taxpayer**

144. There was general support for the role of the JAC. There was also little clear support for a reduction in the number of commissioners now, although there was an appreciation that moving the detail of the composition of the Commission to secondary legislation would provide flexibility to meet operational needs.
145. Our original proposal in the consultation document to reduce the number of Commissioners to nine was based on the findings of the judicial appointments and judicial arms length bodies review undertaken in November 2010. Overall, whilst, based on the consultation responses, we do not consider that there is a strong argument to reduce the number of Commissioners now, it would be beneficial to allow for a greater degree of flexibility in the future on the numbers of Commissioners to respond to business needs and potentially achieve greater efficiency. The same arguments also apply to having flexibility to amend the composition of the Commissioners to meet changes in business need. **We are therefore proposing that legislation should be amended to provide a power to set the number and composition of the JAC in secondary legislation, but that key principles**

**(including the need for judicial, professional and lay members, a lay chair and a non-judicial majority) should be retained on the face of the Act.**

146. In relation to the remit of the JAC, we will **amend legislation to allow for a power to remove certain offices from the remit of a JAC selection exercise.** However, we are aware of the concerns raised in consultation regarding removing these processes from the JAC and this will therefore be subject to stringent safeguards. It is not proposed to make use of this power until agreement has been reached between the Lord Chancellor and the Senior President of Tribunals or Lord Chief Justice of England and Wales that the replacement system meets the existing JAC selection standards.

### **Delivering the changes**

147. We intend to deliver many of these changes by removing detail of the selection and appointment process from primary legislation and creating powers to set out the process in secondary legislation. The reason for this is that whilst there is a broad consensus around the framework set out by the Constitutional Reform Act 2005 there is also a widely held view that the Act is too prescriptive, which reduces flexibility. This point is illustrated by Baroness Prashar who said in evidence to the House of Lords Constitution Committee that the Constitutional Reform Act is “an interesting mixture of high principle and low level bureaucracy”.

148. **It is therefore proposed that the majority of the procedural elements of the selection and appointments process be moved from the face of the Constitutional Reform Act 2005, and replicated within secondary legislation** that would be subject to agreement with the Lord Chief Justice or the President of the UK Supreme Court (depending upon nature of judicial office) and Parliament's affirmative resolution procedure.

149. The purpose of this is to allow matters of business process to be amended without the need for primary legislation. It is intended that important matters of principle relating to the appointment process should, rightly, remain on the face of the Act and require primary legislation to make changes. Key principles of the selection process such as having an independent JAC that can determine its own selection procedures, appointment being solely on merit and only having one name put forward for each vacancy, will, therefore, remain on the face of the Act. The principle areas covered by regulations will be the number and composition of the JAC, the composition of selection panels and commissions for the senior judiciary and other detailed elements of the selection process.

## The consultation criteria

The seven consultation criteria are as follows:

1. **When to consult** – Formal consultations should take place at a stage where there is scope to influence the policy outcome.
2. **Duration of consultation exercises** – Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
3. **Clarity of scope and impact** – Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
4. **Accessibility of consultation exercises** – Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
5. **The burden of consultation** – Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
6. **Responsiveness of consultation exercises** – Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
7. **Capacity to consult** – Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

**These criteria must be reproduced within all consultation documents.**

## **Consultation Co-ordinator contact details**

**Responses to the consultation must go to the named contact under the How to Respond section.**

However, if you have any complaints or comments about the consultation **process** you should contact the Ministry of Justice consultation co-ordinator at [consultation@justice.gsi.gov.uk](mailto:consultation@justice.gsi.gov.uk).

Alternatively, you may wish to write to the address below:

**Ministry of Justice Consultation Co-ordinator**

**Better Regulation Unit  
Analytical Services  
7<sup>th</sup> Floor, 7:02  
102 Petty France  
London SW1H 9AJ**

## Annex A – List of respondents

The following documents those who responded to the consultation, including details of whether they were individuals or organisations.

### Organisations

Name
Association of Her Majesty's District Judges
Association of Members of the Immigration and Asylum Tribunals
Association of Woman Solicitors
Bar Council
Bar Lesbian & Gay Group
Black Solicitors Network
Chancery Bar Association
Chwarae Teg
Council of Appeal Tribunal Judges
Council of Employment Judges
Council of Immigration Judges
Discrimination Law Association
Diverse Cymru
Employers Network for Equality & Inclusion
Employment Group
Equal Justice Initiative
InterLaw Diversity Forum
JUSTICE
Judicial Appointments Board for Scotland
Judicial Appointments Commission
Judicial Appointments and Conduct Ombudsman
Justices of the Supreme Court of the United Kingdom
Legal Wales Standing Committee
Litigation Committee of the City of London Law Society
Liverpool Law Society
London Solicitors Litigation Association
Mental Health Tribunal Members Association
Prison Reform Trust
Stonewall
The Chartered Institute Of Legal Executives (CILEx)
The Council of Her Majesty's Circuit Judges
The Law Society
Tribunals Judicial Diversity Group

<b>Name</b>
United Kingdom Association of Women Judges
Young Bar Council

### **Individuals**

<b>Name</b>
David R Adie
John Akers
Judith Allright
Lady Justice Arden
Charlotte Beatson
Prof Gwyneth Boswell, University of East Anglia
Prof Andrew Burrows, All Souls College, Oxford
Sir Robert Carnwath, Senior President of Tribunals
Chris Chapman
Michael Clements
Marian Davies
Paul Derbyshire
Dominic Dudkowski
David Ford MLA, Northern Ireland Minister of Justice
A J Gamble
Graham Gee, Birmingham Law School
Maurice Greene
Christopher Hall
Michael Hankey
Giles Harrap
Margaret Hendry
The Hon Mr Justice Hickinbottom, Joint Senior Liaison Judge for Diversity
Anthony Holfer
Paul Housego
Theodore Huckle QC, Counsel General to the Welsh Government
Oliver Hyams
Adrian Jack
Simon James, Clifford Chance LLP
Lord Chief Justice of England & Wales
Jessica Karia
Mrs Justice Lang
HHJ Latham, President of the Employment Tribunal for England & Wales
Sir Tom Legg
Jeffrey Lewis, Manchester Law Society
Andrew Lloyd-Davies
Jane Lom

Name
Martin Loughridge
Kenny MacAskill, Cabinet Secretary for Justice, Scottish Government
Lord Mance, Justice of the UK Supreme Court
Jane Marston
HHJ Robert Martin
John Ross Martyn
Douglas J May QC
Siobhan McGrath
Trevor Mistlin
Dr Jim Monach
Karon Monaghan QC, Matrix Chambers
Nick Moss
Helen Mountfield QC, Matrix Chambers
Baroness Neuberger
Professor Alan Paterson OBE Centre for Professional Legal Studies
Geoffery Pettigrew
Graham Phillips
T M Phillips
Ursula Riniker
Lynn Roberts
Claire Sandbrook
Jonathan Swift
HHJ Sycamore
Mark Wall QC
Helen Woods, Carter Lemon Camerons LLP

© Crown copyright 2012  
Produced by the Ministry of Justice

You may re-use this information (not including logos) free of charge in any format or medium, under the terms of the Open Government Licence. To view this licence, visit <http://www.nationalarchives.gov.uk/doc/open-government-licence/> or email: [psi@nationalarchives.gsi.gov.uk](mailto:psi@nationalarchives.gsi.gov.uk)

Where we have identified any third party copyright material you will need to obtain permission from the copyright holders concerned.

Alternative format versions of this report are available on request from Judicial Policy, 020 3334 3853, [graham.mackenzie@justice.gsi.gov.uk](mailto:graham.mackenzie@justice.gsi.gov.uk)