

**RESPONSE BY THE LONDON SOLICITORS LITIGATION ASSOCIATION TO THE  
GOVERNANCE OF BRITAIN: JUDICIAL APPOINTMENTS CONSULTATION PAPER (CM 7210)**

**Introduction to the LSLA**

The London Solicitors Litigation Association (“LSLA”) was formed in 1952 and currently represents the interest of a wide range of civil litigators in London. It has some 800 members throughout London among all the major litigation practices, ranging from the sole practitioner to major international firms.

Members of the LSLA Committee sit on the Civil Justice Council, the Civil Rule Committee, The Law Society Civil Litigation Committee, the Commercial Court Users Committee and the Supreme Court Costs Group, to name but a few. Representatives from the City of London Law Society and the City of Westminster and Holborn Law Society also sit on the LSLA Committee. As a consequence, the LSLA has become the first port of call for consultation on issues affecting civil and commercial litigation in London, and it has on many occasions been at the forefront of the process of change.

**Preliminary Comments**

The LSLA members as litigation solicitors have substantial experience of the judiciary at all levels of disputes but particularly in the High Court and above. However, our members are not involved in the judicial selection process itself, and do not have a detailed knowledge of the workings of the Judicial Appointments Commission (“JAC”).

The changes to the judicial appointments procedures that were brought in by the Constitutional Reform Act 2005 are generally supported in principle by the LSLA. However, since the changes were only implemented in 2006, and the consultation paper does not provide statistical or other evidence of the JAC’s performance so far (nor a comparison with the performance of the previous systems for judicial appointments), it is at this stage very difficult to assess how the changes have been operating in practice or the effect of them on the judiciary who have been appointed. The LSLA hopes that the new procedures will ultimately lead to more solicitors being appointed to the judiciary, as solicitors are greatly under-represented in the judiciary at present compared to barristers.

Our responses to the specific questions in the consultation paper are set out below.

**Question 1: Do you consider these principles for judicial appointments to be broadly right?**

Yes. In our view the most important of the fundamental principles are (in order of importance): appointment on merit, and having an independent judiciary (free from political interference). These are absolutely vital in order to uphold the public trust and confidence in the judicial system, both for British litigants and those from overseas. As the consultation paper records, the judicial system in England is highly respected globally, and is a key factor in London being one of the largest centres for international dispute resolution.

With regard to the third fundamental principle in the consultation paper, namely, equality, this seems to encapsulate two different aspects. First, equality before the law and judicial fairness when giving decisions, which the LSLA believes to be very important. Second, equality of opportunity for judicial applicants in the selection process, coupled with a desire to achieve a greater diversity of candidates, which the LSLA also supports. The LSLA considers that greater diversity among judges is highly desirable but great care must be taken to ensure that appointment on merit is not sacrificed in the interests of bringing about, or accelerating, greater diversity.

There are additional judicial qualities of integrity, propriety and impartiality included in various international guidelines (such as the 'Basic Principles on the Independence of the Judiciary' adopted by the United Nations in 1985) referred to in paragraph 2.21 of the consultation paper. In our view these fall within the first, second and third fundamental principles, namely, an independent judiciary, appointment on merit, and equality; to some extent they are qualities desired in individual judges as opposed to (or in addition to) the selection process itself.

The fourth and fifth fundamental principles of openness and transparency, and efficiency and effectiveness are also key factors in a fair judicial selection process, and the LSLA supports them.

**Question 2: Are there any other fundamental principles that should underpin the process for judicial appointments?**

See our response to Question 1 above.

**Question 3: Do you consider the existing arrangements for making judicial appointments properly take account of these principles?**

Broadly, yes they do – at least in principle. In particular, there is now obviously more openness and transparency to the judicial appointments system, and greater independence of the judiciary from the executive (particularly a greater perception of independence).

However, given that the LSLA's members are not involved in the judicial appointments process itself, and that the consultation paper provides no evidence of the JAC's performance so far (nor any comparison with the performance of the previous system), it is difficult for us to comment further on the workings of the existing arrangements.

In theory, the existing arrangements would take account of the fundamental principles to an even greater extent if the executive had no role to play in the process, or if the executive's role were diminished. However, in practice it is arguably desirable for the executive to have a limited input for the reasons stated in the consultation paper 4.13 to 4.16). There may also be constitutional difficulties with disposing of the executive's role in the process altogether (as referred to in paragraphs 4.17 and 4.18), namely, that the judiciary is technically appointed by the Queen, who acts on the advice of her Government Ministers; it would be difficult for them to give this advice if they had no role at all in the process.

In terms of the judicial appointment systems of other countries, it is notable that of the 19 nations (including the UK) surveyed in Appendix B and Table 1 of the consultation report, all but 3 are appointed by the executive (14 nations) or by the legislature (2 nations). In only 8 of these (including the UK) is there recommendation or screening by a separate judicial appointments body. Only in 3 countries is the selection and appointment of judges made by a separate judicial appointments body. In our view, therefore, the UK compares favourably with most of the other countries highlighted in the Consultation Paper.

**Question 4: Should the current role of the executive in judicial appointments be altered? If so, how?**

In the LSLA's opinion, it is vital to have a system abiding as closely as possible to the principles referred to above. However, we recognise that no system is perfect and every system will inevitably involve some degree of compromise of the fundamental principles. Given that changes were made in 2006 to the system of judicial appointments in England and Wales, we consider that statistical and other evidence should be obtained as to how the current system is operating in practice, and the present system should be given further time in which to operate before deciding on whether further changes are desirable.

**Question 5: Should the current role of the judiciary in the process be altered, and if so how?**

See Question 4 above. The LSLA is in favour of the judiciary having a key role in the selection of judges, which the new system permits them to have. The LSLA regards the role of the judiciary as necessary for the preservation of appointment on merit as one of the two most important fundamental principles.

**Question 6: Whether or not there is a change in the role of the executive or the judiciary, should the legislature be involved in the process in some way, for example by holding post-appointment hearings? If so, how?**

No. The LSLA believes that the involvement of the legislature in the judicial appointments process would make the system less efficient (particularly given the existing demands on Parliamentary time) with no obvious benefit in terms of the independence and competence of those being appointed. Furthermore, by increasing the legislature's involvement in the process, this is likely to bring in a degree of politicisation into the judiciary in a similar way to that of the US. This in our view is more likely to compromise than enhance judicial independence.

**Question 7: Should any change to the arrangements for judicial appointments be across the board, or should it apply to a group of appointments, for example by removing the Lord Chancellor from the process of appointment for all but the senior judiciary?**

This would depend upon the changes being proposed. Assuming that the executive should oversee the appointments process, it seems to us that the Lord Chancellor is best placed to do that. This is subject to the answers in Questions 8 -12 below.

**Question 8: Should there continue to be some check (currently exercised by the Lord Chancellor) on recommendations from the JAC? And if so, who is best placed to perform that role?**

In light of the comments above, we believe that the consultation paper does not contain any cogent reason for a change to the present system. The Lord Chancellor seems to be best placed to carry out such a role. We do not see a need for the Prime Minister to have a role in senior judicial appointments, and consider that this could be done by the Lord Chancellor.

**Question 9: Should the need for consultation or concurrence be removed for decisions on authorisation, nomination, assignment, and extensions of service?**

We have no comment on this point.

**Question 10: Should the Lord Chancellor's functions in making or recommending judicial appointments be exercisable by junior Ministers or senior officials, or should the Lord Chancellor always exercise those functions personally?**

Again, the LSLA and its members have no experience of how the Lord Chancellor carries out these functions in practice. If these functions for posts below the level of a High Court judge could be more efficiently carried out by junior Ministers or senior officials, we cannot see why they should not do so. However, we believe that senior appointments (in the High Court and above) should be carried out by the Lord Chancellor personally.

**Question 11: Should the Lord Chancellor be required to act personally when making or recommending judicial appointments above a certain level, and if so, what should that level be?**

See Question 10.

**Question 12: Should it be possible for junior Ministers or senior officials to act on behalf of the Lord Chancellor, when his concurrence or consultation is required in relation to nominations, authorisations, assignment, or extensions of service?**

See Question 10.

**Question 13: Do you agree that the Lord Chancellor should ultimately have the responsibility for determining eligibility criteria for specific judicial posts?**

We do not have a strong view on this. On balance, it may be preferable to require any changes for determining eligibility criteria to be approved by both the JAC and the Lord Chancellor.

**Question 14: Should medical checks be carried out earlier in the selection process?**

Yes. This would improve the efficiency of the judicial appointments system: earlier medical checks would save time and allow posts to be filled more quickly.

**Question 15: Should the CRA be amended to allow the Judicial Appointments Commission to take the preliminary steps in a selection process before a formal Vacancy Notice is received?**

The LSLA have no experience of this, but such a change sounds sensible.

**Question 16: Are there, in your view, any additional changes that should be made to the judicial appointments process?**

Not at this stage. As set out above, we suggest that the present system be allowed to operate for a further period (perhaps 5 years from when the changes were introduced in 2006), and then for the JAC's performance to be evaluated by reference to statistical and other evidence.

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