CHANCERY BAR

Response of the Chancery Bar Association (ChBA) to the Ministry of Justice Consultation "Appointments and Diversity: A Judiciary for the 21st Century"

1. The Chancery Bar Association is one of the longest established Bar Associations and represents the interests of over 1,100 members handling the full breadth of Chancery work at all levels of seniority, both in London and throughout England and Wales. It is recognised by the Bar Council as a Specialist Bar Association. Full membership of the Association is restricted to those barristers whose practice consists primarily of Chancery work, but there are also academic and overseas members whose teaching, research or practice consists primarily of Chancery work.

2. Chancery work is that which is traditionally dealt with by the Chancery Division of the High Court of Justice, which sits in London and in regional centres outside London. The Chancery Division attracts high profile, complex and, increasingly, international disputes. In London alone it has a workload of some 4,000 issued claims a year, in addition to the workload of the Bankruptcy Court and the Companies Court. The Companies Court itself deals with some 12,000 cases each year and the Bankruptcy Court some 17,000.

3. Our members offer specialist expertise in advocacy, mediation and advisory work across the whole spectrum of finance, property, and business law. As advocates they litigate in all courts in England and Wales, as well as abroad.

4. This response is the official response of the Association to the Ministry of Justice Consultation "Appointments and Diversity: A Judiciary for the 21st Century" (reference number: CP19/2011). It has been produced by Amanda Tipples QC, Mark West, Ian Clarke and Ruth Hughes, all of whom are members of the Committee of the ChBA, and has been approved by the full Committee.

<u>Question 1</u>: 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)

Yes. Given that the Lord Chancellor accepted 685 out of 686 recommendations for judicial appointments made by the JAC in the course of 2011 (Consultation Paper para. 36), it is difficult to see why he needs, or should have, any decision-making role and power in relation to judicial appointments, at least below the level of the Supreme Court. This is because his role in that regard appears *de facto* to be utterly minimal in any event.

More fundamentally, however, we question in principle whether it is appropriate for the Lord Chancellor to have a decision-making role and power in relation to judicial appointments, at least below the Supreme Court. The Constitutional Reform Act 2005 reinforced the separation of powers, inter alia by bringing the role of the Lord Chancellor more squarely within the executive branch of government, so that he is no longer a judge and no longer exercises any judicial functions. Indeed under s. 2(2)(e) of the CRA he no longer need have any legal qualification, but merely such experience as the Prime Minister considers relevant. If the separation of powers is to be taken seriously, the process of judicial appointment should be altogether removed from executive interference (or the appearance of such interference). The Lord Chancellor's overarching responsibility for the effective operation of the justice system as a whole does not require him to have a decision-making role in relation to an individual appointment.

We would, however, note the counter-argument. That is that the practical result of making this change would be either (a) that the Lord Chief Justice would effectively rubber stamp the decision of the Judicial Appointments Commission, so that the JAC, a non-elected body with no direct political accountability, would effectively make all such appointments or (b) that the Lord Chief Justice was at risk of having his office politicised to the extent that he

ever exercised an independent discretion. One might also question the resource implications for the Lord Chief Justice and his office.

<u>Question 2</u>: 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)

We can see that there is a need to collect and publish data on the diversity of Deputy High Court appointments as is done for other judicial appointments. We also agree that there should not be a full JAC selection exercise for Deputy appointments (not least since the JAC will already have been previously involved in the selection of the Recorder or Circuit Judge – or other judge, on which see below - and because the need to make such an appointment may arise at short notice in particular cases) and that the responsibility for the appointment of s.9 judges should remain a matter for the appropriate Head of Division.

We agree, however, that the process should be put on a more formal footing, so that vacancies are advertised and applications invited, with appropriate procedures for selection amongst shortlisted candidates.

In order to ensure the maximum flexibility for the appointment of Deputy High Court Judges we would recommend that the personnel from whom such appointments are made should be expanded to include Judges of the Upper Tribunal and the Patents Court and Masters and Registrars of the High Court.

<u>Question 3</u>: 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)

No. The same considerations apply as we set out in 1 above.

Furthermore, the present process at least has the advantage that the role of the Lord Chancellor is clearly defined in that he can accept or reject the nominations put forward by the panel or ask for them to be reconsidered. For that defined role to be replaced by a more nebulous consultation which would require the panel to "take account" of the Lord

Chancellor's views (whatever that means cf. the present – and unresolved - argument as to the extent to which the Courts are obliged to "take account" of or "have regard to" to the decisions of the European Court of Human Rights) would offend against the basic principle of transparency which is supposed to be one of the hallmarks of the new appointments system.

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)

Yes. We have no reason to believe that the present arrangement has caused any difficulty in practice and we note that the casting vote provision appears never to have been used, but in principle a selection panel at whatever level should have an odd number of members to avoid a tie-break provision having to be used.

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

Yes. If the appointee is in practice working alongside the Lord Chief Justice rather than the most senior Supreme Court Justice, it is more appropriate for the former rather than the latter to chair the selection panel.

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

No. We see no reason to depart from the present arrangement. Given that under it the Supreme Court Justices only number 2 out of the 5 members of the panel, there is no real basis for an argument that the selection process would or might result in the appointment of a candidate who does not meet the merit criteria but who does "fit in".

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)

No. Whilst we agree that the selection panel should be increased from 4 to 5 members, the Lord Chancellor should certainly not be that additional member. Far from implementing or advancing the policy of the CRA as to the separation of powers, it would reintroduce precisely the sort of concerns over possible (or perceived) political interference with judicial appointments at the highest level which the new system was designed to avoid. It is not enough to say that the Lord Chancellor would be but one of the 5 members of the panel. This is because even the potential for executive interference is insupportable in principle. Further, he should not in any event have a right to veto the nomination made by the 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)

No. We see no reason to depart from the present arrangement. If the concern is that the most senior English and Welsh Supreme Court Justice has limited experience of the responsibilities or leadership skills required for the role (which we think is inherently unlikely in any event), the concern can be met by allowing the most senior English and Welsh Justice to appoint another English and Welsh Justice with the relevant experience in his stead.

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)

No. We refer back to what we said in 7 above.

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

We agree that it is not appropriate for the departing President of the Supreme Court to be part of the selection panel which appoints his successor.

We consider that the most appropriate person to chair the selection panel is the Deputy President of the Supreme Court or (if he or she is applying for the post of President) the most senior Supreme Court Justice who is not applying for the post.

We agree that the panel should consist of 7 members rather than 5 to take account of representation from Scotland and Northern Ireland in the appointment of the President, but we have made clear our opposition to the proposal that the Lord Chancellor be part of the panel for the reasons set out above.

We do not agree that there should potentially only be three members of the judiciary on the panel. Given the importance of the position as President of the Supreme Court we consider that it is imperative that the views of the judiciary be given more weight in determining his or her appointment. We consider that the panel should be made up of

The Deputy President (or the next most senior Justice) as chair

A Second Supreme Court Justice

A senior nominated judge from one jurisdiction within the United Kingdom

A second senior nominated judge from another part of the United Kingdom

A Representative from the JAC of England and Wales

A Representative from the JAB of Scotland

A Representative from the JAC of Northern Ireland

In that way the Supreme Court itself would have only 2 out of 7 members of the panel and the two nominated senior judicial members would be from different jurisdictions within the United Kingdom. Whilst under this proposal the judiciary would constitute the majority of the members of the panel, the composition of that majority would not allow for the subconscious appointment of a President in the existing image, but would rather harness and reflect (a) the importance of the Supreme Court, (b) the existing judiciary as the most

likely source of future members of the Supreme Court and (c) the importance of the different jurisdictions within the United Kingdom.

In order to maintain proper lay involvement in the appointment, we agree that at least two members of the panel should be lay members. There should always be a gender and, if possible, an ethnic mix on the selection panel.

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

No. As stated above, we consider that the most appropriate person to chair the selection panel is the Deputy President of the Supreme Court, or (if he or she is applying for the post of President) the most senior Supreme Court Justice who is not applying for the post.

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

Yes. The involvement of the Prime Minister is a relic of the previous system. It has no role in the current system and is merely productive of duplication and delay. We consider that it can safely be abolished.

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)

In principle we have no objection to the extension of salaried part-time working to the High Court and above. If the principle is extended to the High Court we can see that there may be a need to remove (or raise) the statutory limits on the number of judges: that may raise financial questions in a time of straitened economic circumstances which are beyond our remit to answer.

<u>Question 14</u>: 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)

No. In the first place the provisions of s.159 of the Equality Act only apply where "A is as qualified as B to be recruited or promoted". We seriously doubt whether two different candidates are ever "equal" or "essentially indistinguishable" in that sense and suggest that there really is no such case. Indeed, the JAC informed us by email on 31 January 2012 (and this was confirmed by email from the Ministry of Justice on the same day to similar effect) that, to date, it has been able to make all its selections on merit in accordance with its statutory duty and the situation posed in this question has never arisen, even though the Consultation Paper records (at paragraph 16) that since its creation the JAC has made almost 2,500 selections. If that is indeed the case it is difficult to see what purpose is served by the proposed amendment, apart from falsely raising expectations, when in fact the provision will never be used.

More fundamentally we are concerned that either in reality or as a matter of perception people will think that, if the proposed amendment is made, from the current position where appointment is "solely on merit", henceforth in a non-equal position one candidate with a protected characteristic is being preferred over a candidate who does not have a protected characteristic and that positive discrimination has been introduced into the selection system. That could in fact be more damaging on an individual basis to those appointed than otherwise **and** severely risks undermining confidence in the judiciary. Any perception that those with protected characteristics have obtained an appointment otherwise than strictly on merit would also be extremely damaging more generally for the promotion of diversity across the judiciary.

If the amendment were made the question would inevitably arise whether there should also be a general requirement to state where the section was in fact employed on the occasion of any particular appointment(s), whether to the other candidate(s) or to the world at large. In the event that there were no such requirement, could it be said that the process of appointment was in fact transparent? But if there were such a requirement, it would be

likely to have the consequence of diminishing the status of those with protected characteristics to whom the "tie-break" never needed to be applied, because they were clearly the best candidate for the job. If, on the other hand, there were a specific announcement that the tie-break provisions have been applied, that would cast a shadow over the appointment of that particular judge.

In addition, the proposal seems to us to be seriously flawed in this respect. The Consultation Paper suggests that it is concerned with all protected characteristics (see footnote 2), but it is not. There is information about two protected characteristics, namely ethnicity and gender. There is very little or nothing about disability, sexual orientation, religion and belief, age, marriage, gender reassignment, pregnancy or maternity (although perhaps the question about flexible working goes to these last two). Question 14 seems to envisage a situation where there are two “equal” candidates, one of whom has a protected characteristic that is “underrepresented in the workforce” and the other of whom does not, so that the positive action provision can be invoked in favour of the one. But suppose that the other candidate also has such a protected characteristic, albeit different from that of the first candidate: which characteristic is to trump the other? We do not see that there is an answer to this question and this is a further reason why this proposal is seriously flawed.

We also consider that "age" in this context is likely to produce significant difficulties, given that it is highly unlikely that a selection panel will have two candidates of exactly the same age. In relation to judicial appointments, it is not clear whether, absent the Equality Act, the tendency would be to discriminate against those who are young (and therefore seen as lacking experience/gravitas) or those who are old (and therefore seen as too close to retirement, or out of touch). Perhaps both. If there is a tie-break between a younger man and an older woman, does the younger man have a protected characteristic? Or would an older man have a protected characteristic as against a younger woman?

Finally, the application of the tie-break clause would, if it were to be consistent, require

candidates to declare *all* protected characteristics: there could be no option to refuse to state one's sexual orientation, religion etc. This would inevitably result in a very intrusive application process, which may itself tend to discourage those with protected characteristics, and perhaps those without them, from applying.

<u>Question 15</u>: 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?

No. The proposal seems to us both to undermine judicial independence and to undercut judicial expertise obtained over time. The appropriate long stop should be age of retirement, not length of appointment.

If the proposal is enacted it will very significantly increase administration and costs in recruiting and training part-time judges at a time of budgetary constraints and will seriously limit the skill and experience which the people undertaking that role actually acquire. Given that part-time posts entail sitting for between 15-30 days a year there is a clear limit to the amount of experience which can be obtained even over a 5 year period. Indeed, budgetary constraints may mean (as has been the case with the last round of civil recorder appointments) that opportunities to sit will be few and far between.

It can take up to a year for a fee-paid judge, such as a recorder, to be fully trained and start sitting. Therefore, in the first 5 year period, he or she may sit for only 12 weeks (but up to 24 weeks). The training and judicial expertise gained in that relatively short period will all be lost if the appointment ceases at the end of 5 years. It seems to us bizarre to train up part-time judges (an expensive and time-consuming process in itself) to a peak of expertise only to remove them from office (save in exceptional cases) once that expertise has actually been gained. For good constitutional reasons there is no 15 year limit on salaried judges being in post and there is no justification for the proposed limitation in the case of fee-paid judges either.

Whilst a view was expressed in favour of a time limit on appointments, even that was on the

basis that the appointment should be for 15 years (or until 70 years old), with no renewable periods of 5 years, and with the possibility of re-appointment after the 15 years (which might after all only take some Recorders aged 35-40 when appointed up to their 50-55th birthdays). However, as we have set out above we do not think that there should be a 15 year limit on salaried judges being in post.

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

We agree that the number of the Commissioners should be reduced, although we do not consider that the decision should be primarily costs driven. It is doubtful that the quality of the decision-making process is enhanced by a multiplicity of decision-makers, more fundamentally one of the most searing criticisms of the present system is the inordinate and extraordinary delay which seems to be a concomitant of the appointments process. Any steps towards making the Commission a smaller and swifter body is to be welcomed.

That said, the reduction in the number of Commissioners must inevitably lead to a corresponding increase in the influence of the remaining Commissioners. One of the recurring themes in the consultation paper is the need to guard against the risk of appointing in one's own image and likeness. If that be the case serious consideration must be given, whilst reducing the number of the Commissioners, to reducing the term of appointment of each remaining Commissioner from 5 years to 3 years and to providing that a person may not hold office as a Commissioner for periods (whether or not consecutive) totalling more than 6 years (and thus amending the provisions of paragraph 13 of Schedule 12 Part 1 of the CRA which currently provide that a person (a) may not be appointed as a Commissioner for more than 5 years at a time, and (b) may not hold office as a Commissioner for periods (whether or not consecutive) totalling more than 10 years).

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

Yes.

<u>Question 18</u>: 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)

Yes. Although there is something to be said for the proposition that the JAC should deal with appointment to offices which do not require a legal qualification on the grounds that they nevertheless involve appointments to judicial bodies, we consider that the requirements of flexibility and speed are better suited to an amendment to the CRA to make such a change possible.

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

No. Whilst we can see the benefits of flexibility and efficiency and not wasting parliamentary time, we question whether allowing matters such as amendments to terms of judicial appointments, particularly when they affect the appointment of the President and other members of the Supreme Court and the other extremely senior judiciary, are appropriate maters for secondary legislation. Such issues are fundamentally important and should be reserved for primary legislation.

<u>Question 20</u>: 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?

We would refer to the submission which the ChBA made to the House of Lords Select Committee on the Constitution on 5th July 2011 on the Judicial Appointments Process which should be read in conjunction with this paper. It can conveniently be found at http://www.chba.org.uk/library/responses_to_consultation_papers/?a=98448

<u>Question 21</u>: 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?

We have referred to a number of matters above. Other than these there are none of which we are aware.

<u>Question 22</u>: 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?

There are none of which we are aware.