HOUSE OF LORDS: SELECT COMMITTEE ON THE CONSTITUTION

THE JUDICIAL APPOINTMENTS PROCESS INQUIRY

EVIDENCE FROM THE CHANCERY BAR ASSOCIATION

1. This is the response of the Chancery Bar Association (ChBA) to those of the 22 questions in the call for evidence on which we feel able to contribute evidence of some value. This is not the evidence of any one of us, or of the Chairman, but reflects opinions of committee members and of those individual members who responded to our call for contributions.

2. In view of the invitation to submit ideally no more than 6 pages of evidence, we have limited the questions to which we respond and kept our evidence succinct. We are happy to elaborate on our evidence in writing or orally if so requested.

Question 1: current operation of the judicial appointments process.

3. The central characteristics of the process that currently operates are: open competition, supported by publicity and encouragement of a breadth and diversity of applications; substantial independence from the executive; lay participation; and obscured decision-making processes.

4. The consequence of the open competition is that a large number of applications are received, up to about ten times the number of posts advertised. This in turn necessitates some form of initial sift to reduce the applicants to a number that can realistically be investigated and assessed in detail. For competitions below the level of High Court Judge, the initial sift is by way of written examination. We have real concerns whether that examination is being conducted by the JAC in a balanced, fair and transparent way. (See Q13 below.)

5. For there to be such a problem with the process by which more than two-thirds of the applicants are eliminated from the competition casts a heavy shadow over the performance of the JAC. In our view, the JAC is in principle an appropriate way to continue to make judicial appointments, in view of the constitutional role of the judiciary; but the JAC's processes must be significantly improved (see Q2 below), and more weight should be given to the assessments of the judicial representatives both on the Commission itself and those on panels conducting the interviews of the candidates. Although lay representation is to some degree beneficial in maintaining the integrity of the system, and in making it politically acceptable, we very much doubt whether a lay member of the Commission or of a panel is best placed to assess the very particular and special qualities required to make a lawyer a good judge. We would wish to see greater involvement within the JAC given to the judiciary.

Question 2: transparency and accountability

6. A resounding "no" to this question. Neither the initial sift nor the final selection is transparent. The identity of those who make the decision is concealed. Although the Committee as a whole takes responsibility for appointments, it is self-evidently the case – and was confirmed by Jane Andrews of the JAC at the 2009 ChBA Annual Conference – that usually it is the unidentified panels who make the selections.

7. Although the JAC offers feedback to unsuccessful candidates, this has been found to be entirely unspecific and of no value. Candidates are not told what score they achieved on the sift; what the pass mark was; or what they did wrong or failed to do in interview or role play. This important information, which would assist unsuccessful candidates to consider whether or not to apply again (or indeed to find out whether or not a mistake might have been made in their assessment), and to assist successful candidates to know whether they stand a real chance of applying for a more senior appointment later, is withheld.

8. The JAC publishes statistics of mind-boggling detail on the background of applicants and their success or failure rate as a group (e.g. BME solicitor candidates) after the completion of each competition. It is clear that a huge amount of money must be spent compiling this. But it is of no actual value to successful or unsuccessful candidates or to aspiring candidates in future competitions. After all, if the success rate of female BME candidates is 14% and there was one successful candidate out of seven, what does that tell the unsuccessful six or the ten new candidates contemplating entering the following year's competition?

Question 4: constitutional principle of independence of judiciary

9. In general, we would agree that the system of appointments of judicial posts below the Court of Appeal gives adequate regard to the principle of the independence of the judiciary; that is, independence from the executive and legislative arms of government. JAC committee members are appointed on the recommendation of an independent appointments commission, not by the executive or the Lord Chancellor. And the JAC recommends the appointees to the Lord Chancellor, subject to his limited right to ask the JAC to revisit any recommendation that they make.

10. However, the independence of the judiciary connotes its ability and willingness to stand up to the executive and the legislature and the subsidiary organs of government, by declaring their actions, decisions or legislation to be unlawful where it is appropriate to do so (and indeed its willingness to uphold government against the little man where that is appropriate). The correct and cost-effective discharge of this function depends on the very best available judges being appointed to their positions. So unless the JAC is conducting processes that are effective

in selecting the best judges from the applicants, the operation of the constitutional principle is in danger of being undermined.

Question 5: effect of recent reforms on quality of judicial appointments

11. In our judgment, the 2005 reforms have not had any discernible effect on the quality of High Court appointments. The quality of such appointments can best be judged by asking senior advocates who appear before them and appellate judges who have to consider whether or not their judgments are correct, or reasonable. From our position (as senior advocates), we feel that the quality of High Court judges remains, as it has always been, uniformly high.

12. We are less sanguine about the uniformity of quality of circuit judges, recorders and (particularly) district judges before whom our members regularly appear. Undoubtedly there never has been the uniformity of quality found on the High Court bench: whereas some circuit judges are of comparable excellence and experience to red judges, others are not.

13. Our impression is that, at the lower levels of judiciary, the quality of judges has become more hit and miss in recent years. Some appointments are very strange (e.g. appointment of purely transactional lawyer as circuit judge to hear criminal trials, or appointment of specialist judge without specialist background); others are baffling in terms of the apparent inadequacy of the appointee. Changes in the process of appointment of these judges seem to have resulted in more rather than fewer inappropriate appointments having been made.

Question 6: speed and efficiency of appointment process

14. We believe that the process is too slow and therefore, presumably, inefficient. To take but one example, some of our officers were appointed Recorders in 2009. The application deadline was 21 January 2009; the written examination took place in April; the interview and role play exercise in June; informal notice of likely appointment or non-appointment was sent in early August, but formal appointment was not notified until late October. Training was then between January and March 2010. So in total at least 15 months elapsed between application and first sitting. This experience has been repeated in relation to other competitions.

15. Before 2005 there was no formal system for competitions for appointment, so comparison is not likely to be informative nor is it, from our perspective, easy to make.

16. Similarly, we have no information about the cost of the current exercise, so cannot comment on that.

Question 7: impact on diversity

17. In our view there has been some change, though not a significant one. There are apparently more women and BME appointees, but whether this is a reflection of the changes in the appointment process or simply a reflection of the increasing number of women and BME lawyers in practice today is difficult to say.

18. In our view diversity is a legitimate factor to bear in mind as part of the appointment process but only to a defined extent. It is a legitimate consideration because of the importance of the judiciary being seen to be representative of the public that it serves, thereby generating public confidence in the judiciary. However, it is even more important that the best possible judges are appointed from the pool of applicants, regardless of gender, religion, ethnic background or colour. It is not the case, nor should it be the case, that judges are "matched" with the ethnicity of the litigants before the court. It therefore does not matter, at the level of an individual case, whether litigants of Indian descent have their case determined by a Judge of white European descent or of black Caribbean descent. But it does matter that the judiciary as a whole is seen not to be the means of imposing values and judgements of only a small (and elite) part of the population.

19. In our view, diversity is a legitimate factor to bear in mind at the stage of seeking to encourage as wide a range as possible of applicants for given judicial posts. It is clearly in the public interest that women and minority candidates are available for selection. But once available, they should be selected strictly on merit, and not on the basis of quotas or of reverse discrimination. One only has to see how cases are dealt with in local county courts to realise how important it is that at every level the best possible judges are appointed to do justice between parties.

Question 12: compulsory retirement age

20. We are not sure whether this question relates only to Supreme Court Justices – it appears beneath the sub-heading "Appointments to the UK Supreme Court" – or whether it applies to all judicial appointments. We think probably the former as only for Supreme Court justices is there no discretion to extend sitting beyond the age of 70.

21. In case it is of general application, however, our view is that a compulsory retirement age of 70 is inappropriate for judges. At a time when retirement ages generally are expected to increase, and people are expected to live substantially longer, it is wrong to force able judges to retire at 70 years of age. Such a retirement age tends also to discriminate indirectly against women and BME lawyers, whose progress through the professional ranks may be slower than others. Couples, particularly where both are professionals, tend to have children later in life than they did 20 years ago, which means that either or both of them may not be in a position to, or be

willing to, contemplate a full-time judicial appointment until their mid-50s. That means that, with a compulsory retirement age of 70, they will be unable to complete 20 years' service for a full pension entitlement.

22. In our view, there should be a presumption in favour of retirement at 72 or 73, but with the possibility for a Judge to be certified (medically and by senior judiciary) fit for service for additional years (one at a time) up to a maximum of 75 years of age.

Question 13: assessment of performance of JAC since 2006

23. In our view, the JAC has lamentably failed to establish an appropriate, consistent and fair system for selection of judicial appointees.

24. It is evident that the system for appointment of lower judiciary (up to and including circuit judges) does not have the confidence and support of would-be applicants. It is believed that there are strong dissenting views among the Commissioners themselves as to the appropriateness of the written test.

25. Following the competition for Civil Recorderships in 2009, we surveyed our members on the quality and fairness of the written examination. 35 respondents were almost universally damning about the fairness of the test. (It should be added that all but two of these responses were received before the outcome of the examination was known, so responses were unaffected by individual success or failure in the examination.) We send with this evidence a copy of the Report we produced and sent to the JAC following that exercise, and draw attention to the third appendix at the end, which is a tabular summary of responses and which illustrates starkly the extent of dissatisfaction.

26. Unfortunately, this failing is not a one-off. There is substantial other (admittedly anecdotal) evidence of similar failings with other tests. There is also evidence that the tests do not succeed in selecting some of the strongest candidates on paper. While it would not be surprising if some of the strongest candidates on paper were not selected at the end of the process, it is surprising and troubling that such candidates do not even progress pass the initial sift. Only after this sift are candidates' application forms and references considered.

27. Following the debacle of the 2009 Civil Recorder competition, where the written test was far too difficult and unfair, it appears that the most recent written examination, for Family and Crime Recorders in June 2011, was too easy and heavily favoured those who specialise in that work. Anecdotal evidence suggests that experienced family lawyers outside the test room remarked that the paper would not even have tested their pupils in chambers sufficiently. It is the apparent inability of the JAC to get the standard of test consistently right, or to devise a better method of conducting the first stage of initial selection, that causes us real concern.

28. At the level of higher judicial appointment, the results of the process seem to show that the JAC is performing reasonably well. It may be, therefore, that the process for selection of lower judiciary has something to learn from the process employed for the selection of High Court Judges. If that process is more labour intensive and costly, so be it: what could be more important than money spent on ensuring that each and every judicial appointment is of someone who is (a) suitable, and (b) the best candidate for the job?

Question 16: how should the JAC's process be reformed?

29. It should be clear from what we have said above that urgent reform is needed of the way in which the JAC carries out selection exercises. We agree with the Lord Chancellor that developing a more flexible (and appropriate) set of selection activity options is urgently required.

30. We are very alarmed, however, by his suggestion that fewer references should be taken. Presumably this is suggested with a view to saving time and costs. But only 4 references are currently required, which we regard as minimal when a candidate is applying for an important judicial function. The idea that fewer references might be taken is surprising. We consider that references are extremely important, that more weight should be given to them, and that more rather than fewer should be taken.

31. We consider that the judiciary should have a significant role and contribution in the selection of candidates for judicial appointment and welcome the suggestion that the Lord Chief Justice and the senior judiciary should be involved. Whether that is wholly at the expense of the Lord Chancellor's role is a matter on which we are agnostic. It may be appropriate, if one still believes (as we do) that the position of the Lord Chancellor is an important role in Government, that the Lord Chancellor have a part to play in the decision making, and in making recommendations to Her Majesty. But we welcome greater involvement on the part of the existing judiciary generally.

Question 20: does the appointments process cost too much?

32. One cannot easily spend too much money ensuring that each judicial appointee is suitable and the best available candidate at the time. But it may well be the case that money is wasted on aspects of the JAC procedures that can be changed for the better. We would suggest focussing on the appropriateness of the selection procedures, and then, having identified the best procedures, on how any cost savings can further be made. It would be wrong to allow cost alone to determine the procedure.