Constitutional reform: 
a new way of appointing judges
CONSTITUTIONAL REFORM: A NEW WAY OF APPOINTING JUDGES

July 2003

A consultation paper produced by the Department for Constitutional Affairs

This information is also available on the DCA website (www.dca.gov.uk) at www.dca.gov.uk/consult/jacommission/

Code number: CP 10/03
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Foreword

By The Lord Falconer of Thoroton
Secretary of State for Constitutional Affairs and Lord Chancellor

This consultation paper constitutes part of the Government's continuing drive to modernise the constitution and the legal system for the purpose of making it more relevant and effective for today's world. The paper seeks views on the form and responsibilities of a new, independent Judicial Appointments Commission which will take responsibility for the selection of judges in England and Wales. A further paper seeks views on a new Supreme Court. Separately and together they deal with issues of great constitutional importance because they focus on changes to the judiciary's relationship with the Executive and the Legislature.

Judges preside not only over the cases which arise in the criminal and civil justice systems but their decisions affect society in many other areas such as human rights, judicial review, family law, mental health and immigration. They are very often entrusted to chair major inquiries whenever an impartial, independent investigation is required.

In all these areas of work England and Wales are well served by judges of the highest calibre. At all levels of our justice system, we are fortunate to have a strong, independent judiciary respected nationally and internationally. We must ensure independence and quality are maintained and strengthened.

Since the Government came to power in 1997, it has made a number of significant improvements to the judicial appointments system. It has made the system more open, and more efficient.

But that is not enough. In a modern democratic society it is no longer acceptable for judicial appointments to be entirely in the hands of a Government Minister. For example the judiciary is often involved in adjudicating on the lawfulness of actions of the Executive. And so the appointments system must be, and must be
seen to be, independent of Government. It must be transparent. It must be accountable. And it must inspire public confidence.

There is a second point. As the existing Commission for Judicial Appointments pointed out in its first annual report, the current judiciary is overwhelmingly white, male, and from a narrow social and educational background. To an extent, this reflects the pool of qualified candidates from which judicial appointments are made: intake to the legal professions has, until recently, been dominated by precisely these social groups.

Of course the fundamental principle in appointing judges is and must remain selection on merit. However, the Government is committed to opening up the system of appointments, to attract suitably qualified candidates both from a wider range of social backgrounds and from a wider range of legal practice. To do so, and, to create a system which commands the confidence of professionals and the public, and is seen as affording equal opportunities to all suitably qualified applicants, will require fresh approaches and a major re-engineering of the processes for appointment. Those processes must be resourced with the appropriate professional skills and expertise and underpinned by modern human resource best practice.

Accordingly the Government intends to establish an independent Judicial Appointments Commission to recommend candidates for appointment as judges on a more transparent basis. There is already such an independent commission in place for selecting judges in Scotland and one forms part of the agreed settlement in Northern Ireland. There will now be one for England and Wales.

Once appointed, judges have security of position – judicial independence depends upon it. So the decision to appoint must be the right one, in every case. But one of the Commission’s central tasks will also be to look at the appointment procedures to see if new and better ways can help in attracting a wider range of people to the judiciary: more women, more minority members, and lawyers from a wider range of practice. Developing a judiciary more broadly reflective of society at large will not be easy and the introduction of an independent
Commission will not be enough in itself to bring about change. It will need a close partnership with the current judiciary and the legal profession, as well as the Government to examine fresh ideas about the nature of judicial careers. The Government does not believe that a career judiciary on the continental model would be appropriate for the common law system of England and Wales but they do believe that new career paths should be looked at to promote other opportunities and diversity in appointments.

Another central theme will be accountability. Those responsible for judicial appointments must be accountable to Parliament without it becoming part of the political process and consideration will need to be given to ensuring that this is achieved.

Furthermore it is important to consider how members of the new Appointments Commission are themselves appointed since the independence from Government of the new Commissioners must be beyond question. These reforms are of very real and lasting importance. They must be implemented in a way which commends the widest possible support.

This paper is intended to promote widespread discussion and debate among the legal profession and the public. I hope that as many people and with as wide a range of views as possible will respond.

Lord Falconer of Thoroton
Secretary of State for Constitutional Affairs and Lord Chancellor
Introduction

This paper seeks views on an issue of constitutional importance. That is proposals for a new Judicial Appointments Commission for England and Wales, on a statutory basis, to recommend candidates for appointment as judges.

This consultation is aimed at as wide a range of people as possible, and is being conducted in line with the Code of Practice on Written Consultation issued by the Cabinet Office. It falls within the scope of the Code. The Code criteria set out in Annex E have been followed.

An initial analysis of the potential changes to the judicial appointments process discussed in this paper did not indicate any impact on businesses, charities or the voluntary sector. Consequently, no formal Regulatory Impact Assessment is attached to the current consultation document but the position will be reviewed in the light of responses to it.

A full list of consultees can be found at Annex D. Those being consulted include the judiciary, legal professional bodies, other professional bodies, Government departments and public bodies.
How to Respond

Please send your response by 7 November 2003 to:

Kerri Sephton
Department for Constitutional Affairs
Legal and Judicial Services Group
5th Floor
PO Box 38528
30 Millbank
London  SW1P 4XB

Tel: 020 7217 4800
Fax: 020 7217 4882
Email: kerri.sephton@dca.gsi.gov.uk

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

The Department may wish to publish responses to this consultation paper in due course. Please ensure your response is marked clearly if you wish your response or name to be kept confidential. Confidential responses will be included in any statistical summary of numbers of comments received and views expressed.

Further copies of this consultation paper can be obtained from Kerri Sephton at the above address or by phoning 020 7217 4800. The consultation paper is also available on the internet at http://www.dca.gov.uk/consult/jacommission/.

Welsh language copies of this consultation paper are available on request.
Executive Summary

The consultation paper deals with proposals for a new Judicial Appointments Commission, which would handle applications from those seeking appointment at all levels of the judicial system.

This paper seeks views on what form and role the new Judicial Appointments Commission will take.

The paper starts with an overview of the current judicial appointments process and a description of recent improvements made by the Government to that process, including the role of the current Commission for Judicial Appointments.

The paper includes a detailed description of the three broad models possible for the Commission. These are:

- a Commission which would take over the Lord Chancellor’s role in directly making appointments up to the level of Circuit Judge\(^1\) and in advising The Queen on appointments at that level and above; or
- a Commission which would make recommendations to a Minister as to whom he or she should appoint (or recommend that The Queen appoint); or
- a Commission which combines the functions above by directly making more junior appointments (for example, part-time judicial and tribunal appointments) and by recommending more senior appointments.

The paper examines additional functions which a new Commission might carry out, and the division of responsibilities between the Commission and the Department for Constitutional Affairs. In particular, views are sought on whether

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\(^1\) With the exception of District Judges (Magistrates’ Courts) who are appointed by The Queen.
the responsibility of the Secretary of State for Constitutional Affairs for preserving judicial independence should be enshrined in statute.

The paper finishes with a closer look at how the membership of a new Commission might be structured. This includes discussion about whether the Commissioners might be appointed by Ministers, by a separate appointing body, by nominated professional bodies (e.g. the Bar Council or the Law Society) or by some combination of the above.

The Government’s proposals

The paper provides an indication of the Government’s preferred model for a Judicial Appointments Commission. In brief, the Government proposes that:

- The Commission should be a recommending Commission, putting up a short-list of candidates for appointment to the Secretary of State [paragraphs 34, 42-48];
- A separate judicial Ombudsman should be established by legislation (broadly fulfilling the role of the existing Commission for Judicial Appointments) [paragraphs 74-76];
- The Commission should be a fully independent Non-Departmental Public Body, established by legislation [paragraphs 77-83];
- The Commission should take day-to-day responsibility for issues related directly to appointments, and for the development of the appointments process [paragraphs 88-89];
- The Department for Constitutional Affairs should retain policy responsibilities for appointments [paragraphs 90-92];
- The Department for Constitutional Affairs should task the Commission with establishing how best to attract a more diverse range of qualified candidates to apply for judicial posts [paragraphs 93-97];
- Most Commission members should be appointed following open competition by an appointing panel (made up of the Permanent
Secretary, a senior judge, a senior figure, not connected to the legal system and an independent assessor) [paragraphs 116, 126-130];

- The Commission should have 15 members (five of whom should be judges, five should be lawyers, and five should be non-lawyers) [paragraphs 118-121].

More detailed information on the existing appointments process along with comparative information on judicial appointments arrangements in a selection of other jurisdictions, including Scotland and Northern Ireland is annexed to the paper.
1 The Current System

1. This chapter provides a brief overview of the current appointments process. It also describes recent improvements to the process and explains why we now need to establish an independent Judicial Appointments Commission.

2. References to the Lord Chancellor in this paper should be read in the context of the Government’s wider constitutional reforms. Lord Falconer was appointed as the first Secretary of State for Constitutional Affairs at the head of the new Department for Constitutional Affairs, which replaced the Lord Chancellor’s Department on 12 June 2003. Lord Falconer was also appointed to the office of Lord Chancellor (including responsibility for the current judicial appointments system), pending the abolition of the existing office of Lord Chancellor. This chapter therefore describes the judicial appointments process as it currently stands in that context.

Responsibility for appointments

3. Appointments to the offices of Lord of Appeal in Ordinary, the Heads of Division of the Supreme Court and Lord Justice of Appeal are made by The Queen on the recommendation of the Prime Minister as the Sovereign’s principal adviser. It has been practice that the Prime Minister seeks advice from the Lord Chancellor in the first instance.

4. Appointment to the offices of High Court Judge, Circuit Judge, Recorder, District Judge (Magistrates’ Courts), Social Security Commissioners, the Judge Advocate General and the Judge Advocate of Her Majesty’s Fleet are made by The Queen on the recommendation of the Lord Chancellor.

5. The Lord Chancellor bears personal responsibility for making a wide range of full-time and part-time appointments to the judiciary, including to
the offices of District Judge (Civil) and Deputy District Judge, and to a wide range of tribunals.

The role of the Department for Constitutional Affairs

6. The administration of the judicial appointments system is carried out on the Lord Chancellor’s behalf by staff of the Legal and Judicial Services Group in the Department for Constitutional Affairs. A principal function of the Group is to supply all the information and advice which the Lord Chancellor requires to enable him to fulfil his responsibilities in this field, and to provide him with the material on which to make a fair and informed judgement about every appointment. This includes corresponding with, informing and interviewing those who are, or may become, candidates for appointment; consulting judges, members of the profession and others as required; recording and filing the results; administering the selection procedures; following and executing the Lord Chancellor's instructions and guidance, both on individual appointments and candidates; providing feedback as required on individual applications and on his general policy. There are currently 140 staff working in these areas. In 2001/2002 the Department received 4225 applications for judicial posts and made 915 appointments - (not including appointments to the lay magistracy, which totalled 1783.) The annual cost of this aspect of the Government’s work is £9m.\(^2\)

Guiding principles

7. The Lord Chancellor may only appoint (or recommend for appointment) to judicial office those who meet the statutory qualifications. Beyond that, the guiding principle which underpins the Lord Chancellor's policies in selecting candidates for judicial appointment is that appointment is strictly on merit. The Lord Chancellor appoints those who appear to him to be the

\(^2\) A small proportion of the work included in these figures related to casework post appointment, and not strictly to the appointments process itself.
best qualified regardless of gender, ethnic origin, marital status, sexual orientation, political affiliation, religion or disability. Decisions on merit are based on assessments of candidates against the specific criteria for appointment.

8. In summary the criteria for appointment are:

- legal knowledge and experience
- intellectual and analytical ability
- sound judgement
- decisiveness
- communication and listening skills
- authority and case management skills
- integrity and independence
- fairness and impartiality
- understanding of people and society
- maturity and sound temperament
- courtesy
- commitment, conscientiousness and diligence

9. The Lord Chancellor has considered it important that those seeking full-time judicial appointments have relevant experience of sitting part-time, and will not normally appoint someone without such experience. The Lord Chancellor has not, however, regarded advocacy experience in itself as an essential requirement for legal appointments to judicial office.

The appointments process

10. A detailed description of the appointments process is provided in Annex A. The appointments process works differently for different levels and types of judicial appointment. Briefly, however, there are six parts to the general selection procedure:

- The first part is the application process. For appointments up to and including the level of Senior Circuit Judge it is necessary to apply in writing to be considered for appointment. Posts are advertised.

3 Or knowledge and experience as required of the post, in the case of lay and specialist tribunal members.
Application forms state the criteria for the job and require candidates to assess themselves against the criteria for appointment.

- The second part is consultation with those who can provide an assessment of the suitability of the candidate. For some competitions, there are consultees who are consulted as a matter of course. Candidates are informed who these consultees are. Candidates may also nominate other people they would like to be consulted. Consultees must link their comments to the criteria for the post, and must provide specific objective evidence.

- The next stage of the process is the sift. The sift is carried out by a panel including a judge from the relevant jurisdiction, a senior official from the Department for Constitutional Affairs, and an independent non-lawyer. The panel consider the candidates application and self-assessment, and the written evidence of consultees.

- The fourth stage is the interview. A shortlist of candidates for interview is put together by the sift panel. The interview panel will either be the same as the sift panel or will be similarly constituted. Questions must be related to the criteria for appointment, and the panel’s assessment must be linked to the criteria.

- The fifth stage is the appointment decision. After the interview the candidate is rated against each of the criteria. Each panel member reaches an independent conclusion and then views are discussed and an overall assessment reached. The Lord Chancellor personally considers all the information available to him on each candidate interviewed, before he makes his final decision. The successful candidate will have best demonstrated they meet the criteria during the whole of the selection process.

- The final stage is feedback. Feedback is offered for unsuccessful candidates, on the views expressed about them in the consultation, and, where appropriate, on their performance at interview.
Making the system more open

11. Since 1997 the Government has worked to improve the system of appointments. A key step in this process came in 1999 when the then Lord Chancellor, Lord Irvine of Lairg, asked Sir Leonard Peach, formerly Commissioner for Public Appointments, to scrutinise the appointments process.

12. Sir Leonard's Report concluded that the procedures were "as good as any" which he had seen in the public sector. But he also made a number of recommendations which the Government has taken forward.

The existing Commission for Judicial Appointments

13. The central recommendation of the Peach Report was that an independent Commission for Judicial Appointments be established to provide oversight of the appointments process.

14. The Commission was established in March 2001, when Sir Colin Campbell was appointed First Commissioner for Judicial Appointments. In addition to the First Commissioner, there are seven Deputy Commissioners, one of whom also serves as Commissioner for Judicial Appointments in Northern Ireland. None of the Commissioners is a practising lawyer or judge.

15. The Commission's role is:

- to conduct an ongoing audit of the judicial appointments and Silk procedures (Commissioners have the right to observe sifts and interviews and have access to every piece of paper, every assessment and every opinion relating to every appointment);

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4 Independent Scrutiny of the Appointments Processes of Judges and Queen's Counsel, Sir Leonard Peach, December 1999
16. The Commission published its first Annual Report in October 2002. The report found that the requirement to make judicial appointments entirely on merit was unquestioned and that the system's record of ensuring the appointment of well-qualified people of impeccable probity was very good. The Commissioners also identified areas of the system that could be improved. They noted, for example, that the quality of responses from consultees was variable, that there was not a clear audit trail for all decisions, and that there was undue delay in the appointments process. The Government recognised these concerns and has instituted a programme of work to address them.

17. It should be stressed that nothing in this paper is intended as a criticism of the existing Commission for Judicial Appointments, which has had a successful first two years. The work of scrutinising the appointments process, and considering complaints about it, is valuable in its own right, and the Commission has already demonstrated its worth in this area. Consideration is given in Chapter 2 to what should happen to the work of the existing Commission when the new Judicial Appointments Commission is established.

Other reforms

18. Other reforms to the appointments process since 1997 have been designed to make the system more open, more accessible and more effective. In terms of openness, key steps have been opening up the system of appointments to the High Court Bench which had been by
invitation only, through allowing all qualified candidates to apply; publicising criteria and appointments procedures at events and conferences, on the Department’s web site and on video; and introducing a judicial appointments annual report to provide an overview of the appointments process, to describe reforms introduced over the year, and to give figures on the appointments made. To make the process more accessible, the Government has removed lower age limits for most appointments and upper age limits for those applying for professional judicial offices5. To make the system more effective, the Government has: involved judicial and lay members in the sift stage as well as the interviews themselves, and piloted an Assessment Centre for the appointment of Deputy District Judges in England and Wales.

The need for a Judicial Appointments Commission

19. Despite this programme of improvements to the current system of appointments, many of the most fundamental features of the system, including the role of the Lord Chancellor, remain rooted in the past. Incremental changes to the system can only achieve limited results, because the fundamental problem with the current system is that a Government minister, the Lord Chancellor, has sole responsibility for the appointments process and for making or recommending those appointments. However well this has worked in practice, this system no longer commands public confidence, and is increasingly hard to reconcile with the demands of the Human Rights Act.

20. In the same way, the central role he has played in the selection of judges has taken up much of the time of successive Lord Chancellors. This has inevitably diverted their attention from the core business of administering the justice system, and in particular running the courts.

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5 Subject to the overall statutory retirement age for most members of the judiciary (up to an absolute maximum of 75 years)
21. The time has now come for a radical change to the judicial appointments system to enable it to meet the needs and expectations of the public in the 21st century. Any system which is introduced must, in addition to ensuring quality, also guarantee judicial independence. A Commission will provide a guarantee of judicial independence, will make the system for appointing judges more open and more transparent, and will work to make our judiciary more reflective of the society it serves. A Commission will also free the Department to focus on its core responsibilities. These benefits are considered in more detail in the following paragraphs. But the Secretary of State for Constitutional Affairs will have a continuing responsibility for ensuring judicial independence. He will, both within Government and publicly, be responsible for defending judicial independence from any attack. Consideration should be given to whether the responsibility should be embodied in statute setting up the Commission.

Judicial independence

22. At present, the entire process for the appointment of judges is effectively in the hands of the Lord Chancellor. It is increasingly anomalous for a minister to run the process in this way. While it is not suggested that the power to appoint judges has been abused in modern times, there is undoubtedly a view that this power is a potential source of patronage over the judiciary and the legal profession which has no place in a modern democratic society. The judiciary today is more than ever before involved, through judicial review, in adjudicating on the lawfulness of actions of the Executive. This role has expanded since the coming into force of the Human Rights Act 1998. If the judiciary is to be seen and trusted as independent of the government of the day, it must be appointed by a process which must be seen to be open and independent.

23. The creation of an independent Judicial Appointments Commission with the appropriate responsibilities and powers will end this breach of the
separation of powers, and will bolster judicial independence. But to do so the Commission itself must be truly independent, rather than merely handing the responsibilities which currently reside with the Lord Chancellor to a political appointee or appointees.

Improving credibility and legitimacy

24. In order for the judiciary to continue to command public confidence, it is vital that the process by which judges are selected and appointed must also command confidence. The present judicial appointments system has come under increasing scrutiny and challenge in recent years. Rightly or wrongly, the existing procedures are commonly seen as unaccountable and lacking in transparency. They are perceived by many to be systemically biased. Whether or not the system really is biased, the perception has an impact which is real enough. This perception may damage public confidence in the administration of justice and deters some potential candidates from applying for judicial office.

25. An independent Judicial Appointments Commission will be able to bring a wide range of experience, professional background and fresh ideas to the process, to help ensure that judicial appointments are underpinned by best practice in recruitment.

26. This requires the creation of the processes, systems and culture which are needed to ensure that the selection and appointment procedures are fair, equitable and transparent to all, and which help to ensure the widest range of candidates for the modern judiciary.

Diversity

27. As the existing Commission for Judicial Appointments pointed out in its first annual report, the current judiciary is overwhelmingly white, male, and from a narrow social and educational background. To an extent, this
A New Way of Appointing Judges

reflects the pool of qualified candidates from which judicial appointments are made: intake to the legal professions has, until recently, been dominated by precisely these social groups. The Government, however, is committed to opening up the system of appointments, both to attract suitably qualified candidates from a wider range of social backgrounds and from a wider range of legal practice. To do so, and, to create a system which commands the confidence of professionals and the public, and is seen as affording equal opportunities to all suitably qualified applicants, will require fresh approaches and a major re-engineering of the processes for appointment. An independent Judicial Appointments Commission with appropriate powers will be well placed to take this forward.

28. It should be noted in the context of opening up the appointments process that the fundamental principle in appointing judges is, and must remain, selection on merit. The public must have confidence that judges are independent, impartial and of complete integrity, as well as possessing the intellectual skills and personal qualities of the highest calibre which are required for the discharge of their duties. The present system of making judicial appointments in England and Wales has been successful in ensuring the appointment of judges who have the necessary independence, integrity and ability. There have been no suggestions of the sort of judicial corruption or scandals which have occurred in some other countries. That is a record to be proud of. No changes to the appointments system should risk undermining confidence that the judiciary will continue to uphold that record. The role of the independent Judicial Appointments Commission must be to reinforce the standards of the judiciary.

29. Working with the Government, the judiciary, and the legal profession, a Commission will play an important role in examining how best to increase the diversity of the judiciary, while maintaining its quality. This paper seeks views on how best that can be done.
2 Options for Change

30. Our judiciary enjoy the highest international standing. The Government wants to ensure that the way in which they are selected is as well regarded. It is committed to ensuring that judges and other judicial office holders are selected by a transparent process, independently conducted. It will legislate to make the appointments process the responsibility of an independent Judicial Appointments Commission for England and Wales\(^\text{6}\), which will provide a public guarantee of that independence and transparency.

31. The Lord Chancellor made over 900 judicial and tribunal appointments in 2001-2002. Although he formally made or recommended all of these appointments, and all final decisions were subject to his approval, he could not personally undertake the very heavy programme of sifting and interviewing and his degree of involvement necessarily varied considerably, depending on the level of appointment. The routine work of assessing candidates for all but the most senior posts was carried out by panels involving his civil servants, the judiciary, and lay or specialist members who undertook the sifting and interviewing process. About 140 staff of the Department for Constitutional Affairs are currently involved in this work, including the necessary administrative support.

32. The Commission will be able to look afresh at its tasks and the existing procedures, and to innovate and adapt to make sure that it follows best modern practice – for example, to encourage applications from a more diverse range of qualified candidates, as discussed in the previous chapter. It will need the flexibility to adapt its procedures to meet the

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\(^6\) The Lord Chancellor currently appoints, or recommends for appointment by The Queen, judges, magistrates and tribunal members in England and Wales. He also appoints some members of tribunals in Scotland. Paragraphs 53-69, below, examine which appointments the Commission will take responsibility for.
needs of its role efficiently and effectively. It will be given a free hand to
decide what it will need to do in-house and what might be more effectively
carried out by contracting with professional recruitment consultants and
Human Resources experts.

33. However, even with a Commission of, say, 15 members, it will not be
possible for every sift or interview to be conducted by one or more of the
Commissioners. They will not routinely conduct interviews themselves
(although they might well wish to take a direct part in some competitions,
to ensure that they were satisfied with the quality of procedures and of
decision-making). But all decisions on whom to recommend or to appoint
will be sent to them for ratification and approval, and they will be able to
send for all the relevant papers to satisfy themselves if necessary. It is
likely that, as with the Lord Chancellor, their direct personal involvement
will be most focused on the more senior appointments, and in ensuring
that other appointments are dealt with appropriately. There will therefore
be an important role for the staff of the Commission, as well as for the
Commissioners.

Different models of Commission

34. One factor which will affect the work of the Commission fundamentally is
the precise role it is charged with carrying out in the appointments system.
There are three main models on which the Government seeks views:

- an **Appointing Commission** which would itself make those
  appointments which the Lord Chancellor currently makes personally
  and directly advise The Queen on appointments above that level
  without any ministerial involvement; or,

- a **Recommending Commission** which would make recommendations
  to a minister as to whom he or she should appoint (or recommend that
  The Queen appoints); or,
• a Hybrid Commission in which the Commission would act as an appointing commission in relation to the more junior appointments (for example, part-time judicial and tribunal appointments) and as a recommending commission in relation to more senior appointments.

Model 1: An Appointing Commission

Selection process

35. In this model, after running the appointment process and assessing the candidates, the Commission would itself make the decision whom to appoint, with no involvement by ministers at any stage. It would directly appoint candidates to those posts which the Lord Chancellor has directly made appointments to, and would recommend appointments directly to The Queen for posts above that level. Ministers would not be formally consulted about whom to appoint, although they would of course be informed of the outcome. The Commission would, in other words, take over the full powers of the Lord Chancellor and Prime Minister in this area.

36. This model bears some resemblance to the systems operated in some continental European countries, as described in Annex B.

Constitutional issues

37. Having a Commission which appoints judges without any ministerial involvement would remove any potential for allegations that particular judicial appointments were made according to a minister's direct personal preference or party affiliation, although, depending on the way in which such a Commission were appointed and who sat on it, there might still be room for argument that political or professional influence was involved. The Commission would be required under statute to show the maximum transparency about the processes it employed, and to report on its
handling of those processes to Parliament. Its procedures and policies, and any overall trends (but not individual appointments) would be subject to scrutiny by a Departmental Select Committee.

38. It is however important to note that removing the role of a minister would entail a significant change to our wider constitutional arrangements. In England and Wales, judges hold office under the Crown and are (in the case of the more senior appointments) appointed personally by The Queen. One of the limitations on the power of the Crown, in our constitutional monarchy, is that The Queen acts formally on the advice of Her Ministers, who are accountable to Parliament. As one aspect of this principle, it is constitutional practice that The Sovereign, when making appointments, does so only on the advice of Ministers. This ensures that Ministers and not the Crown personally can be held accountable to Parliament for the appointments process.

39. The same arguments apply, in a slightly different way, to the greater number of more junior appointments made every year by the Lord Chancellor himself. He does this as a Minister of the Crown and as a member of the Government, which is accountable to Parliament. Appointments made directly by an appointing Commission, with no involvement by anyone else, would not be accountable to Parliament in the same way.

40. The powers of Parliament to change the normal constitutional arrangements in this respect by legislation are effectively without limit. If it were thought desirable, Parliament could of course decide to pass legislation that would empower a Judicial Appointments Commission either to advise The Queen directly or simply to appoint judges by itself. There are independent regulatory bodies with no ministerial involvement in their work. Such bodies include the Electoral Commission which works within a framework laid down by Parliament.

41. However, this path has not been followed in Scotland or Northern Ireland when establishing their appointments commissions. Removing all
ministerial accountability to Parliament in relation to judicial appointments would be a major innovation and would require very careful consideration.

Model 2: A Recommending Commission

Selection process

42. A Recommending Commission would take responsibility for the application, sifting, interviewing and recommendation stages of the appointments process. It would differ from the Appointing Commission model, however, in that it would pass those recommendations to the Secretary of State for Constitutional Affairs (or the Prime Minister, for the most senior appointments), and the final decision whom to appoint, or recommend to The Queen for appointment, would rest with the Minister.

43. It would be possible to approach this model in different ways, according to the amount of discretion the Minister had in relation to individual appointments.

44. If the Minister were to have a very wide discretion, the Commission, having conducted the selection process, would submit to the Minister a list of all those candidates who met the relevant criteria and could properly be appointed, together with supporting information. Candidates might be ranked according to the Commission’s assessment of their suitability. The Minister would then be free to decide to appoint anyone from that list, and also free to decide whether to accept any ranking suggested by the Commission. If the Minister found all the names unsatisfactory he would be able to tell the Commission to reconsider its recommendations and submit other names.

45. If the Minister were to have a more limited discretion, the Commission would put forward the names of those candidates it thought most suitable in a ranked order of preference. This might perhaps be only two or three candidates. There would be an expectation that the Minister would make the first appointment suggested by the Commission, although he would
retain the power, if he thought it necessary, to choose another name from the list, or, if necessary, to reject the Commission’s proposal and require it to submit different names. This would be something like the procedure which currently applies in relation to the appointment of Diocesan Bishops in the Church of England.

46. A still more restrictive version of this proposal would be for the Commission to put only one name, of its preferred candidate, to the Minister. He would still retain the option of rejecting the Commission’s proposal and requiring it to submit a different name.

47. It is arguable that if the Minister were to reject the proposals of the Commission in this way, that fact ought to be made public, or reported to Parliament. The drawback of this approach is that it would be likely to damage the credibility of whoever was finally appointed, and it might also be professionally damaging to a practitioner if it became public that their name had been rejected for a judicial appointment. It might be possible, however, for statistics on the number of recommendations, if any, rejected by the Minister to be anonymised and included in the Commission’s annual report.

Constitutional issues

48. While retaining ministerial involvement and accountability, this model would significantly curtail that involvement by placing the entire appointments process (prior to the appointment itself) in the hands of the Commission. However, the Minister would still remain ultimately accountable to Parliament for the appointments process. This model therefore preserves the constitutional convention that The Queen acts on the advice of Her ministers and also retains formal accountability to Parliament for the appointment of judges, a central function of the State.
Model 3: a Hybrid Commission

Selection process

49. As in the other two models, a Commission of this kind would take responsibility for the application, sifting, interviewing and recommendation stages of the appointments process in all cases. In relation to most appointments it would go on to make the appointments itself as if it were an Appointing Commission. In the case of the more senior appointments, however, it would act as a Recommending Commission and advise the Secretary of State or Prime Minister. The degree of discretion the Minister had in relation to appointments might vary as described above.

Constitutional issues

50. The point of having a Commission of this kind would be to gain the advantages of having a fully independent appointments process as far as possible in relation to most appointments, while avoiding the constitutional problems which may arise if The Queen is unable to rely on a Minister’s advice in relation to those appointments which are formally made by Her, and if the appointments process, at least in relation to senior appointments, is not formally accountable to Parliament through a Minister. Which appointments are regarded as senior in this context would be a matter of some importance. The obvious dividing line would be that those appointments currently made by The Queen should count as senior.

51. This produces some anomalies, however. In England and Wales civil District Judges, who have permanent judicial appointments, are currently appointed by the Lord Chancellor, while Recorders, who are practising lawyers with only part-time judicial appointments, are appointed by The Queen. The legislation to establish an Appointments Commission will provide an opportunity to consider alterations to these arrangements, if that is thought desirable.
52. On balance, the Government's view at this stage is that the best combination of independence, accountability and propriety in safeguarding the constitutional position of The Queen and Her relationship with Her ministers is achieved by a Recommending Commission, combined with severely circumscribed ministerial discretion, in which the Commission would generally put forward only one name to the Secretary of State, who could however reject that name and require another to be put forward. Different considerations might apply in relation to the most senior appointments – those to the Court of Appeal and Heads of Division. These senior appointments are considered in paragraphs 54-58, below.

Question 1: Do you prefer:

   i. An appointing commission?
   ii. A recommending commission? or
   iii. A hybrid commission?

   What are your reasons?

Question 2: If you favour a Recommending Commission, what degree of discretion do you think should be exercised by the Secretary of State or Prime Minister?

   What are your reasons?

Question 3: If you favour a Hybrid Commission, which appointments do you think should be made by the Commission and which should it recommend? How much discretion should the Secretary of State or Prime Minister have in relation to recommended appointments?

   What are your reasons?
Which appointments?

53. One factor to be taken into account in establishing a Commission is the range and number of appointments to be made. The Commission will be responsible for the full range of appointments currently made by the Lord Chancellor, including not only the small number of high profile senior judicial appointments made each year which attract most attention, but hundreds of other appointments in courts and tribunals. Depending on the outcome of this consultation it may also have some role in the appointment of lay magistrates and coroners.

Promotions

54. In England and Wales, some appointments, such as those of Recorder, tribunal members and Deputy District Judge will generally be first appointments, made from a very wide potential pool of applicants with no prior judicial experience. Others, such as District Judge, District Judge (Magistrates’ Courts) some more senior Tribunal appointments, and Circuit Judge will generally be made from the more limited pool of those who already have at least some part-time judicial experience. High Court appointments may be made by promoting existing Circuit Judges, or by appointing senior Counsel or solicitors with experience as Recorders or Deputy High Court Judges. Appointments to the Court of Appeal and House of Lords have, in modern times, been made exclusively from among existing members of the senior judiciary.

55. In some cases, such as considering applicants for High Court appointments, for example, the Commission will probably be faced with candidates with a range of experience, some of whom will have gained extensive experience as Circuit Judges, and others of whom will have sat only part-time as Recorders. Obviously in these cases all candidates will have to go through the same process in order to ensure fairness between them.
In cases where the Commission is considering different candidates all, or almost all, of whom are existing judges, its role is likely to be different from that which it plays in recruiting a new judge from a broad pool of candidates. This distinction will be more marked the smaller the pool of potential appointees is. In considering potential appointments to the Court of Appeal, for example, the views of a Commission might not be as well informed or useful as the detailed and first-hand knowledge of the different candidates which the senior judges are able to bring to bear under the current system.

It may be that the Commission should form different sub-committees to deal with different levels of appointment, and that the most senior appointments – those to the Court of Appeal, and Heads of Division – would be dealt with by a small sub-committee, presided over by the Chair of the Commission.

The Government believes that appointments to the Court of Appeal, and Heads of Division appointments, should certainly stay within the scope of the Commission. Nevertheless, in view of the overall public interest in a balanced and high quality group of judges, the Secretary of State may wish to have a more direct input into their appointment than in relation to more junior appointments. Under the Appointing Commission model, therefore, the Commission might be required to consult the Secretary of State for Constitutional Affairs before making recommendations on these appointments to The Queen. Under the Recommending or Hybrid models, the Secretary of State might wish to consult the senior judiciary personally before reaching a decision, in addition to taking the advice of the Commission.

Question 4: Do you have a view as to any special arrangements that will need to be made by the Commission in dealing with senior appointments from among the existing judiciary?
Retired judges

59. Some judges who retire before their compulsory retirement age nevertheless agree to sit part-time as deputies until they reach the compulsory age of retirement. This is a purely administrative arrangement, which assists the Court Service by giving it the additional flexibility of being able to call on part-time judges to sit in some cases. These authorisations are currently made by the Lord Chancellor, but it would probably not be necessary, or appropriate, for the Commission to be involved in an attempt to assess whether a judge should continue to sit in these circumstances. The only relevant factors are whether there is an operational need for judges to continue to sit as deputies and whether a particular judge is willing to do so. It is suggested that in the future these arrangements should be authorised by the Lord Chief Justice, and notified by him to the Secretary of State, so that the Court Service is aware of and able to make use of the judges concerned.

Question 5: Do you agree that the Commission should not be involved in authorisations to allow judges who have retired before their compulsory retirement age to then sit part-time as deputies until they reach the compulsory age of retirement?

The Supreme Court

60. A particular issue arises in relation to appointments to the Supreme Court, which the Government intends to create to take over the judicial functions of the House of Lords. The initial appointments will consist of the existing Lords of Appeal in Ordinary. The Supreme Court will be a court of the United Kingdom as a whole, and not only of England and Wales. While it will doubtless continue in practice to have a majority of judges from
England and Wales, with a smaller number of Scottish and Northern Irish judges, it would not be appropriate for appointments to that Court to be made or recommended solely by the Judicial Appointments Commission for England and Wales. The arrangements for appointments to the Supreme Court are considered further in the *Constitutional Reform: A Supreme Court for the United Kingdom* consultation paper.

### Lay magistrates

61. The current arrangements for the appointment of lay magistrates differ from those for the judiciary. There are about 30,000 lay magistrates, who try more than 95% of criminal cases, as well as having a significant family jurisdiction and some civil jurisdiction. In 2001-2002, 1786 appointments to the lay magistracy in England and Wales were made. The administration of magistrates’ courts, which has been conducted locally by Magistrates’ Courts Committees will be unified with the administration of the other courts by the Courts Bill currently before Parliament. Magistrates are appointed by the Lord Chancellor\(^7\), and the process is currently overseen by his officials, but magistrates have until now been appointed to a particular area, and the nominations are made locally by local Advisory Committees.

62. There are 104 Advisory Committees in England and Wales (including the Duchy of Lancaster’s). Their functions include:

- determining the number of magistrates to be recommended each year, taking into consideration the Lord Chancellor’s\(^7\) requirements on sitting levels, the views of the Magistrates’ Courts Committee (MCC), Bench Chairmen and Justices’ Clerks;

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\(^7\) Except in the County Palatine of Lancaster, where appointments are made by the Chancellor of the Duchy of Lancaster. However, the Courts Bill (currently before Parliament and subject to Parliamentary approval) will end this arrangement.
• recruiting and recommending for appointment as magistrates, candidates with the necessary qualities, taking into account the need for Benches to be diverse in terms of age, gender, ethnic origin, disability, occupation, geographical spread and political affiliation;

• ensuring that Benches do not include a disproportionate number of magistrates who are members of any one group or organisation.

63. Each Advisory Committee prepares annual reports for the Lord Chancellor on such matters as he may from time to time determine. Included in these reports are statistics on the make up of the bench in terms of gender, ethnicity etc. Advisory Committees also investigate complaints about magistrates and make recommendations, where appropriate, to the Lord Chancellor on what action should be taken against them.

64. The Courts Bill will give lay magistrates a jurisdiction covering England and Wales for the first time. However, the Government considers the local input into their appointment to be important. One option for keeping this local input would be to maintain the current role of Advisory Committees, and for the Committees to advise the Secretary of State direct on appointments to be made, without any role for the Commission. Given the expertise that the Commission will develop, however, and its overall responsibility for the appointments process, consideration should be given to the Commission having a role in the process for appointing magistrates.

65. A second option, therefore, would be for the local nominations of lay magistrates to be forwarded by the local Advisory Committees to the Commission, either for formal appointment by them or for transmission to the Secretary of State, depending on the model of Commission selected. This would have two advantages. It would make the practice in the
appointment of magistrates conform more closely to that in other judicial and tribunal appointments, and would emphasise the independence and transparency of the process, which is no less important in relation to the appointment of lay magistrates than of professional judges.

66. A third option would be for the Commission to take responsibility for magistrates’ appointments. This would provide coherence for the appointments process, with all the judiciary in England and Wales being appointed by the same body and the same process. It would also enable the Commission to examine the appointments process for lay magistrates, to identify areas where it can be improved, and to encourage applications from a wider range of suitable candidates, as it will do for other judicial appointments. The Government wants to see a more representative magistracy that can really be seen to reflect the community. Adding responsibility for the 1700 or so magistrates appointments a year would, however, significantly increase the workload of the Commission. If the work was to be managed centrally, local input into the appointments process could also be lost. If the Commission was to take on this sort of role, it would therefore need to be supported by local panels which would undertake most of the day-to-day responsibility of the Commission.

**Question 6:** What arrangements should be made for the appointment of magistrates? In particular (a) should there be a continuing role for local Advisory Committees? and (b) what role should there be for the Judicial Appointments Commission?

**Coroners**

67. At present coroners are appointed by local authorities, although the Lord Chancellor has the power to remove them from office in certain circumstances. The Luce Report (Death Certification and Investigation in
England, Wales and Northern Ireland - The Report of a Fundamental Review 2003, Home Office, June 2003) recommended that when the new national coroner jurisdiction for England and Wales is introduced, all responsibilities for the appointment and discipline of coroners should be brought together in the Department for Constitutional Affairs. The Government’s intention is that the appointment of coroners should be assimilated to that of other judicial office holders, and will be one of the responsibilities of the Judicial Appointments Commission, with appointments made either by the Commission itself or by the Secretary of State on the recommendation of the Commission, according to which type of Commission is created.

Question 7: Do you agree that the appointment of coroners should be brought into line with that of other judicial office holders?

Tribunal appointments

68. The Government previously announced its intention to form a unified Tribunal Service under what is now the Department for Constitutional Affairs, and to make all tribunal appointments the responsibility of the Lord Chancellor. The Lord Chancellor is already responsible for many tribunal appointments in England and Wales. In some cases, the jurisdiction of those tribunals extends to Great Britain. The Government now proposes that the Lord Chancellor’s tribunal appointments responsibilities will pass to the Judicial Appointments Commission, and the Commission will assume the Lord Chancellor’s statutory duties in relation to tribunal appointments, including the requirement to consult other bodies before making appointments. For Scottish interests in these appointments and other aspects of tribunals policy, discussions are continuing between the Scottish Executive and the Department for Constitutional Affairs.
69. Tribunal appointments in England and Wales which are not currently the responsibility of the Lord Chancellor are made by different ministers according to the legislation governing the particular tribunal concerned. The objections to judicial or quasi-judicial appointments made by a Minister other than the Lord Chancellor are at least as strong as, if not stronger than, the arguments against appointments by the Lord Chancellor, who has historically had a hybrid judicial and ministerial role and has often been perceived as playing a less directly political part than other ministers. These appointments should now be brought into line with the arrangements that will apply to tribunal appointments currently made by the Lord Chancellor.

Question 8: Do you agree that tribunal appointments should be the responsibility of the Judicial Appointments Commission, under the arrangements discussed in paragraphs 68-69?

Authorisations and administrative responsibilities

70. In addition to his involvement in appointments as such, the Lord Chancellor has also been involved in many decisions to give different judges authorisations to sit in particular jurisdictions. Whether a particular judge is given a particular authorisation will reflect an assessment by the Presiding Judges or relevant Head of Division of their aptitude for a particular type of work, but these are essentially administrative arrangements. It is convenient for some judges to have a degree of specialisation, and receiving a particular authorisation does not constitute a promotion or affect the pay of the judge concerned. In order to emphasise that authorisation to sit in a particular category of case does not constitute a promotion, these arrangements have now largely been devolved to the Heads of Division, and it has also been emphasised that where authorisations are no longer used or not needed they will be
withdrawn. It is not proposed to disturb these arrangements or to involve the Commission in these decisions.

71. The Lord Chancellor assigns Circuit Judges to Circuits on their appointment, assigns High Court Judges to particular Divisions, and appoints certain High Court Judges to sit in specialist jurisdictions such as the Patents, Admiralty or Commercial Courts. He is also able to authorise judges to change Circuits or Divisions. These are administrative arrangements designed to meet the business needs of the courts, and where possible to suit the personal requirements of the judges concerned, and it will not be necessary for the Commission to be involved in decisions of this kind. These will therefore not be a matter for the Commission to be involved in.

72. Nor will the Commission be involved in decisions to give judges particular administrative or representational roles. For example, different Lords Justices of Appeal currently serve as the Senior Presiding Judge, as the Vice-Presidents of the Civil and Criminal Divisions of the Court of Appeal, as Vice-President of the Queen’s Bench Division and as Chairman of the Judicial Studies Board. Around a dozen High Court Judges at any one time are involved as the Presiding Judges of the different Circuits; and many other judges at all levels are asked to fulfil other administrative functions or to represent the judiciary on different bodies.

73. These administrative responsibilities are designed to enable the judiciary, and particularly the Lord Chief Justice, to discharge their wide range of responsibilities as effectively as possible, or are part of the partnership between the judiciary and the administration which is essential for the work of the justice system to be carried on. Taking on these responsibilities does not constitute promotion to a higher level of the judiciary, and most of these posts are held in rotation by different judges for a limited term. The Commission will not have the knowledge of particular judges to be able to suggest meaningfully which ones should discharge which administrative functions, and these decisions should continue to be made by the Lord Chief Justice and the Secretary of State
for Constitutional Affairs, as appropriate, in order to ensure that the practical needs of the Court Service in relation to the deployment of the judiciary are met.

**Question 9:** Do you agree that the Commission should not be involved in the allocation of responsibilities, as described above?

**Scrutinising the appointments process**

74. One of the main improvements to the existing appointments process has been the creation of a Commission for Judicial Appointments charged with oversight of the appointments process and able to consider complaints from applicants. Whichever of the models for a new Commission is considered most appropriate, a decision will be needed about whether there should be a continuing role for a body like the existing Commission in scrutinising appointments.

75. Having created this function the Government believes it would be a retrograde step to abolish it. One option would be to create two distinct bodies – a new Commission to run the appointments process, and a separate body with an Ombudsman role, along the lines of the current Commission. As under the existing arrangements, an Ombudsman could audit the appointments process, recommend areas for improvements, and consider complaints from candidates about the appointments process. These complaints would include grievances about decisions made by the Commission, the way it has applied its processes, quality of service and so on. Such an arrangement would give the public, Parliament and indeed the Government the assurance that the Appointments Commission was operating effectively, that its procedures were working and that its decisions were fair.

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The role of the existing Commission for Judicial Appointments is discussed in paragraphs 13-17.
76. A second option would be not to have a separate reviewing body, and for the Commission to establish formal internal procedures for dealing with complaints. Complaints that are not resolved under these formal procedures could ultimately be referred (by the complainant’s MP) to the Parliamentary Ombudsman, for independent review. This option reflects practice in other jurisdictions\(^9\) but the Government believes that public confidence in the transparency and independence of the Judicial Appointments Commission would be better served by a separate complaints and review body with an Ombudsman role established in legislation.

**Question 10:** Do you agree that there should be a separate body with a reviewing and complaints function once the Judicial Appointments Commission has been established?

**The status and organisation of the Commission**

77. In addition to the three types of Commission which might be created, in terms of the work it will perform, there is also a choice to be made in relation to the formal basis on which the Commission is legally constituted. The Government intends that the Commission will be established by legislation, and that it will have legal personality, rather than being a mere emanation of the Department for Constitutional Affairs.

78. There are three main options, varying in the degree of formal independence from Government that they afford and in the nature of the financial arrangements and accountability that would be put in place.

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\(^9\) Judicial Appointments Commissions in other jurisdictions are not generally overseen by external bodies. In Northern Ireland, it is intended that the position of the existing Commissioner for Judicial Appointments for Northern Ireland (who performs an independent audit and oversight function in respect of the current appointment procedures) will be reviewed after the new Northern Ireland Judicial Appointments Commission (which will handle the appointments process itself) has been set up.
First, the Commission and its staff might together constitute a Non-Departmental Public Body, with the Commission responsible for recruiting and employing its own staff. (This of course does not preclude it – as many bodies have done in the past – deciding that it wished to have a mix, with at least some staff being civil servants on loan.) The Commission would be independent of Government but would be sponsored by the Department for Constitutional Affairs and would look to the Department for its funding. As a Non-Departmental Public Body the Commission would be subject to the scrutiny of a Parliamentary Select Committee and would be required to submit to Parliament an Annual Report.

The second option is for Commissioners to constitute a Non-Departmental Public Body, but with its staff provided separately by civil servants of the Department for Constitutional Affairs, perhaps working in a distinct executive agency under a chief executive who would also be the Secretary of the Board. Arrangements of this kind can be very effective, and the Commission’s accountability to Parliament would be as in the first option above, but there might be concerns that the Commission’s independence was in reality or in appearance affected by it not being able to hire any of its own staff, who would all be civil servants.

The third option would be for the Commissioners and their staff together to constitute a non-ministerial department. This would mean it was financially accountable to Parliament, and not dependent on the Department for Constitutional Affairs for its resources, but it would remain a Government department and not formally independent of Government.

In making a decision on the best way forward, the Government will need to take account of the need to establish the Commission on a clearly independent basis, the need to ensure proper accountability to Parliament, the potential costs of duplicating existing personnel and other functions in a new organisation, and the desirability, at least in the first years of the new commission’s life, of maintaining some continuity of
expertise from the judicial appointments teams in the Department for Constitutional Affairs.

83. The Government’s initial view is that the Commission should be fully independent and should constitute a Non-Departmental Public Body, with its own staff. Arrangements would have to be made in establishing the Commission for a transitional period in which it could benefit from the existing expertise in the Department for Constitutional Affairs.

**Question 11: What formal status should the Commission have?**

**Should it be:**

i. a Non-Departmental Public Body?

ii. a Non Departmental Public Body supported by an agency?

iii. a non-Ministerial Department? or

iv. should it have some other status? If so what?

**Costs of a Commission**

84. The current cost of running judicial appointments processes within the Department for Constitutional Affairs is £9m per year. A Commission would be handling the same number of appointments. Costs might rise in the short term from the need to pay Commissioners, and if a Commission was to require its own accommodation, and recruit its own staff, separate from the Department for Constitutional Affairs. Costs might also increase if the Commission were to pursue improvements such as the assessment centre approach to making Deputy District Judge appointments, which has been piloted by the Department. This pilot has been assessed very favourably, but was more expensive than the process currently used for other appointments.
85. In total it is estimated at this stage that the initial additional cost of establishing a Commission is likely to be around £3m a year more than the existing system. However, a Commission would be tasked with improving the efficiency of the current system, and should therefore be able to produce some savings to offset this, at least in part, in the longer term.

86. In addition, if it were decided to maintain a separate body with a scrutinising and complaints function, the £0.5m per annum costs of the existing Commission would continue for the future.
3  Other Functions

87. In addition to making (or advising The Queen on making) appointments to the judiciary, the Lord Chancellor currently has overall responsibility for various other functions which relate to the judicial appointments system, or to the judiciary more generally. As explained earlier in this paper, the Government intends to abolish the current office of Lord Chancellor. This, along with the creation of the Judicial Appointments Commission, creates an opportunity to consider where it is most appropriate for those functions to lie in future.

Responsibilities directly relating to appointments

88. Whichever of the three models of Commission outlined in Chapter Two is chosen, the Government believes that the Commission should also take responsibility for:

- any improvement to the appointments process itself;
- dealing with the mechanics of appointments once they have been approved by The Queen;
- taking forward work to encourage applications from lawyers and other professionals from a diverse range of backgrounds; and
- producing statistical information on appointments.

89. These are functions directly relating to the appointments system, so it would seem logical to give the Commission responsibility for them, subject to the overall responsibility of the Secretary of State for ensuring that the appointments system is efficient and effective. This would ensure that the system operates effectively from start to finish, and that day to day responsibility for the process is in the hands of one body. Views are
invited on which, if any, of the functions listed above should or should not be placed in the hands of the new Commission.

Policy relating to appointments

90. The judiciary, of course, plays an integral role in the Government’s objectives to ensure the effective delivery of justice, and to improve the level of public confidence in the criminal justice system. The criteria for judicial appointment (as set out in Chapter 1) are designed to ensure that those appointed to judicial office are the most suitably qualified and able to perform their role in meeting those objectives. On a more individual level, the criteria form the basis for ensuring that the appointments system provides judges and tribunal members best able to meet the continuously evolving day-to-day challenge of working in the courts and tribunals. The Government is in an ideal position to determine how well the criteria are suited to achieving that end. It is therefore fundamental that the responsibility for defining the criteria for appointment remains a duty of Government.

91. Decisions on the numbers of judges and tribunal members, and their deployment, are also central to the delivery of justice. The Government must therefore, in consultation with the judiciary, continue to set the number of new judicial appointments, as it is best placed to interpret the demands of new areas of work in the justice system as a whole. In addition, policy relating to judicial recruitment, numbers, functions and pay requires primary or secondary legislation, or financial decisions by a Minister accountable to Parliament.

92. For these reasons, setting overall policy in relation to judicial appointments should remain a Government responsibility. The Judicial Appointments Commission will nevertheless be in a position to make a valuable contribution on these issues and the Government will therefore

10 A full list of the Government’s criminal justice objectives can be viewed at: www.hm-treasury.gov.uk/Spending_Review/spend_sr02/psa/spend_sr02_psalord.cfm
seek to establish a formal requirement to consult with the Commission about them.

**Question 12:** Do you agree that the Commission should take on those functions which relate directly to the appointments process (paragraph 88) and that the Government should retain responsibility for policy relating to appointments (paragraphs 90-92)? If not, please provide views on which responsibilities should, and which should not, pass to the Commission and why.

**Increasing diversity**

93. As is noted in Chapter 1, the judiciary is currently not reflective of the society it serves. The Government believes more can and should be done to enable the judiciary to be more reflective without reducing quality. One step would be to improve the appointments procedures, and question 12 seeks views on the Government’s proposal that the Commission take responsibility for developing the appointments process. There are, however, other significant obstacles to increasing diversity in judicial appointments outside the appointment procedures themselves. For example:

- the terms and conditions of judicial office and workloads may not be ‘family friendly’;
- factors affecting the willingness of women and minority ethnic lawyers to apply for appointment; and
- factors affecting retention of women in the legal profession and difficulties of re-establishing a career after breaks.
94. One of the main benefits of a Judicial Appointments Commission is that, in widening the range of decision makers, it gives the opportunity for fresh thinking about how to tackle these issues. As stated above, overall policy in relation to appointments policy should remain with the Government. However, the Commission could be tasked by the Department for Constitutional Affairs with examining how improved appointment procedures might encourage applications for judicial office from a wider range of qualified candidates; and to work with the judiciary, the legal profession and the Government to find more diverse and representative judges. For example, the Commission could examine whether the traditional pattern of entry into the judiciary at particular levels, with some, though limited, scope for promotion thereafter, means that opportunities are being missed to identify and develop people who already hold less senior judicial offices.

95. The Government does not believe that a fully career judiciary on the Continental model would be appropriate for the common law system of England and Wales. However, an identifiable career path which enabled practitioners – whether barristers or solicitors – to apply for a first judicial post after a number of years in practice, with a realistic prospect of progression to higher office through that route as an alternative to remaining in practice and entering the judiciary at the higher level, could open new opportunities and help to promote diversity in appointments. This approach would encourage the development of those who may, for example, have elected to become District Judges or members of tribunals because this fitted in better with their professional or family commitments at the earlier stages of their career.

96. This sort of approach might also be applied to barristers or solicitors who have left their professions for a career break, or who have only been able to work part-time while their colleagues have been gaining experience. Such candidates might have the potential to make very successful judges, but their lack of experience might count against them under the current arrangements. The Commission could establish how far it is possible to overcome this difficulty. One option which has been suggested and which
could be examined would be to reserve a number of places for them at Recorder or District Judge level, but it would be vital that any such scheme did not run contrary to the principle of appointment on merit.

97. Under each of these approaches, if this pool of talent is not to be wasted, some way will have to be found of ensuring they can acquire the necessary qualifications for appointment to the higher judiciary. Through sitting part-time, therefore, they could gain the necessary experience, and, through the Judicial Studies Board, the necessary training, to apply for appointment to the circuit bench and from there to the High Court. Mentors could be provided to assist their development. The Commission will need to ensure that the appointments procedures for higher office do not discriminate against them.

**Question 13:** Do you agree that the Commission should be tasked with establishing how best to encourage a career path for some members of the judiciary?

**Question 14:** What other steps could be taken by the Commission to encourage diversity?

**Other responsibilities**

98. Some might argue that, as well as responsibility for the judicial appointments process, the new Commission should be given a ‘follow through’ role in personnel/human-resources management of the judiciary, as exists in conventional employer-employee relationships. However, the status of a judge, once appointed, is that of an office-holder not of an employee, and the Commission is not in an analogous role to an employer. Above all else, this ensures that judges retain their constitutional independence. It is therefore inaccurate to see the relationship between the judges and the authority that appoints them (be
that Government or a Commission) as that of employee and employer. Notwithstanding these considerations, there may nevertheless be merit in the Commission having a role in some aspects of the working-life of judges once they are appointed. The issues are discussed below.

Pay and pensions

99. Judicial pay and pensions are funded from the public purse. There must therefore remain Ministerial responsibility and accountability to Parliament for these matters and it would not be appropriate to devolve this area to the Commission. There may however be a role for the Commission in giving evidence to the Senior Salaries Review Body on the appropriate level of judicial salaries.

Judicial discipline and complaints against judges

100. Permanent judges hold office during good behaviour, as a protection of their independence, and cannot normally be removed from office. Judges of the High Court and above can only be removed from office by The Queen, acting after receiving a formal address from both Houses of Parliament. At present, the Lord Chancellor has the statutory power to remove Circuit Judges and below from office on the grounds of incapacity or misbehaviour. Consequently he receives and considers complaints about the personal conduct of members of the judiciary in England and Wales. The Lord Chancellor does not consider complaints about judicial decisions, which are a matter for the appeal courts.

101. Around 85% of the 1,200 or so complaints about the judiciary received each year by the Lord Chancellor are entirely about judicial decisions. These are sifted out and the complainants are advised that they should seek legal advice as to the possibility of an appeal, which is the proper and only recourse in such matters. However, complaints which, if true,
would give cause for concern about the judge’s personal conduct, even though they would not raise any question of removal from office, are formally investigated by the Lord Chancellor’s officials, who then submit advice and recommendations to him. In these cases, the Lord Chancellor can, if appropriate, advise or warn a judge as to his or her future conduct, or issue a formal reprimand.

102. On the very rare occasions that the Lord Chancellor receives a complaint of such seriousness that, were it to be found justified, it would raise the possibility that he might seek to remove the judge concerned from office, he asks the Lord Chief Justice to nominate a judge to conduct an investigation. Following that investigation, the nominated judge reports to the Lord Chief Justice and Lord Chancellor who then decide together what action, if any, to take (subject to any representations from the judge under investigation). The Lord Chancellor only exercises his power to remove a judge with the agreement of the Lord Chief Justice.\(^{11}\)

103. The Lord Chancellor’s current role in personal conduct complaints about the judiciary has stemmed partly from his statutory power of dismissal, and partly from his traditional position as Head of the Judiciary. The judiciary have recently agreed with the Lord Chancellor a formal protocol governing procedures for the handling of complaints. In view of the announcement that the post of Lord Chancellor is to be abolished, it will be necessary to consider how these disciplinary functions will be exercised in the future. There are a number of options in this respect.

104. One possibility is that the Lord Chancellor’s former disciplinary role and powers should pass to the Lord Chief Justice, as his effective replacement as Head of the Judiciary of England and Wales. The Lord Chief Justice of Northern Ireland could provide a similar function in that jurisdiction. This would reflect the role that the Lord Chief Justice already

\(^{11}\) For tribunals which cover Great Britain and for which the Lord Chancellor is responsible for appointment, the Lord Chancellor consults the Lord President in relation to conduct issues where the tribunal member sits in Scotland. The role of the Lord President will be retained.
plays in the most serious disciplinary cases, and would uphold the independence of the judiciary and their separation from the Executive.

105. It may however be desirable, in order to ensure public confidence in the process, that judicial discipline and complaints should not be entirely in the hands of the senior judiciary. In other professions there is often an independent lay element involved in the consideration of complaints and disciplinary matters. Even if there is a substantial judicial element in the complaints process, and it is ultimately placed under the control of the Lord Chief Justice, such an independent lay element might still be usefully incorporated. This could perhaps be achieved by involving the Judicial Appointments Commission in considering and advising the Lord Chief Justice on complaints and disciplinary matters.

106. However, discipline and complaints might not sit comfortably in an organisation if it were otherwise exclusively concerned with judicial appointments. Alternatively, therefore, if the role of the existing Commission for Judicial Appointments in providing external oversight of the appointments process and dealing with complaints from applicants for judicial office is retained, it might be more logical for that body to also have a role in judicial discipline and complaints about judges.

107. As a further alternative, this lay element might be provided entirely separately from any Judicial Appointments Commission, by appointing a lay person or body specifically to work on matters of judicial discipline and complaints. The Government remains open-minded about the best procedure for handling complaints and invites views on the options set out above.

Other disciplinary matters

108. In addition to those cases involving judges, the Lord Chancellor may become involved in disciplinary matters involving members of tribunals, lay magistrates or coroners, where he also has statutory powers of removal. Complaints against lay magistrates and members of tribunals
are dealt with, in the first instance, at a local level or by the President of the tribunal concerned, only reaching the Lord Chancellor if the complaint is of a serious nature. Complaints against coroners in England and Wales are handled in the first instance by the Home Office and referred to the Lord Chancellor if they are serious. It may not be appropriate for the Secretary of State to exercise powers of removal in these cases, and procedures might need to be adjusted to reflect whatever arrangements are made for the judiciary more widely, while preserving the local or tribunal level input into these cases.

Question 15: Should either (i) the Judicial Appointments Commission, or (ii) a body overseeing the work of the Commission, have a role in advising the Secretary of State for Constitutional Affairs or the Lord Chief Justice on complaints and disciplinary matters?

Training judges and magistrates

109. The Judicial Studies Board (JSB) provides training and instruction for all full-time and part-time judges in the skills necessary to be a judge. It also has an advisory role in the training of lay magistrates and of chairmen and members of tribunals. The Board's area of responsibility is for England and Wales.

110. An essential element of the philosophy of the JSB is that the training of judges and magistrates is under judicial control and directions. The JSB has a technical and formal status which ensures that it maintains a suitable level of independence from the Department for Constitutional Affairs. The Board and its programme of training are run by committees of judges, with only administrative support from the Department, and judges provide the training itself. The training requirements of the different jurisdictions are the responsibility of six committees: criminal, civil and family law, magistrates, tribunals and equal treatment and diversity.
111. The focus of the JSB, therefore, as well as its expertise and its membership, are all very different from the Commission, and the Government believes that the JSB remains the appropriate home for judicial training.

Complaints by judges

112. To follow modern best practice, the Government is considering the best way to establish an internal grievance procedure for use by judges in cases where they have a complaint against the Court Service, its staff, the Department, the Lord Chancellor or other judges. New UK legislation will come into force later this year to ensure that the UK adheres to European Union anti-discrimination directives. This means that judicial office holders who believe they have suffered discrimination on the grounds of their race, gender, sexuality and so on will be entitled to seek redress through the Employment Tribunal. A formal internal grievance procedure would aim to resolve any grievances before redress through the Employment Tribunal became necessary. It might be possible for such grievances to be referred to the Commission, or to the judicial members of the Commission, or to a body with an Ombudsman role as referred to in paragraph 74-76 above.

Question 16: Should the Commission have a role in an internal grievance procedure? If so, what should that role be?

Appointing Queen’s Counsel

113. The future of the rank of Queen’s Counsel is subject to a separate consultation exercise\(^\text{12}\). Consequently, no consideration will be given at

this stage as to the Commission having a role in the appointment of Queen’s Counsel.

Preserving judicial independence

114. This is a role the Lord Chancellor has traditionally undertaken. It is of real constitutional significance. Whilst the effect of the changes frees up the Secretary of State for Constitutional Affairs to be a more normal Cabinet minister, he should still retain the role of protecting judicial independence, both within and outside Government. Because the post is new, to provide clarity about this, it may well be sensible to enshrine this responsibility in statute.

**Question 17: Should the responsibility of the Secretary of State for protecting judicial independence be enshrined in statute?**
4 Membership

115. The new Judicial Appointments Commission for England and Wales will be made up of Commission members to direct and oversee the appointments process, and either make appointments or recommend them, with a supporting staff to administer the process itself. This chapter sets out the Government’s proposals for how Commission members should be appointed, what the size and balance of membership of the Commission should be, what qualities Commission members should possess and what working arrangements and tenure the members can expect.

Separate recommending body to appoint the Commission members

116. The Government proposes that members of the Judicial Appointments Commission for England and Wales are appointed using open and transparent methods, in accordance with the Nolan principles. The Government does not believe that appointments should simply be made by the Secretary of State for Constitutional Affairs, as this would leave the decision about who sits on the Commission solely in the hands of the Executive. The preferred option would be to have the appointments made by The Queen. The Permanent Secretary of the Department for Constitutional Affairs would chair a separate recommending body, whose recommendations would be passed up to the Prime Minister who would make the formal recommendation for appointment to The Queen. Other members of that recommending body might be a senior judge, for example, a senior figure entirely removed from the Department and the

13 The seven Nolan principles are selflessness, integrity, objectivity, accountability, openness, honesty, and leadership.
judiciary, and of course an Independent Assessor, appointed in line with the Code of Practice for Public Appointments Procedures14.

**Question 18: Who should be responsible for appointing Commission members?**

**Size of Commission**

117. The Government proposes that the Commission has 15 members. This would make it large compared to the senior boards of other similar bodies, but that figure is proposed due to the sheer scale of the appointments process in England and Wales. Approximately 900 judges and tribunal members are appointed each year, considerably more than any comparable jurisdiction. Even if the majority of the appointing work is handled by panels and support staff, there will still be a considerable role for the Commission members, in directing and overseeing that work and making appointments or recommendations as appropriate. This input will increase further if the Commission members are to have a direct role in more senior appointments. The figure of 15 members is proposed in order to have enough members to handle that work, but not so many to make the Commission an unwieldy body. Views are sought on the most appropriate size of the Commission.

**Membership groups in the Commission**

118. Commissions in other jurisdictions are mostly a combination of judges, practising lawyers, and lay people (often including those with experience of personnel management and appointments). The Judicial Appointments Board in Scotland, for example, is comprised of ten members (including the Chairman), with an equal balance of lay members from varying backgrounds, and legal members, drawn both from the judiciary and legal professions. The current Chairman is from a senior local government

14 The full Code of Practice for Public Appointments is at www.ocpa.gov.uk/leaflets/codeofpractice.pdf
background. Two lay members have backgrounds in business. The two other lay members are university professors with a background in academic law. In Northern Ireland, the Justice (Northern Ireland) Act 2002\textsuperscript{15} has set out the framework for establishing the Northern Ireland Judicial Appointments Commission which will be comprised of a Chairman (who will be the Lord Chief Justice) and 12 members. There will be five judicial members nominated by the Lord Chief Justice from each layer of the judiciary, two legal professional members (a barrister nominated by the Bar Council and a solicitor nominated by the Law Society) and five lay members who have never held judicial office or been barristers or solicitors and who should as far as possible be reflective of the community in Northern Ireland.

119. Both examples have a membership which includes judicial representatives, legally-qualified members and lay members. The Government believes this to be the right model for the membership of a Judicial Appointments Commission for England and Wales. Judicial representatives provide expert knowledge of the requirements of judicial posts, legal members provide representation from the pool from which candidates are drawn, and lay members provide input from outside the legal world and represent the community served by the courts.

Balance of membership

120. The key to establishing a successful, well-respected, independent Commission is to get the balance of members right. The Government is keen to ensure a good balance of members from a reasonably wide range of different groups and backgrounds so that no one section dominates and the Commission can form a strong identity, distinct from the vested interests of the groups from which its members are drawn. If some members of the Commission for England and Wales were to be judges, and others legally qualified, it would be important to ensure the

\textsuperscript{15} See: www.hmso.gov.uk/acts/acts2002/20020026.htm
Commission did not simply represent their views, but took into account the input of non-legal members.

121. The Government’s preferred option would be for the judges, legally qualified members and lay members to be equally represented. If the Commission were to have 15 members, there would be five judicial members\textsuperscript{16}, five legally qualified members, and five lay members. The Government would propose to include any academic lawyers in the five places reserved for the legal profession, rather than in the five lay places.

**Question 19: Should the Commission include judicial members, legally-qualified members and lay members as proposed?**

If so, how should the balance between the membership groups be struck?

If not, how should the Commission be constituted?

**The Chair of the Commission**

122. The Chair of the Commission will be a critical role. The Chair will have overall responsibility for the running of the judicial appointments process, and will need to ensure that the Commissioners work effectively together. The commitment will almost certainly be more significant than for other members of the Commission.

123. There are two options for who could chair the Commission. The Chair would be drawn from one of the membership groups discussed above. An eminent non-legal person as Chair, would help to ensure that the lay voice in the Commission was heard, and could enhance public confidence in the independence of the Commission.

\textsuperscript{16} This would go some way towards meeting the recommendation of the European Charter on the Statute for Judges that at least half the membership of an appointments commission should be judges.
124. An alternative option would be to have a senior judge as Chair, such as the Lord Chief Justice. This option would strengthen the judicial representation on the Commission, and would certainly bring prestige to the Commission and ensure that it commanded the respect of the judiciary and the legal profession.

**Question 20: Who should chair the Commission?**

**Other Commission members**

125. The Commission’s main purpose would be the appointment of judicial office holders, so it would be important to recruit one or more Commission members with a strong background in recruitment to senior positions. It will be vital for a Commission tasked with modernising and opening up the appointments process to be able to draw on recruitment expertise. Another important attribute for some or all Commission members, and particularly so for the Chair of the Commission, would be the ability to focus on the delivery of appointments in the required timescales. The number of appointments dealt with by the Commission each year will be large and the Commission will be working to meet the needs of the Court Service and tribunal services. These needs are dictated by business demand in the courts and tribunals and vacancies arising due to other factors such as sickness or retirement. Failure to fill these vacancies in sufficient time would have a direct detrimental effect on court and tribunal business.

**Methods of appointing Commission members**

126. As stated above, the Government’s intention is that members of the Commission will be appointed using open and transparent methods in accordance with the Nolan principles.
127. It might be considered appropriate, however, for some members to be nominated to sit on the Commission, rather than appointed by open competition. This might be particularly relevant for those Commission members who are intended to be representative of particular interest groups, such as the judiciary. It is not unusual for judges to be nominated to sit on independent bodies. The Government would not consider it appropriate for the Secretary of State for Constitutional Affairs to nominate judges to sit on the Commission; they should be nominated by the Judges Council, which is representative of all levels of the judiciary, and which is entirely independent of the Government.

128. Under this arrangement, the Judges Council would have a statutory right to nominate the judicial members of the Commission. The Office of the Commissioner for Public Appointments (OCPA) recommends that in exercising such a right, bodies must ensure their nominees meet the criteria laid down for the appointment and reflect the spirit of the Code of Practice for Public Appointments Procedures in the procedures they apply internally to the selection of their nominees. The Judges Council would therefore give a choice of candidates to the separate recommending body (outlined in paragraph 116), who would assess the nominations and pass their recommendation to the Prime Minister who would make the formal recommendation for appointment to The Queen, as with other Commission members. There would be no requirement, however, for nominees to undergo a full application and interview process.

129. Professional bodies, such as the Bar Council or Law Society – the two bodies which represent the pool from which almost all candidates for judicial office are drawn – might also be identified as bodies with a statutory right to have a representative on the Commission. Examples of other such bodies might be those who represent national consumer interests or legal advice bodies. Views are sought on whether any legal or non-legal members should be nominated to the Commission in this way and if so which bodies would be most appropriate to be given a statutory right to provide such nominations.
130. There remains one further option, on which views are also sought, which would combine the approaches of nomination and open competition. Under this option, bodies such as the Bar Council or Law Society would be consulted by the separate recommending body on which members they would particularly like to put forward for appointment to the Commission. These members would then be invited to apply for the selection process, under open competition.

Question 21: Should all Commission members be appointed following open competition?

If not, should some members be nominated?

If you think some members should be nominated, which bodies should be invited to provide nominations?

Should these bodies be given a statutory right to have a member on the Commission?

If not, should they be consulted by the separate recommending body to put forward candidates to apply for the selection process, under open competition?

Working arrangements

131. In order to attract a sufficient calibre of Commission member, it is proposed that members would work part-time. This allows people of the appropriate calibre to give their time to the Commission without jeopardising alternative careers. As the administrative staff would mostly work full-time, it is possible that most, if not all, of the Commission members could therefore work part-time to fulfil the role they are to play in the appointments process, discussed in more detail in Chapter 2.

132. Even if the Commission members were to work part-time to fulfil their role, they would be appointed on a permanent basis. The Chair would
therefore be paid a pro-rata salary, as opposed to fees per day worked, as would most of the Commission members. Exceptions would arise where the members of the Commission were in full-time state employment (including full-time judges and civil servants). These members would receive no additional pay for their work for the Commission.

Question 22: Do you have any views on the working arrangements for Commission members?

Tenure

133. Once the Commission members are appointed, they must have security of tenure to ensure their full independence from those who have appointed them. Their contracts must be sufficiently protected to ensure they are not able to be removed from office for making a decision or recommendation that is contrary to the will of the Executive or those who appointed them. As with other Commissions, such as the Electoral Commission, there would need to be specific statutory provisions to allow for the removal of a Commissioner should circumstances arise in which it was no longer appropriate for him or her to remain in office.

134. The length of tenure would ideally be five years, allowing members to build up expertise. In the establishment phase, however, the tenures would need to be staggered, with some appointments shorter than five years initially. After a suitable period, all tenures could then be set to five years, by which time the sequence would be staggered so there would not be a time when all Commissioners left and were replaced at once. A similar system was used to good effect in Ontario in Canada when the Judicial Appointments Commission was established there in 1989. There could also be the option to serve more than one term, to retain experience and expertise.
135. If the situation arose when a judicial member of the Commission wanted to apply for a judicial post, that member would have to leave the Commission prior to applying for the post.
Annex A: The Judicial Appointments Process

This annex describes the general procedure followed for judicial appointments in England and Wales\(^\text{17}\).

Applications

For all judicial appointments up to and including the level of Senior Circuit Judge it is necessary to apply in writing to be considered for appointment. Judicial posts are advertised in national newspapers, legal journals and/or on the Web, or by direct contact with all those who are eligible. Job descriptions and statements of the criteria for appointment for each office are available with application forms. The application form requires candidates to assess themselves against the criteria for appointment and to give examples from their experience to demonstrate how they meet those criteria.

Applications are welcome from any suitably qualified candidates.

Consultation

It is a central feature of the appointments system that assessments of the qualities and work of practitioners and fee-paid office holders are made by judges, members of both branches of the legal profession and others who may be able to comment on any particular skills or knowledge of the applicant.

There is no secrecy about those who are consulted. For those competitions where there are ‘automatic’ consultees, the application pack indicates exactly who the consultees are for those competitions where they are used. There are essentially two types of consultation: Automatic consultation is carried out for these competitions to obtain assessments on candidates from experienced senior members of the judiciary and legal profession as a whole. For all competitions, candidates may also nominate between three and six other people to be consulted.

The consultation process is linked directly to the particular criteria for appointment to a post. Those who are consulted are advised to provide specific, objective evidence, related to the criteria. The information provided must be up-to-date and preferably based on recent knowledge of the applicant. The weight

\(^{17}\) Exact procedures may vary slightly for some judicial offices.
attributed by the sift and interview panel to a consultee’s views will depend on how particularised they are, how well the consultee knows the applicant’s work, and how recent is that knowledge.

Any factual information held on candidates is available to the individuals concerned on request to check and, if necessary, amend. As is not unusual in a selection system where independent parties are consulted on a candidate’s suitability for appointment, those assessments remain confidential. Candidates, however, are invited to seek feedback from a member of Legal and Judicial Services Group, during which they will be told of the assessments collected about them, although not who has said what.

For the most senior appointments, the Lord Chancellor consults senior members of the judiciary before recommending individuals for appointment to the Court of Appeal or the House of Lords. All Supreme Court Judges and Law Lords have been consulted on those who are being considered for the High Court Bench, and there is more focused consultation on Circuit Judges. The Lord Chancellor consults the four Heads of Division, together with the Senior Presiding Judge, when considering candidates for appointment to specific posts on the High Court Bench.

**Sifts**

For appointments up to and including the level of Senior Circuit Judge all applications will be considered to form a shortlist of candidates who will be asked to attend a formal interview. The sifting panel consists of a serving judge of a relevant jurisdiction, a senior official in the Legal and Judicial Services Group and a lay person (a non-lawyer, independent of the Department and the legal profession). The panel considers each candidate’s application and self-assessment against the criteria for appointment, along with the written assessments received. Taking into account the number of vacancies for the post concerned, a shortlist of candidates for interview is compiled.

**Interviews**

The interviews are conducted by the same, or similarly constituted, panels. Panel members make their assessments by asking questions which further test how well each candidate demonstrates the criteria for appointment. The

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18 If the appointment in question is for a tribunal post the panel may, instead of a judge, contain either the President of the tribunal, a Regional Chairman of a tribunal or a legal member of the tribunal. Where a specific quality is to be assessed e.g. for medical members of a tribunal, a member of the appropriate profession would be present on the panel.
interview therefore provides a further opportunity for the candidate to
demonstrate the qualities and skills needed to be a judge or tribunal member.

After the interview the candidate is rated against each of the criteria. Each
member reaches an independent conclusion and then views are discussed and
an overall assessment reached. The rating for each candidate takes account of
the evidence from the application form and self-assessment, written assessments
made against the criteria as well as the interview. Further information about
interviews is given in the guide for applicants in each application pack.

Successful candidates

The successful candidates are those who best demonstrate that they meet the
criteria during the whole of the selection procedure. The Lord Chancellor
personally considers the applications of each candidate interviewed, before he
makes his final decision, which is based on all the information available to him.

Feedback for unsuccessful candidates

An applicant who has been unsuccessful, either at the sift or interview stage, may
discuss the outcome of his or her application with a Legal and Judicial Services
Group official. This official will also give advice, where appropriate, about how a
candidate could do better in the next application should he or she wish to reapply.
They will also explain the tenor of the assessments received during the
consultation, without revealing the source, and will discuss how the candidate
performed at interview (if applicable) and, if any areas could be improved, identify
those areas. The discussion is intended to be a constructive dialogue. Given the
strength of the competition for a limited number of vacancies, it is often the case
that candidates are considered suitable but are not among the best at that time.
Seeking feedback does not disadvantage candidates who make future
applications.
Annex B: Judicial Appointments in Other Jurisdictions

This annex provides comparative information on the Judicial Appointments Board for Scotland, and the proposed Northern Ireland Judicial Appointments Commission, and gives a brief overview of judicial appointments arrangements in a selection of civil and common-law jurisdictions.

It should be noted that the development and use of appointing commissions in other jurisdictions must be viewed in light of the specific political and historical context in which they have arisen. This is a particularly important consideration in the case of continental Europe, in which civil-law justice systems differ significantly from our own common-law system, not least in the presence of a career judiciary.

Scotland

Background

The statutory arrangements for judicial appointments in post-devolution Scotland are set out in the Scotland Act 1998. The Act empowers the First Minister to recommend candidates to The Queen, following consultation with the Lord President of the Court of Session. Post-devolution, but prior to the creation of a Judicial Appointments Board in June 2002, the Lord Advocate recommended candidates to the First Minister following confidential consultation. Vacancies for appointment to Sheriffs Posts were advertised, following which the Lord Advocate again made recommendations to the First Minister, having received advice from the Sheriffs Principal.

In September 1999, the Scottish Executive committed to a consultation exercise on the arrangements for judicial appointments in A Programme for Government. In April 2000, the Executive issued a consultation paper entitled Judicial Appointments: an Inclusive Approach. Responses revealed general support for the establishment of a Judicial Appointments Board. In March 2001, the Justice Minister announced the Executive’s intention to establish the Judicial Appointments Board for Scotland. The Board began work in June 2002. It presently operates on an administrative footing but will, in due course, be formalised in legislation.

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19 Scottish legislation can be viewed at: www.scotland-legislation.hmso.gov.uk
21 See: www.scotland.gov.uk/consultations/justice/jaia-03.asp
Membership

The Board is comprised of ten members (including the Chairman), with an equal balance of lay members from varying backgrounds, and legal members, drawn from both the judiciary and legal professions. The current Chairman is from a senior local government background. Two lay members have backgrounds in business. The two others are academic professors. The members were appointed by the Scottish Executive after an advertisement seeking applicants.

Remit

For those judicial offices covered by the Board (see below), the power to make appointments (or recommend them to the Queen) remains in the hands of the Scottish Executive. The Board’s specific remit is:

- to provide the First Minister with a list of candidates recommended for appointment to the offices of Judge of the Court of Session, Sheriff Principal, Sheriff and Part-time Sheriff;
- to make such recommendations on merit, but in addition to consider ways of recruiting a judiciary which is as representative as possible of the communities which they serve; and
- to undertake the recruitment and assessment process in an efficient and effective way.

The Board is authorised to organise its own methods of working within the framework of a set of principles laid down by the Executive. Those are:

- vacancies must be publicly advertised;
- all eligible applicants must be considered;
- applicants should be considered against objective criteria;
- legally qualified members must be satisfied that any candidate to be recommended for appointment has the requisite professional competence for the post;
- candidates must be recommended on merit;
- no candidate should be recommended without having been interviewed;
- Ministers are provided with a written report on all competitions and that candidates interviewed should be reported on; and
- feedback is provided to applicants, if requested, although it is for the Board to decide the method and extent of feedback given to applicants.

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22 The Judicial Appointments Board for Scotland website: www.judicialappointments.scotland.gov.uk contains further information on members’ backgrounds.
When the Executive requires judicial posts to be filled, the Board, supported by a small administrative staff, advertises vacancies and conducts recruitment exercises. After assessing candidates, the Board submits a ranked list of recommendations to the Executive. This process is the same for all appointments within the Board’s remit. Although the Board’s procedures must be seen to be open and fair the identity of applicants is confidential, as is the information contained in applications.

The First Minister has discretion to reject the Board’s recommendation and require a new list to be drawn up, but only where there is a compelling reason to do so. Since the Board began work in June 2002, none of its selections have been rejected and appointments to approximately 40 posts have been made.

The Scottish Judicial Appointments Board’s remit does not include judicial training, which is arranged by the Judicial Studies Committee. The Board has no involvement in dealing with complaints about judicial misconduct, which are dealt with by the Scottish Executive Justice Department. Removal of judges for gross misconduct is a matter for the Scottish Parliament on presentation of a motion for removal brought by the First Minister.

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23 All posts are now advertised and subject to application, interviews and the collection of references
The table below summarises the appointment arrangements before and after establishment of the Judicial Appointments Board for Scotland:

<table>
<thead>
<tr>
<th>Judicial Office</th>
<th>Before</th>
<th>After</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lord President and Lord Justice Clerk</td>
<td>Appointment by The Queen on the advice of the Prime Minister (on candidates put forward by the First Minister)</td>
<td>As before</td>
</tr>
<tr>
<td>Senators of the College of Justice (Judges in the Supreme Courts of Scotland)</td>
<td>Appointment by The Queen on the recommendation of the First Minister following consultation with the President of the Court of Session.</td>
<td>Appointment by The Queen on the recommendation of the First Minister who is presented with a ranked list of candidates selected by the Judicial Appointments Board. The First Minister also consults the Lord President of the Court of Session (who has a statutory right to be consulted).</td>
</tr>
<tr>
<td>Sheriffs Principal and Sheriffs</td>
<td>Appointment by The Queen on the recommendation of the First Minister in consultation with the Lord President</td>
<td>Appointment by The Queen on the recommendation of the First Minister who is presented with a ranked list of candidates selected by the Judicial Appointments Board. The First Minister also consults the Lord President of the Court of Session (who has a statutory right to be consulted).</td>
</tr>
</tbody>
</table>

Northern Ireland

Background

Since 1973, the Lord Chancellor has been responsible for making (or advising The Queen on) all judicial appointments in Northern Ireland. In performing this role he receives administrative support from the Northern Ireland Court Service.

In June 1998, the Criminal Justice Review Group was established pursuant to a commitment to review the criminal justice system, set out in the Good Friday Agreement (officially entitled the Belfast Agreement 1998). The Review Group published a consultation paper in August of that year, which canvassed opinion on judicial appointment procedures. In April 2000, the Group’s findings were published in the Report of the Review of the Criminal Justice System in Northern Ireland24. Amongst its findings was a recommendation that political responsibility and accountability for judicial appointments should lie with the First Minister and

24 See: www.nio.gov.uk/issues/justice/htm
deputy First Minister acting jointly, who should take over responsibility for making recommendations to The Queen for appointments to the High Court, and for making direct appointments at county court level. The Review Group also recommended the creation of a Judicial Appointments Commission. The Justice (Northern Ireland) Act 2002\textsuperscript{25} sets out the framework for establishing such a Commission. The provisions are not yet commenced. A new Justice Bill is to be introduced in Autumn 2003 to allow the Judicial Appointments Commission to be established prior to the devolution of justice.

**Membership**

The Commission will be comprised of a Chairman and 12 members, appointed jointly by the First Minister and Deputy First Minister. The membership will comprise:

- the Chairman: (who will be the Lord Chief Justice);
- five judicial members nominated by the Lord Chief Justice from each layer of the judiciary;
- two legal professional members (a barrister nominated by the Bar Council and a solicitor nominated by the Law Society); and
- five lay members who have never held protected judicial office or been barristers or solicitors and who should as far as possible be representative of the community in Northern Ireland.

**Remit**

As with the Judicial Appointments Board for Scotland, the power to appoint, (or recommend appointments to The Queen), will remain in the hands of the Executive.

The Commission's role will be to organise selection panels, shortlisting and interviewing candidates, before in most cases making a recommendation to the First and Deputy First Ministers who may invite the Commission to reconsider its decision but, ultimately, are obliged to appoint, or recommend for appointment, candidates selected by the Commission.

The Commission will be required to make or recommend appointments strictly on the basis of merit. However, in so doing, as with the Judicial Appointments Board for Scotland, the Commission will be obliged to seek means to ensure that those available for selection are as reflective of the community in Northern Ireland as possible.

\textsuperscript{25} See: www.hmso.gov.uk/acts/acts2002/20020026.htm
For each of its selections the Commission will be required to make a report of its process of selection including the basis of its decision. In addition, the Commission will be required to make an annual report (see Schedule 2 Paragraph 5 of the Act).

The table below summarises the proposed changes to appointments for key judicial posts.

<table>
<thead>
<tr>
<th>Judicial Office</th>
<th>Present</th>
<th>Intended</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lord Chief Justice</td>
<td>Appointment by The Queen on the recommendation of the Prime Minister following advice from the Lord Chancellor</td>
<td>Appointment by The Queen on the recommendation of the Prime Minister following consultation with the First Minister and Deputy First Minister (who will have the advice of the Judicial Appointments Commission as to the procedure to adopt) and the Lord Chief Justice</td>
</tr>
<tr>
<td>Lord Justice of Appeal</td>
<td>Appointment by The Queen on the recommendation of the Prime Minister following advice from the Lord Chancellor</td>
<td>Appointment by The Queen on the recommendation of the Prime Minister following consultation with the First Minister and Deputy First Minister (who will have the advice of the Judicial Appointments Commission as to the procedure to adopt) and the Lord Chief Justice</td>
</tr>
<tr>
<td>High Court Judge</td>
<td>Appointment by The Queen on the recommendation of the Lord Chancellor following advice from the Lord Chief Justice</td>
<td>Appointment by The Queen on the recommendation of the First Minister and Deputy First Minister following selection by the Commission</td>
</tr>
<tr>
<td>County Court Judge</td>
<td>Appointment by The Queen on the recommendation of the Lord Chancellor following advice from the Lord Chief Justice</td>
<td>Appointment by the First Minister and Deputy First Minister following selection by the Commission</td>
</tr>
<tr>
<td>Resident Magistrate</td>
<td>Appointment by The Queen on the recommendation of the Lord Chancellor</td>
<td>Appointment by the First Minister and Deputy First Minister following selection by the Commission</td>
</tr>
<tr>
<td>Deputy Resident Magistrate</td>
<td>Appointment by the Lord Chancellor</td>
<td>Appointment by the First Minister and Deputy First Minister following selection by the Commission</td>
</tr>
</tbody>
</table>

The Commission will not be responsible for judicial training. This will continue to be handled by the Judicial Studies Board for Northern Ireland, with support from the Northern Ireland Court Service. As at present, complaints about judicial misconduct will continue to be dealt with by the Lord Chancellor (and in some

26 The full range of appointments within the competence of the Commission is listed at Schedule 1 of the Justice (Northern Ireland) Act 2002.
instances the Lord Chief Justice). The procedures for removal of a judge from office appear in Part 1 Sections 6 & 7 of the Act. The Commission will have no involvement in this process.

**Commissioner for Judicial Appointments for Northern Ireland**

It should be noted that the intended Northern Ireland Judicial Appointments Commission is distinct from the existing Commissioner for Judicial Appointments for Northern Ireland27, who performs an independent audit and oversight function in respect of the current appointment procedures and investigates complaints relating to these procedures. This office corresponds with the recommendations of Sir Leonard Peach, and was also recommended by the Criminal Justice Review Group.

The first Commissioner for Judicial Appointments for Northern Ireland, John Simpson, was appointed in December 2001 and is currently supported by a staff of four. The Commissioner’s remit is to:

- conduct an ongoing audit of the existing processes and procedures for making and renewing judicial and tribunal appointments;
- handle complaints resulting from the application of those processes and procedures in individual recruitment schemes;
- monitor the programme of work set out by the Judicial Appointments Unit of the Northern Ireland Court Service for implementing those elements of the Criminal Justice Review Report’s recommendations on appointments procedure and outreach that do not require legislative change;
- monitor existing processes and procedures for appointing Queen’s Counsel and to handle complaints resulting from the application of those processes and procedures;
- consider comments about the judicial and Queen’s Counsel appointment processes, received from individuals, MPs, representative bodies and other organisations;
- investigate any matter in the appointment process which the Lord Chancellor wishes to have examined;
- recommend improvements and changes on the above procedures to the Lord Chancellor; and
- publish an annual report.

It is intended that the Commissioner’s role will be reviewed when the Northern Ireland Judicial Appointments Commission is established.

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27 See: [www.courtsni.gov.uk/cjani/home.htm](http://www.courtsni.gov.uk/cjani/home.htm)
Continental Europe

The majority of civil-law jurisdictions which exist in continental Europe exhibit one key difference to common-law systems such as our own; namely a career judiciary. Thus, it should be noted that direct comparisons with our own system are of little relevance, since the appointment processes and make-up of the judiciary in these jurisdictions are bound up with this fundamental distinction.

A growing number of continental European countries have instituted new arrangements for appointing judges in recent years, which have led to a reduction in the role of the Executive in the appointing processes. Countries such as France, Italy, Spain and Portugal have established judicial self-governing bodies (typically known as ‘higher councils of the judiciary’).

Where a career judiciary exists, experience within the legal profession is not a pre-requisite to becoming a judge. Judges are generally recruited following graduation from university followed by completion of some form of public examination and a mandatory period of training. Although in some cases the formal power of appointment remains with the Executive, a key feature of higher councils of the judiciary is the very significant role which they play, not only in the selection and appointment of the judges, but also in every other major aspect of judicial life. For example, as well as controlling the appointments process, the Italian Consiglio Superiore della Magistratura (CSM), is responsible for appointing the judges, public prosecutors and law professors who comprise the board responsible for setting the examination which candidates must pass to be selected for judicial training. The CSM also controls career advancement and disciplinary matters, and has overall responsibility for the supervision of cases. The position is similar in Spain, Portugal and France.

Membership of higher councils of the judiciary generally includes judges, representation from the Executive, members of the legal profession and lay members with some legal expertise.
The table below summarises the composition of a selection of higher councils of the judiciary and the methods by which members are appointed:

<table>
<thead>
<tr>
<th>Country / Name of Body</th>
<th>No of Members</th>
<th>Membership</th>
</tr>
</thead>
<tbody>
<tr>
<td>France</td>
<td>10</td>
<td>5 elected by judges 1 public prosecutor 1 councillor of state chosen by his/her peers 3 individuals nominated one each by President of Republic, the Senate and National Assembly Ex officio Members: President of Republic &amp; Minister of Justice</td>
</tr>
<tr>
<td>Italy</td>
<td>24</td>
<td>16 judges elected directly by the judiciary 8 lawyers or university law professors nominated by Parliament Ex officio Members: President of the Republic (Chair) First President of the Corte di Cassazione Attorney General of the Corte di Cassazione</td>
</tr>
<tr>
<td>Spain</td>
<td>20</td>
<td>12 judges 8 Lawyers with more than 15 yrs experience All appointed by Parliament Ex officio Members: President of the Supreme Court</td>
</tr>
<tr>
<td>Portugal</td>
<td>16</td>
<td>7 judges elected directly to the judiciary 1 judge &amp; 1 non-judge nominated by President of the Republic 7 non-judges nominated by Parliament Ex officio Members: President of the Supreme Court</td>
</tr>
</tbody>
</table>
USA and Canada

In kind with England and Wales, the USA and Canada are common-law countries and do not have a career judiciary. It is therefore worth looking at their judicial appointment arrangements in a little more detail.

USA

Federal Level Appointments

There are no constitutional or federal requirements to be a federal judge. The American constitution simply provides for the President to appoint Judges of the Supreme Court with the advice and consent of the Senate. Congress has applied the same selection procedure to the federal appellate and trial courts. Due to the pivotal role played by the legislature, appointment arrangements at federal level are not relevant to the issues raised in this consultation and are not discussed further here.

State Level Appointments

The use of Commissions (often called Merit Plans or Merit Commissions) by US states to select candidates for appointment by the state Executive has arisen as a result of growing criticism of direct popular election of judges, which has traditionally been seen as the prevailing method of appointment. Merit Plans are so called because of their aim to shift the balance of selection on to a candidate’s merit rather than his or her social or political affiliations, or financial means to run an election campaign, which some see as a major shortfall of elective appointments. To date, 34 states have adopted Merit Commissions to select candidates for at least a proportion of their judicial appointments. The remaining appointment methods include legislative and gubernatorial28, as well as remaining partisan and non-partisan elections (see table below for a summary of appointment methods in each US state).

There is no set model for Merit Commissions and different states operate different combinations of systems. However, there are certain common features which are outlined by the American Judicature Society29 (AJS), a body which promotes the use of Merit Commissions.

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28 Similar to federal level appointments. After initial screening judges are first appointed by the State Governor followed by confirmation or rejection by the State legislature

29 See: www.ajs.org for further information
Membership

According to the AJS model, a typical Merit Plan or Commission will be:

- comprised of both lay persons and legal professionals chosen by panels of public officials, lawyers and private citizens; and

- ranging in size from five to 24 members (a common model in practice being three lawyers, three non-lawyers and one judge, who has a casting vote).

Remit

Merit Commissions do not make appointments themselves. Their role is to:

- advertise and publicise judicial vacancies;
- assess applications, shortlist and interview candidates; and
- present recommendations in ranked order to the appropriate appointing authority (usually the State Governor).

In performing this role, general guidelines exist around which each Commission derives its own procedures.

The AJS model proposes that efforts be made to ensure that the Commission itself substantially reflects the gender, ethnic and racial diversity of the jurisdiction it serves.

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30 The AJS model recommends that the commission nominate between two and five candidates to the appointing authority.
The table below summarises the appointing procedures used in the United States:

<table>
<thead>
<tr>
<th>Merit Selection through nominating commission</th>
<th>Gubernatorial or legislative appointment without nominating commission</th>
<th>Partisan election</th>
<th>Non-partisan election</th>
<th>Combined merit selection and other members</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alaska</td>
<td>California</td>
<td>Alabama</td>
<td>Arkansas</td>
<td>Arizona</td>
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<td>Colorado</td>
<td>Maine</td>
<td>Illinois</td>
<td>Georgia</td>
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<td>Connecticut</td>
<td>New Jersey</td>
<td>Louisiana</td>
<td>Idaho</td>
<td>Indiana</td>
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<td>Delaware</td>
<td>Virginia</td>
<td>Michigan</td>
<td>Kentucky</td>
<td>Kansas</td>
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<td>District of Colombia</td>
<td>South Carolina</td>
<td>Ohio</td>
<td>Minnesota</td>
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<td>Hawaii</td>
<td>Pennsylvania</td>
<td>Mississippi</td>
<td>New York</td>
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<td>Iowa</td>
<td>Texas</td>
<td>Montana</td>
<td>Oklahoma</td>
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<td>Maryland</td>
<td>West Virginia</td>
<td>Nevada</td>
<td>South Dakota</td>
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<td>Massachusetts</td>
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<td>North Carolina</td>
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<td>Nebraska</td>
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<td>North Dakota</td>
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<td>New Hampshire</td>
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<td>New Mexico</td>
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<td>Rhode Island</td>
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<td>Wisconsin</td>
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<td>Wyoming</td>
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**Canada**

For some years the judicial appointments system in Canada was similar to that of England and Wales, with the power to appoint judges and the appointing procedures themselves controlled by the Executive. Canada has, in recent years, begun to adopt the use of advisory Commissions in an attempt to provide greater openness and wider participation after criticisms of what were viewed as a series of overtly party-political appointments in the mid-1980s.

**The Federal Committees**

**Membership**

Each Committee has seven members who sit for two years with the possibility of re-appointment for one further term. The membership comprises three lawyers, three lay persons and a judge. Two lay persons and one lawyer are appointed directly by the federal Minister of Justice and the remainder from a list of lawyers provided by the Provincial Law Society and Canadian Bar Association, and judges provided by the Chief Justice of the province. The provincial Attorney General or Minister of Justice provides the final appointment.
Remit

Appointments are officially made by the Governor General on the advice of the federal Cabinet. The Cabinet receives recommendations from the Minister of Justice on the advice of the Committee following consultation with the senior judiciary and Bar. In 1996, Ministers agreed only to appoint candidates recommended by the Committees. The Minister of Justice is required to seek and select appointments to the Committee which reflect the gender, language and cultural diversity of the Province.

Only initial appointments, rather than promotions, are made by the Committee, as it is deemed to be inappropriate for the Committees to scrutinise existing judges.

The Provincial Committees

Four of Canada's 13 provinces use appointment commissions and the remainder are considering adopting the system.

Different provinces use different models of committee with a different balance between a purely advisory or more proactive approach to appointing. The Ontario Judicial Appointments Advisory Committee\(^{31}\) (JAAC), set up by the Canadian Attorney General in 1989, is generally cited as a model example.

Membership

The JAAC has 13 members. It is comprised of:

- seven lay persons (selected by the provincial Attorney General);
- three lawyers (selected by the Ontario branch of the Canadian Bar Association and the County and District Law President’s Association);
- two judges (selected by the Chief Judge of the Provincial Court); and
- a member of the Judicial Council.

Those choosing appointees to the Committee are required by statute to consider the social diversity of the jurisdiction.

Members are appointed for three years with the possibility of a further three year renewal and membership is staggered to maintain a balance of experience.

\(^{31}\) See: [www.ontariocourts.on.ca](http://www.ontariocourts.on.ca)
Remit

The JAAC advises the Attorney General on appointments to the Ontario Court of Justice, effectively meaning all judicial appointments within the Province.

The Committee’s remit is to:

- advertise vacancies;
- review applications, collect references and interview candidates; and
- recommend a ranked list of those interviewed to the Attorney General, who makes the final appointment.

The Committee has the power to decide the criteria to be applied in making a recommendation. However, these must broadly encompass certain statutory criteria, such as professional excellence and community awareness.

The Committee undertakes initiatives to increase applications for judicial vacancies from under-represented groups.
A New Way of Appointing Judges

Australia

Federal level appointments in Australia are made by the federal Government on the advice of the Attorney General. The statutory criteria for appointment are usually limited to a period of admission or practice as a legal practitioner within the relevant jurisdiction. In recommending appointments, the Attorney General follows an informal but well established process of consultation with the federal judiciary and bodies representing the legal profession, such as the National Professional Association of Legal Practitioners.

Judicial Appointments at state level are made by the relevant state Government either directly by, or on the advice of, the Attorneys General of the state in question.

New Zealand

As with Australia, the power to make judicial appointments in New Zealand rests with the Executive.

In 1998, the New Zealand Government set up the Judicial Appointments Board, comprised of judges, members of the bar and lay members. The Board advertises judicial positions, reviews applications and submits a ranked list of at least two candidates to the Attorney General, who makes the final recommendation to the Governor General.

In September 2002, the Government asked Sir Geoffrey Palmer to review the current appointment procedures in New Zealand. Sir Geoffrey's report, entitled Judicial Administration Issues, published in November 2002, rejected the notion of an independent commission to make judicial appointments and recommended that this power should remain with the Executive. The report also recommended the establishment of a new Judicial Appointments and Liaison Office to assume responsibility for the recruitment process and other issues currently shared by several agencies, such as judicial terms and conditions of service. The Government is considering this proposal.

32 The only exception to this is the appointment of High Court Justices for which the federal Attorney General must consult the Attorneys General of the States (High Court of Australia Act 1979)
33 Amongst other past roles Sir Geoffrey Palmer has held the offices of Prime Minister and Justice Minister and Attorney General of New Zealand
Annex C: Summary of Consultation Questions

Below is a summary of the questions set out in the consultation paper to which we would specifically like answers. **Please ensure that you include the number of the question/s to which you are responding.** However, when replying, please feel free to make any additional comments or raise other points which you consider relevant.

**Question 1:** Do you prefer:

i. An appointing commission?
ii. A recommending commission? or
iii. A hybrid commission?

What are your reasons?

**Question 2:** If you favour a Recommending Commission, what degree of discretion do you think should be exercised by the Secretary of State or Prime Minister?

What are your reasons?

**Question 3:** If you favour a Hybrid Commission, which appointments do you think should be made by the Commission and which should it recommend? How much discretion should the Secretary of State or Prime Minister have in relation to recommended appointments?

What are your reasons?

**Question 4:** Do you have a view as to any special arrangements that will need to be made by the Commission in dealing with senior appointments from among the existing judiciary?

**Question 5:** Do you agree that the Commission should not be involved in authorisations to allow judges who have retired before their compulsory retirement age to then sit part-time as deputies until they reach the compulsory age of retirement?

**Question 6:** What arrangements should be made for the appointment of magistrates? In particular (a) should there be a continuing role for local Advisory Committees? and (b) what role
A New Way of Appointing Judges

should there be for the Judicial Appointments Commission?

Question 7: Do you agree that the appointment of coroners should be brought into line with that of other judicial office holders?

Question 8: Do you agree that tribunal appointments should be the responsibility of the Judicial Appointments Commission, under the arrangements discussed in paragraphs 68-69?

Question 9: Do you agree that the Commission should not be involved in the allocation of responsibilities, as described above?

Question 10: Do you agree that there should be a separate body with a reviewing and complaints function once the Judicial Appointments Commission has been established?

Question 11: What formal status should the Commission have? Should it be:

i. a Non-Departmental Public Body?
ii. a Non Departmental Public Body supported by an agency?
iii. a non-Ministerial Department? or
iv. should it have some other status? If so what?

Question 12: Do you agree that the Commission should take on those functions which relate directly to the appointments process (paragraph 88) and that the Government should retain responsibility for policy relating to appointments (paragraphs 90-92)? If not, please provide views on which responsibilities should, and which should not, pass to the Commission and why.

Question 13: Do you agree that the Commission should be tasked with establishing how best to encourage a career path for some members of the judiciary?

Question 14: What other steps could be taken by the Commission to encourage diversity?

Question 15: Should either (i) the Judicial Appointments Commission, or (ii) a body overseeing the work of the Commission, have a
role in advising the Secretary of State for Constitutional Affairs or the Lord Chief Justice on complaints and disciplinary matters?

**Question 16:** Should the Commission have a role in an internal grievance procedure? If so, what should that role be?

**Question 17:** Should the responsibility of the Secretary of State for protecting judicial independence be enshrined in statute?

**Question 18:** Who should be responsible for appointing Commission members?

**Question 19:** Should the Commission include judicial members, legally-qualified members and lay members as proposed?

- If so, how should the balance between the membership groups be struck?

- If not, how should the Commission be constituted?

**Question 20:** Who should chair the Commission?

**Question 21:** Should all Commission members be appointed following open competition?

- If not, should some members be nominated?

- If you think some members should be nominated, which bodies should be invited to provide nominations?

- Should these bodies be given a statutory right to have a member on the Commission?

- If not, should they be consulted by the separate recommending body to put forward candidates to apply for the selection process, under open competition?

**Question 22:** Do you have any views on the working arrangements for Commission members?
Name:

Organisation:

Address:

If you are a representative group please give a summary of the people and organisations you represent:

Please send your response by 7 November 2003 to:

Kerri Sephton  
Department for Constitutional Affairs  
Legal and Judicial Services Group  
5th Floor  
PO Box 38528  
30 Millbank  
London  
SW1P 4XB

Tel: 020 7217 4800  
Fax: 020 7217 4882  
Email: kerri.sephton@dca.gsi.gov.uk
Annex D: List of Consultees

Copies of the consultation paper have been sent to the following organisations. Please note the list is not exhaustive and comments are welcomed from any group or individual who hold a view on the issues in this paper:

• Judiciary
  The Lord Chief Justice of England and Wales  
  The Lord President of the Court of Session, 
  The Master of the Rolls  
  The Vice Chancellor, Chancery Division  
  The President of the Family Division of the High Court  
  High Court Judges  
  Circuit Judges  
  District Judges  
  District Judges (Magistrates Court)  
  Recorders  
  Her Majesty’s Council of Circuit Judges  
  Association of District Judges  
  Magistrates’ Association  
  Magistrates’ Courts Consultative Council.

  Young Barristers’ Committee  
  Young Solicitors’ Committee

• Government Departments, Public Bodies and Agencies
  Advocate General for Scotland  
  Attorney General’s Chambers  
  Cabinet Secretary’s Office  
  Chief Medical Officers  
  Civil Justice Council  
  Commission for Judicial Appointments  
  Commission for Racial Equality  
  Council on Tribunals  
  Crown Dependencies  
  Crown Prosecution Service  
  Department for Work and Pensions  
  Environment Agency  
  Equal Opportunities Commission  
  European Commission  
  Health and Safety Executive  
  HM Customs & Excise  
  HM Treasury  
  Home Office  
  Inland Revenue  
  Judicial Studies Board  
  Law Commission  
  Legal Services Commission  
  Legal Services Consultative Panel  
  Legal Services Ombudsman  
  Lord Advocate  
  National Audit Office  
  Northern Ireland Office  
  Probation Service  
  Scotland Office  
  Serious Fraud Office  
  Solicitor General  
  Solicitor General for Scotland  
  Treasury Solicitor’s Department  
  Wales Office

• The Legal Professions
  Administrative Law Bar Association  
  Association of Personal Injury Lawyers  
  Association of Women Barristers  
  Bar Council  
  Chancery Bar Association  
  Commercial Bar Association  
  Family Bar Association  
  Institute of Barristers’ Clerks  
  Institute of Legal Executives  
  Justices’ Clerks’ Society  
  Law Society  
  Legal Aid Practitioners’ Group  
  Magistrates’ Association  
  Society for Black Lawyers  
  Solicitors’ Association of Higher Court Advocates  
  Solicitors’ Criminal Law Association  
  Solicitors’ Family Law Association
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- Police and Probation Interest Groups
  Association of Chief Officers of Probation
  Association of Chief Police Officers of England, Wales and Northern Ireland
  Association of Police Authorities
  Police Federation
  Police Superintendents' Association of England and Wales

- Main Representative Groups
  Advice Services Association
  British Bankers Association
  British Building Societies Association
  CASIA (Complaints Against Solicitors Action for Independent Adjudication)
  Civil Courts Users' Association
  CBI (Confederation of British Industry)
  Consumers' Association
  Crimewatch
  Crime Concern
  Crime Stoppers
  Disability Alliance
  Federation of Law Centres
  Gingerbread
  Howard League for Penal Reform
  IPPR (Institute for Public Policy Research)
  Jill Dando Institute
  Justice
  Legal Action Group
  Liberty
  Local Government Association
  Litigants in Person Society
  NACRO
  National Association of Citizen's Advice Bureaux
  National Consumer Council
  National Council for Civil Liberties
  NCH
  National Society for the Prevention of Cruelty to Children
  Rape Crisis Federation Wales and England
  Rights of Women Victim Support
  Women's National Commission
Annex E: Consultation Co-ordinator

If you have any complaints or comments about the consultation process, you should contact the Department for Constitutional Affairs consultation co-ordinator, Laurence Fiddler, on 020 7210 8516 or email him at laurence.fiddler@dca.gsi.gov.uk. Alternatively, you may wish to write to the address below:

Laurence Fiddler
Consultation Co-ordinator,
Room 8.23
Department for Constitutional Affairs
Selborne House
54-60 Victoria Street
London SW1E 6QW

General principles of consultation

The criteria in the Code of Practice on Written Consultation issued by the Cabinet Office are as follows:

A Timing of consultation should be built into the planning process for a policy or service from the start, so that it has the best prospect of improving the proposals concerned, and so that sufficient time is left for it at each stage.

B It should be clear who is being consulted, about what questions, in what timescale and for what purpose.

C A consultation document should be as simple and concise as possible. It should include a summary, in two pages at most, of the main questions it seeks views on. It should make it as easy as possible for readers to respond, make contact or complain.

D Documents should be made widely available, with the fullest use of electronic means (though not to the exclusion of others), and effectively drawn to the attention of all interested groups and individuals.

E Sufficient time should be allowed for considered responses from all groups with an interest. Twelve weeks should be the standard minimum period for a consultation.

F Responses should be carefully and open-mindedly analysed, and the results made widely available, with an account of the views expressed, and reasons for decisions finally taken.

G Departments should monitor and evaluate consultations, designating a consultation co-ordinator who will ensure the lessons are disseminated.