

RESPONSE TO THE REVIEW OF THE PROCESS FOR APPOINTING JUSTICES OF THE SUPREME COURT OF THE UK

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We recently completed a three-year, AHRC-funded project on *The Politics of Judicial Independence in Britain's Changing Constitution*. The process for appointing Justices of the UK Supreme Court, and indeed judicial appointments processes more generally, was an important limb to our project. We interviewed around 160 judges, politicians, civil servants and practitioners across the UK, including many of those most closely involved in appointments to the Supreme Court. In the responses below we draw on those interviews as well as other research that we have conducted.

1. How far have we properly identified the scope and nature of the job?

There is something to be said for a short, focused description of the role of the Justices. But the description on page 1 of the Information Pack is anodyne: e.g. no explicit mention is made, for example, of the Court's constitutional role. It is also wholly focused on the *judicial* functions of Justices: no mention is made of the important role that each Justice should make to the life of the Court by fulfilling certain administrative roles or the ambassadorial functions within the larger legal community and public at large through giving speeches.

2. Are the criteria sufficiently comprehensive/too full, and are they properly expressed?

The criteria are relatively comprehensive and clearly expressed.

3. What is your view on whether the Supreme Court should aim to have specialists in certain subject areas, or generalists capable of dealing with any cases which might come before them?

The Court's leadership should strive to ensure that there is a range of expertise reflected on the Court broadly in line with the range of cases that come before it. Plainly, there are very real limits on the ability to do so in a twelve-member court, but these are largely offset by the ability to draw on ad hoc judges where the Court's President feels that it is especially important that a panel hearing an appeal has the relevant expertise.

answer to question 9: the Secretary to each commission has a key role to play in

world provides a good opportunity to test 'social awareness and understanding of the contemporary world' (i.e. one of the qualities listed on p4 of the Information Pack).

15. Should a selection commission ask for references? What alternatives might there be, particularly for applicants who are not serving Judges?

Yes: references are an important part of most recruitment processes and can be useful evidence for a selection commission to consider. Applicants who are not serving judges should still be asked to provide references. Whilst there would be an expectation that at

The job description should emphasise the need for high-level leadership skills including (small 'p') political judgment, diplomatic skills and a willingness to engage with the political branches (e.g. by giving evidence to parliamentary select committees).

19. Are there other matters on which you would like to comment?

We recognize that this review is primarily concerned with the process by which the commissions make recommendations to the Lord Chancellor. We would nevertheless like to take this opportunity to encourage the Court's leadership to reflect on the process more generally, and the following points in particular:

(A) Democratic Accountability

- The process for appointing Justices to the Supreme Court is much more transparent than the pre-Constitutional Reform Act regime: e.g. there is now a much more formal selection process with clear selection criteria. But there is also now a serious accountability deficit in the appointment process.
- The Lord Chancellor's power to reject or request reconsideration of the recommendations made by the selection commissions has not been used. Comments from senior judges come close to suggesting that the power might be unusable (e.g. when Lord Phillips, as President, suggested that the Lord Chancellor's use of the power might signal that the commission was recommending for appointment 'a judge in whom the government had no confidence'. It is difficult to imagine the basis on which the Lord Chancellor might make such a claim of someone who would, in all likelihood already be a very senior serving judge. What this means, then, is that the stakes have been raised so high that the Lord Chancellor's power may have become unusable other than in wholly exceptional circumstances. If this turns out to be so, these commissions will become de facto appointing bodies, with the Lord Chancellor offering a veneer of accountability, but little in reality.
- We are concerned that there should be greater political involvement in the appointment of senior judges such as Justices of the Supreme Court. Political involvement serves multiple purposes, including:
 - injecting an essential democratic nexus into the process of appointing top judges who, as most today recognize, perform an important policy function;
 - creating scope for political leadership on the diversity agenda, which as the experience of other countries suggests (e.g. the US and Canada) is often a critical ingredient for making fast and visible progress on judicial diversity;
 - ensuring that politicians retain a stake and appreciate the importance of an independent judiciary.

- There are a number of ways of enhancing political involvement in the process of appointing Supreme Court Justices, including:
 - (a) the selection commissions could present the Lord Chancellor with a short-list of three names from which to appoint;
 - (b) some form of parliamentary hearing, which could be either pre- or post-appointment; and
 - (c) an expanded selection commission that includes politicians (e.g. the chairs of the House of Commons Justice Committee and the House of Lords Constitution Committee).

We acknowledge that there is only limited support for these suggestions within the political class, let alone amongst senior judges. However, to paraphrase Sir Thomas Legg, we believe that political involvement ‘will not bring the [Supreme Court] into the political arena any more than it will be anyway, and may help to keep it out’ (2004 Legal Studies, 45 at 46). It is also our view that experience in jurisdictions such as Canada suggests that over time public and political interest in options such as these will grow and the Court must be prepared to consider them.

- We acknowledge that the selection process is today more inclusive than the pre-2005 regime, not only via the involvement of lay people but also the statutory consultation requirements. However, we are very keen to stress that the process remains a closed shop. By our count, there have been six commissions since 2009 that have made ten recommendations (i.e. recommending nine individuals for appointment to the Court and one selection from among the serving Justices to fill a vacancy of Deputy President). Only ten different people have sat on those commissions. We believe that this is another reason why serious consideration should be given to expanding the size of the selection commissions.
- We also strongly encourage the JAC, JABS and NIJAC not simply to nominate their chairs to sit on the commissions. The chairs of the JAC and JABS (Christopher Stephens and Sir Muir Russell) have sat on the last 4 and 5 commissions respectively. We would encourage the various appointments bodies in the UK to adopt a practice of rotating the people who are nominated to sit on the ad hoc selection commissions for the Court.

A Note on the U